

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

<p>FOX TELEVISION STATIONS, INC; TWENTIETH CENTURY FOX FILM CORPORATION; FOX BROADCASTING COMPANY, INC.; NBC UNIVERSAL MEDIA, LLC; UNIVERSAL NETWORK TELEVISION, LLC; OPEN 4 BUSINESS PRODUCTIONS, LLC; NBC SUBSIDIARY (KNBC-TV) INC; AMERICAN BROADCASTING COMPANIES, INC.; ABC HOLDING COMPANY, INC.; DISNEY ENTERPRISES, INC.; CBS BROADCASTING INC.; CBS STUDIOS INC.; BIG TICKET TELEVISION, INC.;; TELEMUNDO NETWORK GROUP LLC; WNJU-TV BROADCASTING LLC, <i>Plaintiffs-Appellants,</i></p> <p>v.</p> <p>AEREOKILLER, LLC; ALKIVIADES DAVID; FILMON.TV NETWORKS, INC.;; FILMON.TV, INC.; FILMON.COM, INC.;; FILMON X, LLC; DOES, 1-3, inclusive, <i>Defendants-Appellees.</i></p>
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No. 15-56420

D.C. No.
2:12-cv-06921-
GW-JC

OPINION

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Appeal from the United States District Court
for the Central District of California
George H. Wu, District Judge, Presiding

Argued and Submitted August 4, 2016
Pasadena, California

Filed March 21, 2017

Before: Diarmuid F. O'Scannlain, Johnnie B. Rawlinson,
and Consuelo M. Callahan, Circuit Judges.

Opinion by Judge O'Scannlain

SUMMARY*

Copyright

Reversing the district court's partial summary judgment in favor of defendants, the panel held that a service that captures copyrighted works broadcast over the air, and then retransmits them to paying subscribers over the Internet without the consent of the copyright holders, is not a "cable system" eligible for a compulsory license under the Copyright Act.

Under § 111 of the Act, a "cable system" is eligible for a so-called compulsory license that allows it to retransmit "a performance or display of a work" that had originally been

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

broadcast by someone else—even if such material is copyrighted—without having to secure the consent of the copyright holder. So long as the cable system pays a statutory fee to the Copyright Office and complies with other regulations, it is protected from infringement liability.

The panel concluded that § 111 was ambiguous on the question presented. Deferring to the Copyright Office’s interpretation, the panel held that Internet-based retransmission services are not eligible for the compulsory license that § 111 makes available to “cable systems.”

COUNSEL

Neal Katyal, Hogan Lovells US LLP, Washington, DC, argued the cause and filed the briefs for the plaintiffs-appellants. With him on the brief was Thomas P. Schmidt, Hogan Lovells US LLP, New York, NY; Matthew A. Shapiro and Frederick Liu, Hogan Lovells US LLP, Washington, DC; Paul Smith, Jenner & Block LLP, New York, NY; Richard L. Stone and Julie A. Shepard, Jenner & Block LLP, Los Angeles, CA; Ronald L. Johnston, John C. Ulin, James S. Blackburn, and Eric D. Mason, Arnold & Porter LLP, Los Angeles, CA; and Robert Alan Garrett and Murad Hussain, Arnold & Porter LLP, Washington, DC.

Ryan Geoffrey Baker, Baker Marquart LLP, Los Angeles, CA, argued the cause and filed the brief for the defendants-appellees. With him on the brief was Scott M. Malzahn, Baker Marquart LLP, Los Angeles, CA.

Duncan W. Crabtree-Ireland, SAG-AFTRA, Los Angeles, CA, filed a brief on behalf of amici curiae Screen Actors

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Guild-America Federation of Television and Radio Artists; Directors Guild of America, Inc.; and Writers Guild of America, West, Inc., in support of the plaintiffs-appellants. With him on the brief was Danielle S. Van Lier, SAG-AFTRA, Los Angeles, CA; David B. Dreyfus, Directors Guild of America, Inc., Los Angeles, CA; and Anthony R. Segall, Writers Guild of America, West, Inc., Los Angeles, CA.

Jay A. Rosenthal and J. Matthew Williams, Mitchell Silberberg & Knupp LLP, Washington, DC, filed a brief on behalf of amici curiae The American Society of Composers, Authors and Publishers; Broadcast Music, Inc.; The National Music Publishers' Association; The Recording Industry Association of America; The Recording Academy; and SESAC, Inc. in support of the plaintiffs-appellants.

Geoffrey Manne, International Center for Law and Economics, Portland, OR; and Hans Bader and Sam Kazman, Competitive Enterprise Institute, Washington, DC, filed a brief on behalf of amici curiae The Competitive Enterprise Institute and The International Center for Law and Economics in support of the plaintiffs-appellants.

Brandon Butler, Glushko-Samuelson Intellectual Property Clinic, American University Washington College of Law, Washington, DC, filed a brief on behalf of amici curiae Consumer Federation of America in support of defendants-appellees. With him on the brief was Alexandra Wilson, Law Student, Glushko-Samuelson Intellectual Property Clinic, American University Washington College of Law, Washington, DC.

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Mitchell L. Stoltz, Electronic Frontier Foundation, San Francisco, CA, and Phillip R. Malone; Jeffrey T. Pearlman; and Brian Quinn, Juelsgaard Intellectual Property and Innovation Clinic, Stanford, CA, filed a brief on behalf of amici curiae Electronic Frontier Foundation and Public Knowledge in support of the defendants-appellees.

Rodney A. Smolla, Wilmington, DE, filed a brief on behalf of amici curiae The Media Institute in support of the plaintiffs-appellants.

Rick Kaplan and Benjamin F. P. Ivins, National Association of Broadcasters, Washington, DC; Joseph R. Palmore and James R. Sigel, Morrison & Foerster LLP, Washington, DC; and Paul Goldstein, Morrison & Foerster LLP, San Francisco, CA, filed a brief on behalf of amici curiae National Association of Broadcasters in support of the plaintiffs-appellants.

Brandon Butler, Glushko-Samuelson Intellectual Property Clinic, American University Washington College of Law, Washington, DC, filed a brief on behalf of amici curiae National Federation of the Blind in support of defendants-appellees. With him on the brief was Darlene Tzou, Law Student, Glushko-Samuelson Intellectual Property Clinic,

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Anthony J. Dreyer; Jordan A. Feirman; and David M. Lamb, Skadden, Arps, Slate, Meagher & Flom LLP, New York, NY, filed a brief on behalf of amici curiae National Football League; The Officers of the Commissioner of Baseball d/b/a Major League Baseball; and The PGA Tour, Inc. in support of the plaintiffs-appellants.

