ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7013

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILMON X, LLC, *et al.*,

Defendants-Appellants,

v.

FOX TELEVISION STATIONS, INC., *et al.*,

Plaintiffs-Appellees.

On Appeal from the
United States District Court for the District of Columbia
The Honorable Rosemary M. Collyer
Civ. Case No. 13-cv-758

APPELLANTS' CONSOLIDATED OPENING BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW AND RELATED CASES

Pursuant to D.C. Circuit Rules 26.1 and 28(a)(1), Defendants-Appellants hereby provide the following information:

PARTIES AND AMICI

The following parties appeared before the district court:

Defendants-Appellants:

FilmOn X, LLC certifies that it has no parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

FilmOn.TV Networks, Inc. certifies that, on or about April 7, 2016, it changed its corporate name to FOTV Media Networks, Inc., and that no publicly held corporation owns 10 percent or more of its stock. A new subsidiary named FilmOn.TV Networks, Inc., which is not a party to this action, was formed on or about April 11, 2016.

FilmOn.TV, Inc. certifies that FilmOn.TV Networks, Inc. is its parent corporation and that no publicly held corporation owns 10 percent or more of its stock.

FilmOn.Com, Inc. certifies that it merged with FilmOn.TV, Inc. in November 2015, that the parent corporation of FilmOn.TV, Inc. is FilmOn.TV

Networks, Inc. and that no publicly held corporation owns 10 percent or more of its stock.

Plaintiffs-Appellees:

Fox Television Stations, Inc. (now Fox Television Stations, LLC);

Twentieth Century Fox Film Corporation;

Fox Broadcasting Company, Inc.;

NBC Subsidiary (WRC-TV), LLC;

NBC Studios LLC (now Universal Television LLC);

Universal Network Television LLC (now Universal Cable Productions LLC);

Open 4 Business Productions LLC;

Telemundo Network Group LLC;

American Broadcasting Companies, Inc.;

Disney Enterprises, Inc.;

Allbritton Communications Company (now Sinclair Television Stations, LLC);

CBS Broadcasting Inc.;

CBS Studios Inc.; and

TEGNA Inc.

RULING UNDER REVIEW

On appeal is United States District Court Judge Rosemary M. Collyer's November 12, 2015 Order and Memorandum Opinion granting partial summary judgment in favor of Plaintiffs on Defendants' first counterclaim for declaratory relief. The opinion is not yet published but is available at 2015 WL 7761052. SRA1-48; RA60-107. On January 4, 2016, Judge Collyer entered partial judgment under Fed. R. Civ. P. 54(b) and certified immediate appeal. RA55-59.

RELATED CASES

This case was previously before this Court in *Fox Television Stations, Inc., et al. v. FilmOn.TV Networks Inc., et al.* (consolidated case nos. 13-7145 and 13-7146). That appeal was voluntarily dismissed after the Supreme Court decided *American Broad. Cos., et al. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) ("*Aereo*").

A related, earlier-filed case involving the same parties and identical issues is pending in the United States Court of Appeals for the Ninth Circuit: *Fox Television Stations, Inc., et al. v. Aereo Killer LLC, et al.*, (Case No. 15-564420). That case is scheduled for oral argument on August 4, 2016.

/s/ Ryan G. Baker
Ryan G. Baker

Counsel for Defendants-Appellants

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TABLE OF AUTHORITIES[1]

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Federal Cases:

[1] Appellants have marked those authorities upon which they chiefly rely with an asterisk (*).

Statutes:

Regulations:

Legislative Materials:

Administrative Materials:

Other Authorities:

GLOSSARY OF ABBREVIATIONS

Act	The Copyright Act of 1976
Aereo	*American Broad. Cos., et al. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)
Appellants	FilmOn X, LLC; FilmOn.TV Networks, Inc.; FilmOn.TV, Inc.; FilmOn.com, Inc.; and Alkiviades David
Appellees	Fox Television Stations, LLC; Twentieth Century Fox Film Corporations; Fox Broadcasting Company, Inc.; NBC Subsidiary (WRC-TV), LLC; Universal Television LLC; Universal Cable Productions LLC; Open 4 Business Productions LLC; Telemundo Network Group LLC; American Broadcasting Companies, Inc.; Disney Enterprises, Inc.; Sinclair Television Stations, LLC; CBS Broadcasting Inc.; CBS Studios Inc; and TEGNA Inc.
California Action	*Fox Television Stations, Inc., et al. v. AereoKiller, LLC, et al.*, Case No. 12-cv-6921-GW-JC
D.C. Action	*Fox Television Stations, Inc., et al., v. FilmOn X LLC*, et al., Case No. 13-cv-758-RMC
DMA	Designated Market Area
FCC	Federal Communications Commission
FTA	Free Trade Agreement