Susan Cleary, Vice President & General Counsel, Independent Film & Television Alliance, Los Angeles, CA, and Kelly M. Klaus and David J. Feder, Munger, Tolles & Olson LLP, Los Angeles, CA, filed a brief on behalf of amici curiae Paramount Pictures Corporation; Warner Bros. Entertainment Inc.; and Independent Film & Television Alliance in support of the plaintiffs-appellants.

Ralph Oman, Pravel Professorial Lecturer in Intellectual Property and Patent Law, George Washington University Law School, Former Register of Copyrights of the United States of America, Washington, DC filed a brief on behalf of amici curiae on his own behalf in support of the plaintiffs-appellants.

Cory L. Andrews & Mark S. Chenoweth, Washington Legal Foundation, Washington, DC, filed a brief on behalf of Washington Legal Foundation in support of the plaintiffs-appellants.

OPINION

O'SCANNLAIN, Circuit Judge:

We must decide whether a service that captures copyrighted works broadcast over the air, and then retransmits them to paying subscribers over the Internet without the consent of the copyright holders, is a “cable system” eligible for a compulsory license under the Copyright Act.

I

A

The Copyright Act of 1976 gives copyright holders six “exclusive rights,” including the exclusive right “to perform” copyrighted works “publicly.” 17 U.S.C. § 106(4). The Act provides that “[a]nyone who violates any of the exclusive rights of the copyright owner . . . is an infringer.” *Id.* § 501(a). This case concerns an important limitation on the Act’s provision for exclusive rights.

Under § 111 of the Act, a “cable system” is eligible for a so-called compulsory license that allows it to retransmit “a performance or display of a work” that had originally been broadcast by someone else—even if such material is copyrighted—without having to secure the consent of the copyright holder. *Id.* § 111(c). So long as the cable system pays a statutory fee to the Copyright Office and complies with certain other regulations, it is protected from infringement liability. *Id.* § 111(c)–(d). Compulsory licenses are highly coveted, in no small part because, according to the Copyright Office, the royalty payments the Act requires cable

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companies to pay are “*de minimis*” when compared to the gross receipts and revenues the cable industry collects, a gap suggesting that the government-set rates fall well below market levels. U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* 43 (2008) (“SHVERA Report”); *see also id.* at 70.

This lawsuit pits a group of broadcast stations and copyright holders (collectively, “Fox”) against an entity now known as FilmOn X (“FilmOn”). FilmOn operates a service that uses antennas to capture over-the-air broadcast programming, much of it copyrighted, and then uses the Internet to retransmit such programming to paying subscribers, all without the consent or authorization of the copyright holders. The Supreme Court recently held that such a service does “perform” the retransmitted works “publicly,” and hence infringes the copyright holders’ exclusive performance rights. *American Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014). Fox sued FilmOn for copyright infringement in 2012; in its most recent defense, FilmOn claims that it is a “cable system” eligible for a compulsory license under § 111.

The relevant provision of the Copyright Act defines “cable system” as follows:

A “cable system” is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or

programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

17 U.S.C. § 111(f)(3). The parties offer dueling interpretations § 111, each grounded in various aspects of its text, its perceived purposes, and slices of its legislative history.

B

The district court granted partial summary judgment to FilmOn, agreeing with it that it qualified as a “cable system” and was therefore potentially entitled to a compulsory license. The district court based its conclusion on what it took to be the plain meaning of § 111, as well as the Supreme Court’s *Aereo* decision, which had analogized Internet-based retransmission services to cable companies in the course of deciding that Internet retransmissions count as “performances” under the Act’s Transmit Clause, 17 U.S.C. § 101.

Recognizing that its ruling “involve[s] a controlling question of law as to which there is substantial ground for difference of opinion,” however, the district court authorized

an immediate appeal from its decision. We granted Fox’s petition for permission to appeal.¹

II

“We review *de novo* both the district court’s grant of summary judgment and its holdings on questions of statutory interpretation.” *Phoenix Mem’l Hosp. v. Sebelius*, 622 F.3d 1219, 1224 (9th Cir. 2010). But before turning to the parties’ interpretations of § 111, it is crucial to point out that we do not confront § 111’s compulsory licensing scheme on a blank slate, because there is an agency interpretation in the background. The Copyright Office—the agency charged with implementing the Copyright Act—has for many years maintained that Internet-based retransmission services are *not* “cable systems” and hence are not eligible for compulsory licenses under § 111. Thus, when FilmOn attempted to pay the government-prescribed fee for retransmitting copyrighted broadcast programming, the Office refused to accept FilmOn’s filings, citing its position that Internet-based retransmission services are not covered by § 111.

¹ As of this writing, at least seven federal courts have weighed in on whether Internet-based retransmission services count as “cable systems” under § 111. The district court here is the only one to conclude that they do. A panel of the Second Circuit unanimously said no. *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 276 (2d Cir. 2012) (*ivi II*). So have five district courts: three in the Southern District of New York, one in the District of Columbia, and one in the Northern District of Illinois. *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 600 (S.D.N.Y. 2011) (*ivi I*); *Fox Television Stations, Inc. v. FilmOn X LLC*, 150 F. Supp. 3d 1, 7 (D.D.C. 2015); *Filmon X, LLC v. Window to the World Commc’ns, Inc.*, No. 13 C 8451, 2016 WL 1161276, at *7 (N.D. Ill. Mar. 23, 2016); *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10 CIV. 7532 NRB, 2014 WL 3702568, at *4 (S.D.N.Y. July 24, 2014); *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *3 (S.D.N.Y. Oct. 23, 2014).

Fox and FilmOn each claim that the plain meaning of § 111 resolves this case in its favor. We will first discuss Fox’s interpretation, then FilmOn’s, and only then—if we conclude that the meaning of § 111 is ambiguous on the question presented—will we consider the views of the Copyright Office.

III

A

Fox maintains that § 111’s “plain text makes clear that the relevant ‘facility’ comprises the *entire* retransmission service—both the service’s means of receiving broadcast signals *and* its means of making secondary transmissions to the paying subscribers.” The Copyright Office has not endorsed this interpretation. Nevertheless, under Fox’s reading, FilmOn would necessarily be excluded from § 111’s definition of “cable system” because FilmOn retransmits broadcast signals over the Internet, and yet the Internet “is in no sense under [its] ownership or control.” Indeed, FilmOn concedes that it “uses a communications channel beyond its facility” to make secondary transmissions. “That concession,” says Fox, “should decide this case.”

Fox’s theory is not implausible. As Fox points out, and as FilmOn does not dispute, “[a] traditional cable system is a ‘facility’ in this sense: It . . . retransmits [broadcast] signals directly to its subscribers over a transmission path fully within its control.” Nevertheless, we cannot conclude that the statute *compels* the conclusion that to qualify as a “cable system,” a retransmission service must encompass or have control over the means it uses to transmit material to paying subscribers.

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The most important difficulty with Fox’s interpretation is that it finds insufficient support in the text of the statute. Recall the relevant language: to be a “cable system,” a facility must “make[] secondary transmissions of [broadcast] signals or programs *by* wires, cables, microwave, or other communications channels.” 17 U.S.C. § 111(f)(3) (emphasis added). Nothing in that language on its face compels the conclusion that the facility must *control* the retransmission medium—the wires, cables, microwaves, or other communications channels—that it relies on to deliver its retransmissions. Fox does not cite any specialized or technical meaning, and as a matter of ordinary interpretation, the text could certainly be read the other way. *Cf.* Black’s Law Dictionary 182 (5th ed. 1979) (defining “by” as “[t]hrough the means, act, agency, or instrumentality of”). For instance, someone who deposits a letter in a mailbox could certainly be said to “transmit” his letter “by mail,” even though he does not control the mail system that actually delivers his letter to its recipient. Likewise, it would be reasonable to say that someone “makes a transmission” of money “by wire” when he initiates an electronic funds transfer through Western Union, even though he does not have any possession or control over the wires that transport his money to its destination. (Indeed, the British soldiers Paul Revere warned of were certainly making their advance “by sea,” even though they in no sense controlled the Charles River. Henry Wadsworth Longfellow, *The Landlord’s Tale: Paul Revere’s Ride*, reprinted in Henry Wadsworth Longfellow: Poems and Other Writings 362, 362 (J.D. McClatchy ed., 2000).)

In addition, § 111(a)(3) specifically discusses a scenario in which one entity selects the content or recipients of a secondary transmission, while a different entity supplies the

communications channel. According to that provision, a “carrier” who “provid[es] wires, cables, or other communications channels for the use of others” is not liable for copyright infringement, while the upstream entity who exercises “control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission” may be liable. 17 U.S.C. § 111(a)(3). Section 111(a)(3), therefore, suggests that a facility may be said to make secondary transmissions even if it does not exercise ownership or control over the communications channel it uses. If that is true, then FilmOn’s lack of ownership or control over the Internet does not necessarily exclude it from the class of facilities that “make[] secondary transmissions . . . by wires, cables, microwave, or other communications channels.” *Id.* § 111(f)(3).

B

Although Fox’s plain-meaning construction has not convinced us, Fox can prevail if we defer to the views of the Copyright Office. FilmOn urges us not to do so because, FilmOn insists, the plain meaning of § 111 supports *its* position. FilmOn strives mightily to demonstrate that the plain meaning of § 111 unambiguously entitles it to a compulsory license.

FilmOn first argues that § 111 “should be interpreted in a technology agnostic manner.” FilmOn would have us read § 111 as making compulsory licenses available to *any* facility that retransmits broadcast signals or programming, no matter its technological features or characteristics. That position is a poor fit with § 111’s text and structure. First of all, if Congress had intended § 111 to service the entire secondary transmission community, doling out statutory licenses

without regard to the technological makeup of its members, it would have been easy enough for Congress to say so (and in fact, Congress came very close to doing just that in the Transmit Clause, 17 U.S.C. § 101, as we discuss in the next paragraph). Instead, Congress specified that § 111 applies only to “cable systems,” and it defined “cable system” in a detailed, if arguably ambiguous, way. Second, and relatedly, if Congress meant § 111 to sweep in secondary transmission services with indifference to their technological profile, then it was strange for Congress to have provided separate compulsory license provisions—§§ 119 and 122—for broadcast retransmissions by satellite carriers. 17 U.S.C. §§ 119, 122. The way to prevent discrimination on the basis of technology, one might say, is to stop discriminating on the basis of technology. Congress chose a different course.

Undeterred, FilmOn relies on the Supreme Court’s recent decision in *Aereo*, which, FilmOn insists, “recognized section 111’s technology agnosticism.” But *Aereo* did nothing of the sort. *Aereo* dealt with an altogether different provision of the Copyright Act, the Transmit Clause, which defines the scope of a copyright holder’s exclusive right by delineating the class of activities that count as public performances and hence infringe such right. *See* 17 U.S.C. § 101. Significantly, the Transmit Clause refers in sweeping terms to transmissions or communications made “by means of *any* device or process,” and broadly defined “device” and “process” to mean “one now known *or later developed*.” 17 U.S.C. § 101 (emphasis added). The glaring textual differences between § 101 and § 111 render the *Aereo* decision of very little help to FilmOn’s plain-meaning argument. Moreover, it would be perfectly coherent to pair a broad reading of the Transmit Clause with a narrow reading of the compulsory license provision, insofar as both such

readings would work in tandem to bolster the property interests of copyright holders. Nothing in § 111 or *Aereo* makes such a reading unreasonable.

We also cannot accept FilmOn’s assertion that it clearly satisfies § 111’s requirement that a cable system make secondary transmissions by “wires, cables, microwave, or *other communications channels*.” 17 U.S.C. § 111(f)(3) (emphasis added). It is far from clear whether the Internet counts as one of the “other communications channels” envisioned by § 111. For instance, Fox’s expert explained that “a communications channel in electrical engineering terms has the characteristics set forth by Claude Shannon in his seminal paper, ‘Communication In The Presence of Noise.’ The defining characteristics of a communications channel are bandwidth, noise and throughput. The Internet is not a communications channel.”²

Moreover, it would be perfectly reasonable to interpret “other communications channels” according to the *ejusdem generis* canon, which instructs that “when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.” *Hall St. Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008). Invoking such canon, one could reasonably conclude that the “other communications channels” must share characteristics such as bandwidth,

² Strikingly, FilmOn also relies on the work of Claude Shannon, but offers its own more favorable, but still highly technical, interpretation of “communications channel.” Far from illuminating § 111’s plain meaning, however, FilmOn’s decision to serve up a rival technical definition suggests that this is an issue better left to an expert agency than a federal court.

throughput, and noise; alternatively, one could conclude, as the Copyright Office does, that such channels must be “inherently localized transmission media of limited availability.” Either interpretation would imply that the Internet is not an “other communications channel” under § 111. We cannot conclude that § 111 unambiguously requires otherwise.