HTTPS	Hypertext Transfer Protocol Secure
IP	Internet Protocol
ivi I	*WPIX, Inc. v. ivi, Inc.*, 765 F.Supp.2d 594 (S.D.N.Y. 2011)
ivi II	*WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012)
MDS	Multipoint Distribution Service
MMDS	Multichannel Multipoint Distribution Service
MVPD	Multichannel Video Programming Distributors
NPRM	Notice of Proposed Rulemaking
Office	United States Copyright Office
OTA	Over-The-Air
RA	Required Appendix
SBN I	*Nat'l Broad. Co., Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991)
SBN II	*Satellite Broad. and Communications Ass'n of America v. Oman*, 17 F.3d 344 (11th Cir. 1994)
Skidmore	*Skidmore v. Swift & Co.*, 323 U.S. 134 (1994)
SMATV	Satellite Master Antenna Television
SRA	Sealed Required Appendix
URL	Uniform Resource Locator
1948 Paper	Dr. Claude Shannon, *A Mathematical Theory of Communication*, The Bell

	System Technical Journal, pp. 379-423, July 1948, Vol. 27, No. 3
1949 Paper	Dr. Claude Shannon, *Communication In The Presence Of Noise*, Proceedings of the Institute of Electrical and Electronics Engineers, pp. 447-57, February 1998, Vol. 86, No. 2
1974 Floor Debate	120 Cong. Rec. 30,397 (September 6, 1974)
1991 Proposed Rulemaking	*Cable Compulsory License; Definition of Cable System*, 56 Fed. Reg. 31,580 (July 11, 1991)
1992 Rulemaking	*Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3,284-01 (Jan. 29, 1992)
1994 amendment	Satellite Home Viewer Act of 1994, Pub. L. 103-369, 108 Stat. 3477 (Oct. 18, 1994)
1994 Rulemaking	*Cable Compulsory License; Definition of Cable System*, 59 Fed. Reg. 67,635 (Dec. 30, 1994)
1997 Rulemaking	*Cable Compulsory License; Definition of Cable System*, 62 Fed. Reg. 18,705-02 (Apr. 17, 1997)
2008 SHVERA Report	U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* 188 (2008)

STATEMENT OF JURISDICTION

Pursuant to Rule 28(a)(4) of the Federal Rules of Appellate Procedure and Circuit Rule 28, Defendants-Appellants state that the district court had federal question subject-matter jurisdiction over this copyright dispute pursuant to 28 U.S.C. Sections 1331, 1338(a).

The Circuit Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. Section 1292(b). Pursuant to Federal Rule of Civil Procedure 54(b), on January 4, 2016, the district court entered a final judgment on Defendants-Appellants' first counterclaim for declaratory relief and expressly certified that there is no just reason to delay appeal of this final judgment. RA55-59.[2] Defendants-Appellants timely filed their Notice of Appeal from the aforementioned orders on January 29, 2016, within 30 days from entry of the district court's January 4, 2016 final judgment. Fed. R. App. P. (4)(a)(1)(A). RA51-54.

Defendants-Appellants certify that the instant appeal is from a final order or judgment that disposes of the parties' 17 U.S.C. Secdtion 111 contentions and counterclaim.

[2] All citations to the Required Appendix ("RA") are in the form "RA" followed by the specific pages referenced in the RA. All citations to the "Docket (Dkt.)" are taken from Case No. 1:13-758-RMC, unless otherwise noted.

STANDARD OF REVIEW

The D.C. Circuit reviews "questions of statutory interpretation *de novo*." *United States v. Cordova*, 806 F.3d 1085, 1098 (D.C. Cir. 2015).

The D.C. Circuit reviews a "district court's decision whether [to accept] or decline jurisdiction in favor of an ongoing proceeding . . . for abuse of discretion." *UtahAmerican Energy, Inc. v. Department of Labor*, 685 F.3d 1118, 1123 (D.C. Cir. 2012) (internal quotations and citations omitted; brackets added). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark Inc. v. Allcare Health Management System, Inc.*, 134 S. Ct. 1744, 1748, n. 2 (2014) (internal quotations and citation omitted).

STATEMENT OF ISSUES

1. Should this copyright infringement action be stayed in the interests of efficiency and comity pending the resolution of an earlier-filed action in the Central District of California, which involves the same legal and factual copyright issues and the same parties?

2. Does FilmOn X, LLC, which operates physical facilities located in the United States that receive over-the-air ("OTA") broadcast programming and then retransmit such programming over wires, cables, microwave and other

communications channels (including the Internet) to paying subscribers, qualify for a statutory copyright license under Copyright Act Section 111?

3. Did the district court err in deferring to the Copyright Office's informal and inconsistent administrative statements that retransmission services utilizing the Internet are ineligible for the compulsory license available to cable systems under Copyright Act Section 111?

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Defendants-Appellants respectfully request oral argument. The issues involved in this appeal are complex and important to the public.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in the separately bound addendum.

STATEMENT OF THE CASE

I. Procedural History.

The claims in this action mirror copyright claims previously filed in the Central District of California, in *Fox Television Stations, Inc., et al., v. AereoKiller, LLC, et al.*, Case No. 12-cv-6921-GW-JC (the "California Action"), a case currently before the Ninth Circuit. The California Action and this action involve the same defendants and, with the exception of four network affiliates added to this action, the same plaintiffs.

In August 2012, the major broadcast networks filed two lawsuits in California, alleging that FilmOn X's (then AereoKiller's) use of mini-antenna/DVR technology violated their exclusive right of public performance under the Copyright Act (the "Act"). On December 27, 2012, the California district court found FilmOn X was engaged in a public performance and enjoined defendants from retransmitting the plaintiffs' copyrighted programming within the geographic boundaries of the Ninth Circuit. *Fox Television Stations, Inc. v. AereoKiller*, 115 F.Supp.3d 1152, 1154-55 (C.D. Cal. 2015).

On May 23, 2013, more than nine months after the filing of the California Action, Plaintiffs filed this action in the District of Columbia (the "D.C. Action") to "address Defendants' ongoing infringement outside of the Ninth Circuit." *See* RA120; Dkts. 1, 5. On September 5, 2013, the D.C. district court enjoined FilmOn

X's mini-antenna technology nationwide with the exception of the Second Circuit. RA110-112.

On June 24, 2014, while appeals were pending in the Ninth Circuit and this Circuit from the district court decisions enjoining FilmOn X's service, the Supreme Court found Aereo, FilmOn X's competition, publicly performed. *See Aereo*, 134 S. Ct. at 2498. Although Section 111 eligibility was not before the Supreme Court, at oral argument, Justices Sotomayor and Breyer intimated that Aereo might be a cable company eligible for a statutory license. *See* RA1779 (*Aereo* S.Ct. Hrg. Tr. at 4:1–5:4 (Sotomayor, J.)) ("But I look at the definition of a cable company, and it seems to fit . . . . I mean, I read it and I say, why aren't they a cable company? . . . Do we have to go to all of those other questions if we find that they're a cable company? We say they're a c[]able company, they get the compulsory license."); *see also* RA1828-1829 (*Aereo* S.Ct. Hrg. Tr. at 53:21-54:5 (Breyer, J.)) ("tak[ing] [an Internet-based service] out of the compulsory licensing system" would limit the public's access to copyrighted material). Subsequently, the parties stipulated to dismissals of the then-pending appeals in the Ninth Circuit and this Circuit.

Following *Aereo*, FilmOn X amended its pleadings in the California Action and this D.C. Action to state a Section 111 defense and counterclaim. *See* RA139-158, 165-182; *see also* Case No. 2:12-cv-06921-GW-JC, Dkts. 139-144. After

Plaintiffs declined to respond to a proposal to stay this action, Defendants' counsel raised this issue with the district court. During an October 30, 2014 Scheduling Conference, Defendants' counsel stated: "We had approached actually the plaintiffs in the case to seek a stay of this proceeding to permit the first-filed [sic] case, which was the California case, to proceed first. We were never provided a response to that request." RA204. The district court declined to grant a stay, reasoning that "this is a different case because there are different plaintiffs . . . and [the case] may ultimately be decided slightly differently." RA205.