Nor can we conclude that the Copyright Act’s broad purposes compel the conclusion that Internet-based retransmission services are eligible for compulsory licenses under § 111. Rather, we see powerful arguments that such a reading could very well undermine the balance of interests Congress attempted to strike when it designed § 111. That is especially so when § 111 is viewed in the context of its enactment.

In brief, when Congress passed the Copyright Act of 1976, it overturned two earlier Supreme Court decisions which had held that cable systems were not liable for copyright infringement on the theory that they did not actually “perform” the works they retransmitted at all. *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 408 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 399 (1968). Congress therefore acted to restore a measure of protection to copyright owners. At the same time, however, Congress recognized that cable systems served an important public good, by enabling geographically distant and isolated communities to receive over-the-air broadcasts that would otherwise not reach them. But in 1976 the cable industry was a fledgling one; cable systems had little market power and little ability to overcome the considerable transaction costs they would incur if they had to negotiate individual licenses directly with copyright

owners. Congress responded to these economic conditions by enacting § 111, which relieved cable systems of the need to sit down with every copyright holder before retransmitting their copyrighted broadcast works. Section 111 also helped protect the infrastructure investments cable systems have undertaken in the years prior to the Act. And the broadcast companies and copyright owners benefitted to some extent as well, insofar as they could now reach viewers they would not otherwise have been able to access. Fundamentally, however, § 111 was Congress's attempt to balance the socially useful role cable systems had come to play, on the one hand, against the property interests and creative incentives of copyright holders, on the other.

One could reasonably conclude that extending § 111 to Internet-based retransmission services would not further, and might in fact jeopardize, the values just described. For one, cable systems serve limited geographic communities, but an Internet-based service has no geographic boundary—it can retransmit works across the globe instantaneously—meaning that Internet-based retransmission poses a more serious threat to the value and integrity of copyrighted works. Such threat is exacerbated insofar as Internet retransmissions are more vulnerable than traditional cable to unauthorized copying and other acts of piracy. For another, many copyright owners are capable of transmitting their works over the Internet on their own; they do not need to rely on third parties to do so, as they had to rely on cable companies if they wanted to reach the isolated, distant communities cable systems traditionally served. Relatedly, compared to cable systems and satellite carriers, Internet-based retransmission services have not needed to make the same sort of investments in a delivery platform infrastructure. Finally, there is no evidence that Internet-based services lack market power or face prohibitive

transaction costs of the sort that justified the compulsory license for cable systems.

To be sure, we agree with FilmOn that there are important values on its side of the equation as well. Still, our conclusion from this discussion is a predictable one: the array of competing interests at stake does not unambiguously counsel for or against a broad reading of § 111.

Additionally, throughout its brief FilmOn invokes the statute’s legislative history. Unsurprisingly, however, there is plenty of legislative history to go around, as Fox and the Copyright Office make extensive use of it as well. At best, we think the legislative history is a wash; it certainly does not compel the conclusion that § 111 must be interpreted to be “technology agnostic,” or that Internet-based retransmission services must be deemed “cable systems.” To the extent the legislative history provides relevant evidence of § 111’s meaning, we would defer to the Copyright Office’s interpretation of it, seeing as the Copyright Office has a much more intimate relationship with Congress and is institutionally better equipped than we are to sift through and to make sense of the vast and heterogeneous expanse that is the Act’s legislative history.

Finally, we note two additional reasons to reject FilmOn’s argument that § 111 must be read to encompass Internet-based retransmission services.

As courts have explained in the past, compulsory licenses represent a “limited exception to the copyright holder’s exclusive right to decide who shall make use of his [work],” and courts should not “expand the scope of the compulsory license provision beyond what Congress intended . . . nor

interpret it in such a way as to frustrate that purpose.” *Fame Publishing Co. v. Ala. Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). Such canon supports a narrow construction of § 111.

Additionally, as Fox points out, interpreting § 111 so as to include Internet-based retransmission services would risk putting the United States in violation of certain of its treaty obligations. An age-old canon of construction instructs that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). FilmOn does not have a satisfactory answer to this argument.

For the foregoing reasons, we cannot accept FilmOn’s argument that § 111 *must* be read in such a way as to make Internet-based retransmission services eligible for compulsory licenses. All of that being said, however, we would not go so far as to conclude that it would be clearly *impermissible* to say that FilmOn qualifies for a compulsory license under § 111. The text of § 111 is written in broad terms, and both sides can make plausible arguments about the statute’s purposes and legislative history. Hence, although we do not believe the interpretive scales are in equipoise, we do not foreclose the possibility that the statute could reasonably be read to include Internet-based retransmission services.

IV

Because the statute does not speak clearly to the precise question before us, we must decide how much weight to give the views of the Copyright Office. The Copyright Office has

published its views on the meaning of § 111 through a few different channels. We group them into two broad categories.

First, in 1992 and again in 1997 the Office engaged in notice-and-comment rulemaking in order to decide whether burgeoning retransmission technologies—specifically, satellite and microwave retransmission systems—could be classified as “cable systems” under § 111. The 1992 and 1997 rulemakings did not purport to consider Internet-based retransmission services. In the final rules’ preambles, however, the Office stated broadly “that a provider of broadcast signals [must] be an inherently localized transmission media of limited availability to qualify as a cable system.” *Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705-02, 18,707 (April 17, 1997) (codified at 37 C.F.R. pt. 201); *see also Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3284-01, 3292 (Jan. 29, 1992) (codified at 37 C.F.R. pt. 201) (“Examination of the overall operation of section 111 proves that the compulsory license applies only to localized retransmission services.”). Everyone acknowledges that the foregoing interpretation of “cable system” would rule out Internet-based retransmission services like FilmOn. But the parties disagree sharply about whether such interpretation should have any bearing on our analysis.

That brings us to the second batch of Copyright Office interpretations relevant to this litigation. Since 1997, the Office has on at least four occasions specifically and unequivocally said that, in its view, Internet-based retransmission services are not “cable systems” under § 111, but it has not done so in connection with any rulemaking. Instead, the Office has communicated its position largely through official reports and testimony before Congress.