Subsequently, the district court below entered an initial scheduling order that set the same fact and expert discovery deadlines as the California Action. *Cf.* RA197-198 *with* Case No. 2:12-cv-06921-GW-JC, Dkt. 136. The parties agreed that depositions and other discovery conducted in one case would be admissible in both cases, and the parties filed cross-motions for summary adjudication on FilmOn X's Section 111 counterclaim and affirmative defense in both cases. *Cf.* Dkts. 81, 97 *with* Case No. 2:12-cv-06921-GW-JC, Dkts. 162, 164. The evidentiary record in both actions is the same in all relevant respects.

On July 24, 2015, the California district court granted summary adjudication in favor of Defendants. *See AereoKiller*, 115 F.Supp.3d 1152. The California district court found that FilmOn X had one or more facilities "located in particular buildings wholly within particular states" that received broadcast signals and made

secondary transmissions of those signals on "wires, cables, microwave, or other communications channels" to paying members of the public. *Id.* at 1167. Accordingly, it concluded that FilmOn X fit squarely within the plain definition of a cable system and was eligible for a Section 111 license. *Id.* at 1171. The California district court stayed the California Action and certified an interlocutory appeal under 28 U.S.C. Section 1292(b) on the issue of "whether the cable system compulsory copyright license set forth in 17 U.S.C. Section 111(c) is available to Internet-based retransmission services[.]" Case No. 2:12-cv-06921-GW-JC, Dkt 208. Additionally, pursuant to a stipulation, the California district court ordered that the preliminary injunction shall remain in effect and stayed all further district court proceedings during the pendency of the Ninth Circuit appeal. *Id*.

Shortly after the California district court issued its summary adjudication opinion, on August 13, 2015, Defendants again asked the district court below to stay this action in "the interests of judicial efficiency and to avoid potentially conflicting rulings on the same legal issues between the same parties[.]" Dkt. 126 at 24. Several months later, on November 12, 2015, the district court declined to stay the action and, disagreeing with the California district court, found Defendants ineligible for a statutory copyright license. RA60-107.

At a December 8, 2015 Status Conference, Defendants argued (for a third time) that this action should be stayed in the interests of comity. RA2335.

However, the district court expressed its preference to proceed with discovery pending interlocutory appeal. *See* RA2335-2339. The district court then entered final judgment on Defendants' Section 111 counterclaim under Rule 54(b) and allowed discovery to proceed "on damages and willfulness issues . . . while the Section 111 Counterclaim Appeal is pending[.]" RA55-59. The district court's order further notes: "The fact that Defendants have entered into this stipulation does not constitute a waiver of their argument that this action should have been stayed pending resolution of the [California] [A]ction," and "no trial shall take place in this Court until the Section 111 Counterclaim Appeal has been resolved by the Court of Appeals." RA59.

At present, the Ninth Circuit is poised to decide "whether Internet-based retransmission services such as FilmOn X are 'cable systems' within the meaning of Section 111 of the Copyright Act." *See* USCA Case No. 15-56420, Dkt. 10 at 22. The parties completed their briefing in the Ninth Circuit appeal on May 16, 2016. Oral argument is scheduled for August 4, 2016. *See id.*, Dkts. 82, 84.

II. Statutory and Regulatory Background.

A. Section 111.

In response to *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974), Congress amended the Copyright Act in 1976 "to overturn th[e] Court's

determination" that "[CATV] systems (the precursors of modern cable systems) fell outside the Act's scope." *Aereo*, 134 S. Ct. at 2504. With this amendment, Congress purposely crafted Section 111, a statutory exemption and license for certain secondary transmissions made by "cable systems."

Section 111 defines "cable system" as a facility:

- located in any State, territory, trust territory, or possession of the United States;
- that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission; and
- that 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.

17 U.S.C. § 111(f)(3). FilmOn X plainly meets these definitional requirements.

B. Congress and The Copyright Office.

Congress intentionally drafted the 1976 Act to account for new retransmission technologies. Section 111 permits "cable systems" to make secondary transmissions by "other communications channels." 17 U.S.C. § 111(f)(3). At a 1976 Copyright Act legislative hearing, Senator John L. McClellan stated that "the language of the bill is sufficiently flexible to allow for further evolution in technology and communications." 120 Cong. Rec. 30,397, 30,403 (September 6, 1974) ("1974 Floor Debate").