A

The first question is whether *Chevron* or *Skidmore* provides the proper framework to structure our analysis.³ The parties debate this issue at length. It has divided our colleagues as well: while the Second Circuit said *Chevron* deference is appropriate, *ivi II*, 691 F.3d at 279, district courts in the Southern District of New York, the District of Columbia, and the Northern District of Illinois all applied the less deferential *Skidmore* framework instead, *ivi I*, 765 F. Supp. 2d at 604–05; *Fox Television Stations*, 150 F. Supp. 3d at 27; *Window to the World Commc'ns*, 2016 WL 1161276, at *12. Notably, each of the courts applying *Skidmore* had no trouble accepting the Office's position when all was said and done.

To resolve this issue, we would be required to rule on constitutional questions that could have outsized consequences relative to this case—such as determining whether the Library of Congress is a legislative or executive

³ Under *Chevron*, “[w]hen a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions.” *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). First, we must determine “whether Congress has directly spoken to the precise question at issue.” *Id.* We have already concluded that Congress has not done so. Our second question then becomes merely “whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843.

The *Skidmore* framework is less deferential. Under *Skidmore*, the weight we give to an agency interpretation “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

agency.⁴ However, it is clear the Copyright Office is entitled to at least *Skidmore* deference. *E.g.*, *Alaska Stock, LLC v. Houghton Mifflin Harcourt Pub. Co.*, 747 F.3d 673, 684–85 (9th Cir. 2014) (“[W]e defer to the Copyright Office’s views . . . to the extent that those interpretations have the power to persuade.”). And, whether *Chevron* or *Skidmore* applies ultimately does not affect the conclusion we reach. We therefore adhere to the “well established principle . . . [that] the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case” and will proceed under the *Skidmore* framework. *See Bond v. U.S.*, 134 S. Ct. 2077, 2087 (2014) (citing *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

B

Under *Skidmore*, and having already determined that the meaning of § 111 is ambiguous on the precise question before us, we must now ask whether the Copyright Office’s interpretation is persuasive and reasonable. To do so we review “the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and

⁴ The Copyright Office is housed within the Library of Congress, and it is not clear whether the Library of Congress is part of the executive or legislative branch. *Compare U.S. v. Brooks*, 945 F. Supp. 830, 834 (E.D. Pa. 1996) (“[T]he Copyright Office is part of the legislative branch.”), with *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012) (discussing why the Library of Congress “is undoubtedly a ‘component of the Executive Branch’”). If the Library of Congress is part of the legislative branch, then the Librarian’s “power to appoint all of the officers who execute the copyright laws” may run afoul of the Appointments Clause of the Constitution. *See John Duffy et al., Copyright’s Constitutional Chameleon*, Concurring Opinions (May 17, 2013), <https://concurringopinions.com/archives/2013/05/copyrights-constitutional-chameleon.html#more-74811>.

later pronouncements.” *U.S. v. Mead Corp.*, 533 U.S. 218, 228 (2001) (citing *Skidmore*, 323 U.S. at 140).

First, the Office’s decision to reject Internet-based retransmission services because they do not use a localized retransmission medium finds sufficient support in the text, structure, and basic purposes of the Copyright Act. Such interpretation aligns with § 111’s many instances of location-sensitive language, including “headends,” 17 U.S.C. § 111(f)(3), “contiguous communities,” *id.*, and “distant signal equivalent,” *id.* §§ 111(d)(1)(B)–(C), (d)(1)(E)–(F), (f)(5). As the Office points out—and as FilmOn does not dispute—such references “would have no meaning when applied to . . . nationwide retransmission facilities.” 56 Fed. Reg. at 31,588. Nor does FilmOn dispute the Office’s claim that “at the time Congress created the cable compulsory license, the FCC regulated the cable industry as a highly localized medium of limited availability, suggesting that Congress, cognizant of the FCC’s regulations and the market realities, fashioned a compulsory license with a local rather than a national scope.” 62 Fed. Reg. at 18,707.

Furthermore, confining “cable systems” to localized retransmission media is a sensible way to construe the phrase “other communications channels” so that it does not sweep in every possible retransmission technology. The Office’s position is not rigidly originalist, as its ability to accommodate Satellite Master Antenna Television systems demonstrates. Rather, it is a plausible attempt to maintain the balance Congress struck between the public’s interest in ever-improved access to broadcast television and the property rights of copyright holders. “The interpretation makes considerable sense in terms of the statute’s basic objectives,” *Barnhart*, 535 U.S. at 219, as well as its text.

The Office has maintained a consistent position on this issue since it first expressed its views in 1992. 57 Fed. Reg. at 3292; 62 Fed. Reg. at 18,707. In articulating its position the agency has consistently referenced the statute’s text, structure, and legislative history. *E.g.*, 57 Fed. Reg. at 3292; *see also id.* at 3290 (endorsing the view that “the terms of section 111, when considered as a whole, make it obvious that the license is directed to localized transmission services,” and that § 111 “do[es] not have any application to a nationwide retransmission service such as satellite carriers.”). Since 1997, the Office has on at least four occasions explicitly concluded that Internet-based retransmission services are not “cable systems” under § 111.

Lest there be any doubt, we note that for years Congress has indisputably been aware of the Office’s position that Internet-based services are ineligible under § 111, and yet “Congress has frequently amended or reenacted the relevant provisions without change.” *Barnhart*, 535 U.S. at 220. As the district court for the District of Columbia recounted:

Congress has been fully aware of the Copyright Office’s longstanding interpretation. Despite this awareness, Congress has neither amended the text of § 111 nor enacted a separate compulsory-licensing scheme to include Internet-based retransmission services. However, Congress has repeatedly amended the statute in other respects. For example, it amended the cable system definition to include the term ‘microwave’ and enacted the licensing scheme for satellite providers. As recently as 2014, . . . Congress amended the Copyright

Act without rejecting or altering the Copyright Office's interpretation.

Fox Television Stations, 150 F. Supp. 3d at 26–27 (internal citations omitted); *see also* *ivi I*, 765 F. Supp. 2d at 616 (same). “These circumstances provide further evidence—if more is needed—that Congress intended the Agency’s interpretation, or at least understood the interpretation as statutorily permissible.” *Barnhart*, 535 U.S. at 220; *see also* *Greenhorn Farms v. Espy*, 39 F.3d 963, 965 (9th Cir. 1994).⁵

The Office’s position is longstanding, consistently held, and was arrived at after careful consideration; and it addresses a complex question important to the administration of the Copyright Act. Not only that, but Congress has effectively acquiesced in it. We are persuaded that all of this more than suffices under *Skidmore*. *See Mead*, 533 U.S. at 228.

V

FilmOn and other Internet-based retransmission services are neither clearly eligible nor clearly ineligible for the compulsory license § 111 makes available to “cable systems.” The Copyright Office says they are not eligible. Because the

⁵ Similarly, when the Office denied satellite carriers a § 111 license on grounds that they do not use a localized retransmission medium, Congress responded by enacting a new compulsory license provision in § 119. By contrast, when the Office denied Multichannel Multipoint Distribution Service (“MMDS”) a § 111 license—even though MMDS comports with the localized-retransmission requirement, *see* 57 Fed. Reg. at 3293–94—Congress responded by amending § 111. Such differential treatment maps onto the Office’s view that § 111 embraces only those retransmission services that utilize inherently localized media.

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Office's views are persuasive, and because they are reasonable, we defer to them. The judgment of the district court is therefore

REVERSED.

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - ▶ A material point of fact or law was overlooked in the decision;
 - ▶ A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - ▶ An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ▶ Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ▶ The proceeding involves a question of exceptional importance; or
- ▶ The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - ▶ Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
 - ▶ and electronically file a copy of the letter via the appellate ECF system by using “File Correspondence to Court,” or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:

<http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf>.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

v. 9th Cir. No.

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Continue to next page

Form 10. Bill of Costs - Continued

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Name of Counsel:

Attorney for:

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cited in *Fox Television Stations, Inc. v. Aereokiller, LLC*
No. 15-56420 archived on March 16, 2017

Copyright's Constitutional Chameleon

BY [DANIEL SOLOVE](#) · MAY 17, 2013

by John Duffy, Peter Strauss and Michael Herz

Earlier this year, more than 100,000 citizens petitioned the White House to overturn a copyright rule issued by the Librarian of Congress that made unlocking a cell phone a crime. The White House responded by promising to seek legislation to overturn the Librarian's rule. That was the most the President would or could do because "[t]he law gives the Librarian the authority," and the Administration would "respect that process," even though the Librarian acted contrary to the Administration's views. [See here](#). As the *New York Times* reported, "because the Library of Congress, and therefore the copyright office, are part of the legislative branch, the White House cannot simply

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overturn the current ruling.” [See here](#).

There’s only one problem with all of this: The Department of Justice has been vigorously arguing precisely the contrary constitutional position in the federal courts.

According to the Administration’s filings in litigation that has now reached the Supreme Court, the Library of Congress is “an executive Department,” and the Librarian himself is “subject to plenary oversight by the President.” Justice Department lawyers have explained that Congress made a “purposeful decision to place the Library under the President’s direct control and supervision”; that the Librarian of Congress is the “Head” of this “executive Department”; that the President may remove the Librarian “at will” just as he may remove other heads of executive departments; and that this removal power creates the Librarian’s “here-and-now subservience” to the President. (See pages 16 & 17 of the Government’s Brief in Opposition filed at the Supreme Court, available [here](#) and pages 23, 29 & 37 the Government’s Brief for Appellees filed in the Court of Appeals, available [here](#).)

In light of that clear legal position, an obvious question arises: If the Librarian is really a head of an executive Department subject to “plenary oversight by the President,” why hasn’t the President either taken responsibility for criminalizing cell phone unlocking or ordered the Librarian to reverse his decision?

The answer is that no one in the political arena actually believes for one minute that the Librarian is the head of an executive department. The current Librarian has repeatedly testified to Congress that the Library is “arm of the United States Congress,” “a “branch of the Legislative branch,” and “a unique part of the Legislative Branch of the government.” Members of Congress also understand this to be true. To take but one prominent example, Senator Orrin Hatch has noted not only that “the Copyright Office is in the legislative branch of the Government” but also that this arrangement presents difficulty because “whenever the Copyright Office is tasked with an executive-type function, [a] constitutional question arises.”

The President’s supposed powers of “plenary oversight” and at-will removal are utter fiction, as the controversy about cell phone unlocking shows. Indeed, although the legal force of the assertion is doubtful, the Library’s own website states that the precedent has been “established that a Librarian of Congress is appointed for life.” Bold though it seems, that statement is accurate: Since the current administrative structure for the Library was established in 1897, no President has ever removed a Librarian of Congress, and the Librarians’ average tenure exceeds in duration that enjoyed by Chief Justices of the United States. The current Librarian is 83 years old and was appointed by President Reagan.

Why then are the Administration’s lawyers arguing that the Librarian is a presidential underling? The answer is easy. The Librarian has been vested with the power to appoint all of the officers who execute the copyright laws—including the Registrar of Copyrights and the judges of the Copyright Royalty Board—but the “Appointments Clause” of the Constitution makes clear that such power can be lodged in the Librarian only if he is the head of an Executive Department. Indeed, as the Supreme Court has made clear, the Framers of the Constitution wanted to ensure that such important powers would be wielded only by those high officials who were “accountable to political force and the will of the people.”

The Librarian of Congress has thus become a constitutional chameleon. When testifying before Congress, he calls himself a legislative officer who is part of the Legislative Branch of government. When the Librarian’s constitutional authority is challenged in court, he morphs into an Executive Branch department head subject to the President’s “plenary oversight.” And yet when he makes a controversial decision with which the President disagrees, he changes back again to a legislative officer whom the President cannot control except by recommending new legislation.

The importance of this constitutional issue is vividly highlighted by the current controversy over cell phone unlocking. The Librarian of Congress has made an immensely controversial executive decision that the White House has publicly disavowed. To whom do the people complain? Well, more than 100,000 complained to the President, but the President has avoided accountability by blaming the Librarian, who is assumed by everyone (including the *New York Times*) to be a legislative officer. Indeed, this President can hardly be held responsible for Librarian’s decision because the Librarian was appointed a President first elected when the current President was a sophomore in college.

The Supreme Court has before it a petition to hear a case in which it could consider the constitutionality of an unaccountable legislative officer running the nation’s copyright system. The case presents the opportunity to correct a glaring constitutional defect—either by confirming the President’s “plenary oversight” power or by striking down the current arrangement. It is an opportunity the Court should take.

John F. Duffy is the Samuel H. McCoy II and Armistead M. Dobie Professor of Law at the University of Virginia School of Law.

Peter Strauss is the Betts Professor of Law at Columbia Law School.

Michael Herz is the Arthur Kaplan Professor of Law at the Benjamin N. Cardozo School of Law.