Despite clear congressional intent that Section 111 stand the test of time, the

Office has sought the abolition of the statutory license since 1981, acting to "cabin the statute wherever possible." *AereoKiller*, 115 F.Supp.3d at 1164; *see also* U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* 188, 219 (2008) ("2008 SHVERA Report") ("The principal recommendation in the Report is that Congress move toward abolishing Section 111 and Section 119 of the Act.")

Congress has previously responded to the Office's attempts to limit the Section 111 license. After the Office determined via formal rulemaking that "wireless" cable operators did not come within the section 111(f) definition, *see* RA2011-2030 (*Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3,284-01 (Jan. 29, 1992) ("1992 Rulemaking")), Congress inserted "microwave" after "wires, cables," in Section 111(f)(3)'s cable system definition. *See* RA1961-1985 (Satellite Home Viewer Act of 1994, Pub. L. 103-369, 108 Stat. 3477 (Oct. 18, 1994) ("1994 amendment")). This amendment clarified "that the cable compulsory license applies not only to traditional wired cable television systems, but also to multichannel multipoint distribution services [("MMDS")], also known as 'wireless' cable systems." RA1987-2005 (S. Rep. No. 103-407, at 14 (1994)). Congress also mandated that the amendment be retroactive, and the Office then repealed its 1992 Rulemaking, deemed effective as of January 1, 1978. *See* RA2006-2009 (*Cable Compulsory License; Definition of Cable System*, 59

Fed. Reg. 67,635 (Dec. 30, 1994) ("1994 Rulemaking")).

The Office has not issued any formal ruling or conducted any notice-and-comment proceeding regarding Section 111 eligibility of a company utilizing the Internet as part of a communications channel to reach subscribers. Recently, however, the Office argued that large telecommunications providers using Internet Protocol ("IP") to retransmit broadcast content (*i.e.*, AT&T U-Verse and Verizon FiOS) are eligible for the Section 111 license. *See, e.g.*, 2008 SHVERA Report. There, the Office reasoned that "Section 111(f) defines 'cable system' quite broadly" and that "both AT&T, as well as Verizon, meet each of the elements of the cable system definition." RA1958; *see also* 2008 SHVERA Report at xi ("new systems that are substantially similar to those systems that already use Section 111, should be subject to the license.")

Although the Office has not recognized FilmOn X's right to a compulsory license, the Office stated it "will not refuse FilmOn's [statements of account] but will instead accept them on a provisional basis" because the issue of eligibility has been raised before the courts and before the FCC. RA1197-1198.

C. The FCC.

On December 17, 2014, the FCC adopted a Notice of Proposed Rulemaking ("NPRM") seeking comment on whether certain Internet-based transmission services (such as FilmOn X) should be regulated as multichannel video

programming distributors ("MVPDs"). RA1697-1748. It proposed "to modernize our interpretation of the term [MVPD] by including within its scope services that make available for purchase, by subscribers or customers, multiple linear streams of video programming, regardless of the technology used to distribute the programming." RA1698. The NPRM states that the "proposed interpretation is consistent with Congress's intent to define 'MVPD' in a broad and technology-neutral way to ensure that it would not only cover video providers using technologies that existed in 1992, but rather be sufficiently flexible to cover providers using new technologies such as Internet delivery." RA1707-1708.

III. FilmOn X's Cable Service.

A. FilmOn.com.

Using licensed technology, FilmOn X provides content to FilmOn.TV Networks, Inc., which is displayed on the website www.filmon.com, where users may access original and licensed programming. RA1130, 1364, 2103-2104. FilmOn X programming includes TVC-Latino, Mixed Media Network, Gospel Music Channel and many religious channels like JCTV, The Walk, Daystar and TBN, as well as public interest channels like NASA, DVIDs TV, Biz TV, Voice of America and Classic Arts Showcase. RA1577, 2104.

In August 2012, FilmOn X launched a remote mini-antenna/DVR service in Los Angeles. RA1125, 1134, 2103. Subsequently, it expanded operations to

several other U.S. cities. RA1124, 1183-1195. FilmOn X users enjoyed convenient access to OTA programming without the purchase, installation and maintenance of an antenna. RA1124. FilmOn X offered local OTA channel packages on either a monthly or annual basis, charging between $5.95 and $19.95 for monthly local channel packages and between $59.95 and $199.00 for annual local channel packages. RA1365, 2104-2105.