The briefs filed at the Supreme Court in this case can be found [here](#). SCOTUSblog highlighted the petition for certiorari in this case as the “petition of the day” for May 16, 2013 ([see here](#)).

A pdf version of this post is available [here](#).



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7 RESPONSES

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Sean Croston May 17, 2013 at 3:51 pm

The Appointments Clause, Art. II, sec. 2, cl. 2, refers to appointments by “the Heads of Departments.” One clause before that, the Opinions Clause, Art. II, sec. 2, cl. 1, authorizes the President to request opinions from “the principal Officer in each of the executive Departments.” Likewise, sec. 4 of the 25th Amendment explicitly refers to “principal officers of the executive departments.”

What’s the significance, if any, of the fact that, unlike the Opinions Clause and the 25th Amendment, the text of Appointments Clause doesn’t actually include the key modifier “executive,” as suggested in the post? The framers clearly knew how to add that modifier when they wanted to – they did it twice over time. Could the Librarian of Congress perhaps still be considered the Head of a (Legislative or Independent) Department? I agree it’s pretty odd, but I’m just wondering...



Brett Bellmore May 17, 2013 at 9:23 pm

Haven’t you noticed that this administration’s motto is, “The buck never gets within sight of us.”



Marty Lederman May 18, 2013 at 1:43 am

Whoa – slow down a minute here. The White House response to the petition does *not* say that the Librarian is a legislative officer; that the Librarian has for-cause removal protection; or even that the President lacks the authority to

direct the Librarian on which position to adopt respecting phone unlocking.

Moreover, on that latter question, although I haven't looked closely at the particular statute at issue, I assume Peter is of the view — and perhaps John and/or Michael are, as well — that the President does *not* in fact have the authority to countermand the Librarian's decision, or to direct the Librarian to adopt a particular view on the cellphone unlocking question: The only coercive power the President has is the power to remove. Thus, even though the White House *could* have* gone further and said that the President lacks the authority to tell the Librarian what to do, it did not even offer that as a ground for absolving itself of responsibility; instead, it said only that it "respects" Congress's decision to give the decision-making authority to the Librarian. Hardly such a radical notion — no more so than, say, the White House deferring to an investigatory decision of the FBI Director (an executive officer!), or to a prosecution decision of the Attorney General (same), both of which happen every day.

More to the point, the White House said nothing at all inconsistent with DOJ's argument that the Librarian is the head of an executive department, and thus constitutionally empowered to appoint inferior officers if a statute so prescribes. Indeed, that would be true even if the Librarian were de jure "independent," i.e., even if he did have for-cause removal protection (which he does not).

So what's the fuss about?

P.S. Since Congress — unlike the President — has neither the power to appoint nor to remove the Librarian, the idea that the Librarian is a legislative officer for constitutional purposes is a stretch, to say the least.



John Duffy ▢ May 18, 2013 at 9:00 am

(Response to Marty Lederman from one of the authors)

Our post does not claim that the White House said the Librarian is a legislative officer. The New York Times said that, as our post states.

If, however, the Librarian is truly an executive officer who is subject to the "plenary supervision" of President, then the President should bear some responsibility for his Librarian's continuous and repeated testimony to Congress that the Library is a "branch of the Legislative branch," an "arm of the United States Congress," and "a unique part of the Legislative Branch of the government." In addition to the current Librarian's congressional testimony, statements such as these are currently maintained on the Librarian's own website; so too is the assertion that he is "appointed for life." I don't think that the Attorney General or the director of the FBI have been making similar statements about their constitutional position, in congressional testimony or otherwise.

If DOJ's briefs are correct, the Librarian's statements are highly misleading and, more importantly, have in fact misled the nation's newspaper of record — and, one might think, a significant portion of the public — in a way that undermines accountability for an unpopular decision. The Librarian's statements (or perhaps something else) have also been very successful in misleading Congress, as the Congressional Record includes numerous statements by current members of Congress that the Library is a legislative entity.

It is also true that one part of the Library of Congress — its Congressional Research Service — has statutory duties that, under current precedent of the DOJ's own Office of Legal Counsel (OLC), are unconstitutional if the CRS is just a component within the executive branch. Major administrative scholars such as Paul Verkuil, currently head of the Administrative Conference of the United States, view the CRS as an institution on the "congressional side." Paul R. Verkuil, A Proposal to Resolve Interbranch Disputes on the Practice Field, 40 Cath. U.L. Rev. 839, 847 (1991). Indeed, Verkuil cites CRS and OLC as good examples of institutions "that are by inclination and organization meant to have single branch loyalties." Id. at 848.

Somehow all of these sophisticated actors — the New York Times, Members of Congress, the current head of ACUS and even the Librarian himself — are repeatedly and consistently getting this this separation-of-powers point wrong (if DOJ's litigating position is right). Perhaps DOJ will be proven correct in viewing the Library as executive, but it is nonetheless true that, currently, there is currently a significant conflict of views on the matter, including a conflict between what DOJ is saying to the Article III courts and what DOJ's client has consistently been telling Congress.

That's what the fuss is about, and that sort of fuss — that sort of conflict about a fundamental constitutional issue — is more than enough to justify one spot on Supreme Court's docket.



John Duffy ▫ May 18, 2013 at 10:54 am
(Response to Sean Croston from one of the authors)

Sean Croston's textual point about the Appointments Clause is a good one, and one that I have spent some time considering in writing about this case.

DOJ has not raised this argument in defending the current appointment structure, and there are two reasons why it didn't.

First, in interpreting the word "Department" in the Appointments Clause, the Supreme Court "for more than a century has held that the term 'Departmen[t]' refers only to 'a part or division of the executive government.'" *Freytag v. Commissioner*, 501 US 868, 886 (1991).

Now to a true textualist, such an answer is not so satisfying because the Supreme Court's statements could just be wrong. It does provide part of the explanation as to why DOJ didn't defend the Librarian on the ground that he is the head of a legislative Department: DOJ did not want to have to overturn a century of Supreme Court precedent in order to win its case.

There is, however, a second reason. Everyone agrees that the relevant officers whose appointments are being challenged here — Copyright Royalty Judges — are exercising executive functions. If the Librarian were the head of a Legislative Department vested with the power to appoint Copyright Royalty Judges, the Copyright Royalty Judges would need to be supervised by some other principal executive branch officer or else the judges either would not be "inferior" officers within the meaning of the Appointments Clause, see, e.g., *Edmond v. United States*, 520 U.S. 651, 663 (1997), or would be inferior legislative officers whose execution of the copyright laws would be unconstitutional even under the separation-of-powers principles articulated in *Morrison v. Olson*, *Morrison v. Olson*, 487 US 654, 695-96 (1988).

The need for executive branch supervision was in fact raised and thoroughly litigated in the lower courts, so DOJ needed to have some executive branch officer who was supposed to be the judge's executive branch supervisor.

In fact, one of the great ironies of the result below is that the DOJ lost on the supervision issue. The D.C. Circuit held unconstitutional the statutory tenure protection that Congress had afforded these judges. Under the D.C. Circuit's ruling, these judges now serve at the pleasure of the Librarian of Congress. That is a result that literally no one wants. The Congress never wanted these judges to be removable at will by a self-described part of the legislative branch of government. The DOJ lawyers argued against that result below. And the private parties challenging this arrangement never sought this result either. Indeed, for the private parties, the result below is about a hollow a "victory" as one can imagine. If the D.C. Circuit's constitutional holding stands, the private parties will be in the unenviable position of being remanded back to the Copyright Royalty Board and seeking a more favorable result from judges whose tenure protection these parties have just destroyed! Good luck with that!



Peter Strauss ▫ May 18, 2013 at 12:03 pm
(Another author's reply)

Marty seems to think I must agree with him, but I do not. My view is similar to Justice Stevens' in *Bowsher* — GAO, the Library of Congress, and other lesser bodies attached to Congress are so strongly legislative agencies (as the "independent regulatory commissions" are not) as to fail as harbors for unmistakably executive functions. "Appoint one of these three" is fine for the head of GAO, because of this; ditto for the President's ostensible appointment authority over the ceremonial post of being Librarian of Congress. But these bodies are and unmistakably have been in the legislative branch since their creation — The Library, the GPO, and the National Botanic Garden since early in the 19th Century; GAO since its creation as an intended congressional balance to the Bureau of the Budget when the latter was established ca. 1922.

ACUS has recently created an interesting and quite comprehensive guide to "The Federal Executive Establishment." Here its only two passages concerning the Library:

While executive branch agencies are responsible for carrying out most federal laws, employees in the legislative and

judicial branches also do so. For example, the legislative branch includes what in common language would be called agencies as well, such as the Government Accountability Office (GAO), the Congressional Budget Office, and the Library of Congress, in addition to legislators, their staffs, and other officers of the legislature. Congress created most but not all of these agencies to serve the legislature as staff agencies.¹⁸ For example, the GAO's self-described mission is to serve Congress by investigating how the U.S. government spends federal revenues.¹⁹ The judicial branch includes the Administrative Office of the United States Courts, the Federal Judicial Center, and the United States Sentencing Commission, in addition to the courts and their judges and officers.²⁰ These units provide administrative support for the federal courts, offer the basic management support for the court system, and supply education and research about the court system and sentencing principles and guidelines. On the other hand, some administrative units provide support for all three branches of government. The Government Printing Office is responsible for publishing official information for and about all three branches. The U.S. Botanic Garden, another instrumentality of the legislative branch, is a national botanic garden that "informs visitors about the importance, and often irreplaceable value, of plants to the well-being of humans and to earth's fragile ecosystems."²¹ Neither agency self-evidently needs to be located in the legislative branch

...

The first Congress created the first executive departments, Treasury, State, and War, in 1789.⁸⁸

88. Harold Seidman, A Typology of Government Agencies, in *Federal Reorganization: What Have We Learned?*, 34 (Peter Szanton ed., 1981) [hereinafter Seidman, A Typology]. It is interesting to note that Congress considered, but ultimately rejected, a proposal to create a fourth executive department—a home department. Instead, they took the programs and responsibilities that would have resided in the home department, and placed them in the other departments.

89. There were a few exceptions to this early pattern. Specifically, Congress created four agencies outside the executive departments prior to the Civil War—the Library of Congress, Botanic Garden, Smithsonian, and Government Printing Office. *Id.* at 35. Three of these are located in the legislative branch.

These passages reflect universal understandings. The President does NOT have the complex web of relationships he enjoys with "The Federal Executive Establishment," which (as the AGUS publication accurately reflects) includes ALL the independent regulatory commissions. No-one in the Congressional Research Service thinks she is an executive branch employee; Congress would be outraged (and properly so) by a presidential directive to the Librarian to instruct the CRS that its employees must henceforth provide research to and only to executive departments, or that it must submit budget requests to OMB. He could not, via GSA, relocate it to Rockville, Md. The risk that in my judgment arrangements like the copyright royalty tribunal present is teaching Congress how to create institutions with unmistakably executive function that lie outside that web.

cited in Fox Television Stations, Inc. v. Aereo, LLC, No. 15-56420, archived on March 16, 2017



mls ▫ May 19, 2013 at 12:15 am

It is clear that the Library of Congress is understood, at least by Congress, to be part of the legislative branch. Historically, this is not something that the executive branch has questioned (I am not sure that it would have occurred to the executive branch in the 19th century that this was something that it could question). Perhaps it does now—that depends on exactly what it means to be part of the legislative branch and how it relates to the various legal assertions that DOJ has made in court.

Assuming that the LOC is constitutionally prohibited from performing executive functions, the question remains to what extent the administration of copyright laws constitutes an executive function. No doubt the DC Circuit's observation that "the powers in the Library and the Board to promulgate copyright regulations, to apply the statute to affected parties, and to set rates and terms case by case are ones generally associated in modern times with executive agencies rather than legislators" is correct, but what about the fact that Congress, long before "modern times," has placed responsibility for administering the copyright laws in non-executive agencies? It seems that this historical practice might have some relevance to the separation of powers analysis.

Looking at things from another angle, the Framers might well have looked askance at a "copyright rule issued by the Librarian of Congress that made unlocking a cell phone a crime," but I doubt it would have been because they thought that such a rule should be issued by an executive agency.

Some of the points made by the original post seem to have at most a tangential relevance to these difficult constitutional

questions. As Marty suggests, who cares whether the WH distances itself from actions by the LOC, something it might do with respect to any independent agency (or, in the case of the IRS, close enough to independent for government work)? Likewise, the fact that the Librarian believes the LOC to be part of the legislative branch doesn't seem all that important- the question is whether this belief is correct and, if so, what it means.

This strikes me as a very important case. I wonder whether Congress has considered how its institutional interests may be affected and whether it wants DOJ to represent them.

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