FilmOn X has ceased retransmission of broadcast programming. RA1127, 1499-1500, 2111. FilmOn X is prepared to recommence retransmissions as soon as it is authorized, at which time FilmOn X users will be required to purchase a local channel subscription package to view OTA channels on filmon.com. RA1127, 1138-1144, 1437-1440, 2111. Each subscription package will only include OTA broadcast channels within a specific designated market area ("DMA"). RA1127, 1146, 2106.

B. The Technology.

In each market, FilmOn X operated physical facilities housing antennas and other electronic equipment (licensed from FilmOn Networks) used to capture primary transmissions of OTA broadcast programming. RA1125, 1135, 1138, 2102, 2106. That programming was then retransmitted to specific paying subscribers over cables, wires and other communications channels. RA1125, 1431, 2106.

To make secondary transmissions, FilmOn X's facilities convert OTA content received by its antennas into digital packets. RA1132, 1464-1466. These packets are transmitted to the receiving device (such as a set-top box, laptop tablet or cellular phone) via coaxial cables, fiber-optic cables, microwave links and other "communications channels" that make up the physical layer of the Internet. SRA539-541; RA1132, 1464-1466, 1564-1565. FilmOn X includes an encrypted key to secure the Uniform Resource Locator ("URL") necessary for streaming content, which prevents unauthorized sharing or copying of the stream. SRA 559, 529-530, 559; RA1524-1528.

C. FilmOn X's Recent Technological Advancements.

Since *Aereo*, FilmOn X has refined its retransmission system. SRA529-531, 535-560; RA2111-2113. FilmOn X has taken additional measures to restrict retransmission of the original broadcast. SRA530, 535-560; RA1501, 2112. Subscribers may only access an OTA channel upon positive confirmation the physical address *and* the viewing device are within the applicable DMA at the time of the retransmission. *Id*. FilmOn X has also developed a secure system that uses Hypertext Transfer Protocol Secure ("HTTPS") to provide end-to-end encryption. SRA529-530, 555-560; RA2113. Further, FilmOn X will engage a proxy detection service and will include closed captioning. SRA1502-1503; RA1127, 2113.

D. FilmOn X's Account Statements and Royalty Payments.

On July 11, 2014, and February 27, 2015, FilmOn X submitted Statements of Account and compulsory royalty payments to the Office. RA1183-1195, 1200, 1202-1341. Those statements were amended on December 9, 2014, and June 18, 2015. *Id.* In all, FilmOn X has filed Statements of Account covering July 1, 2012, through December 31, 2014. RA12, 1183-1195, 1200, 1202-1341.

On July 23, 2014, the Office accepted FilmOn X's documentation on a "provisional basis," recognizing that "the question of eligibility of internet-based retransmission services for the Section 111 license appears to have been raised again before the courts." RA1197-1198. It also wrote that the "outcome" of pending FCC proceedings "concerning whether internet-based services may be treated as 'multichannel video programming distributors' . . . could impact" the Office's analysis under Section 111. RA1198, n. 3.

SUMMARY OF ARGUMENT

Plaintiffs originally filed claims of copyright infringement – the same claims before this Court – in the Central District of California (the "California Action"). If this action continues to proceed with the California Action, it will create a serious risk of inconsistent judgments and continue to waste resources of the parties and the courts. On August 4, 2016, the parties here will argue the California Action in front of the Ninth Circuit Court of Appeals. That appeal is

likely to resolve the issues before this Court. The district court abused its discretion when it did not stay this case. This Court should reverse and stay these proceedings pending the resolution of the California Action.

This Court should also reverse the district court's ruling that FilmOn X is not entitled to a compulsory Section 111 license. The district court misconstrued the plain statutory text and legislative history to find that a retransmission system relying in any way on the Internet as a communications channel cannot qualify for a statutory copyright license. Section 111's test contains no requirement that a cable system limit secondary transmissions to local markets or that a cable system own or control the entire distribution path. Although the FCC may impose such restrictions (and is indeed currently considering regulation, which this Court should not disturb), Section 111 does not. Instead, Section 111 requires a cable system's secondary transmissions be accomplished by "wires, cables, microwave, or other communications channels." 17 U.S.C. § 111(f)(3). Congress used broad language so the Act would encompass technologies developed after 1976, such as the Internet. The parties' experts agree that the physical layer of the Internet comprises "wires, cables and microwave." RA1132, 1464-1466.

In *Aereo*, the Supreme Court interpreted the Copyright Act's Transmit Clause in a technology agnostic fashion, finding Aereo substantially similar to a

cable system. Although *Aereo* does not resolve this dispute, the Court's reasoning that Aereo was "substantially similar" to a cable system should inform this Court.

Further, this Court should not defer to the Office. As the district court observed, the Office has issued no formal opinions entitled to *Chevron* deference. RA94-95. Nor is *Skidmore* deference warranted. Not only do the Office's informal and inconsistent policy opinions fall short of formal rulemaking, they reflect open hostility to the compulsory copyright licensing regime Congress established. The Office's informal opinions are – in the words of the California district court – "not persuasive." *AereoKiller*, 115 F.Supp.3d at 1167-69.

Finally, this Court should independently analyze Section 111's unambiguous statutory text, which was not altered by international treaties formed decades after the 1976 Copyright Act. Those treaties specifically abrogate any obligation in conflict with existing U.S. law, so they could not have altered Section 111.

ARGUMENT

I. IN THE INTERESTS OF COMITY, THIS CASE SHOULD BE STAYED PENDING RESOLUTION OF THE CALIFORNIA ACTION.

This dispute should be resolved in the Central District of California, where Plaintiffs first filed the same claims against Defendants at issue in this case. "For more than three decades the rule in this Circuit has been that where two cases between the same parties on the same cause of action are commenced in two

different Federal courts, the one which is commenced first is to be allowed to proceed to its conclusion first. Considerations of comity and orderly administration of justice dictate that two courts of equal authority should not hear the same case simultaneously." *Washington Metropolitan Area Transit Authority v. Ragonese*, 617 F.2d 828, 830 (D.C. Cir. 1980) (Internal citations and quotations omitted).

Based on its finding that certain defendants named here were not plaintiffs in the California Action, the district court refused to stay this case. Dkt. 76. But "[c]ourts have long held that neither the parties involved nor the issues at stake need to be completely identical for the first to file rule to apply." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936). A person may be "so identified in interest with a party to [other] litigation that he represents precisely the same legal right in respect to the subject matter involved." *Jefferson School of Social Science v. Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963). Although there are four immaterial differences between the plaintiffs named in this case and those named in California, all plaintiffs share the same legal subject matter interest.

This action and the California Action involve identical claims of copyright infringement brought by the same "group" of plaintiffs against the same defendants. The defendants in both cases are identical. There are four Plaintiffs in this action that are not named in the California Action: (1) NBC Subsidiary (WRC-

TV),[3] (2) NBC Studios LLC[4] (now Universal Television LLC), (3) Allbritton Communications Company[5] (now Sinclair Television Stations, LLC) and (4) Gannett Co., Inc.[6] (now TEGNA Inc.). *Cf.* Case No. 1:12-cv-6921-GW-JC, Dkt. 3 *with* Case No. 1:13-758-RMC, Dkts. 4, 152-154. All of these parties own and operate (or are owned and operated by companies that are) broadcasting affiliates of the NBC, ABC and CBS networks. *See, e.g.*, RA694.

Moreover, this D.C. Action was not filed to provide relief to a different set of plaintiffs. To the contrary, Plaintiffs alleged in their complaint that the purpose of this action was to "address Defendants' ongoing infringement outside of the Ninth Circuit" because the California district court had declined to grant their request for a nationwide injunction. *See* Dkts. 1, 5; Case No. 2:12-cv-6921, Dkts. 77-78. Plaintiffs in both cases are represented by the same counsel of record, and both cases involve identical copyright claims arising out of the same set of operative facts against the same Defendants. Under these circumstances, there can

[3] NBC Subsidiary (WRC-TV) "is an indirect wholly-owned subsidiary of [California Plaintiff] NBCUniversal Media, LLC," which is owned ultimately by Comcast Corporation. *See* RA160; *see also* Case No. 16-7013, Dkt. 1603956 at 3.

[4] NBC Studios LLC is "an indirect wholly-owned subsidiary of [California Plaintiff] NBCUniversal Media, LLC," which is owned ultimately by Comcast Corporation. *See* RA160; *see also* Case No. 16-7013, Dkt. 1603956 at 3.

[5] Allbritton Communications Company "is the licensee, owner and operator of WJLA-TV," RA161, which is the "main local ABC . . . channel[]" "for the Washington, D.C. area." *See* RA694.

[6] Gannett Company, Inc.'s "wholly owned subsidiary, Detroit Free Press, Inc., owns and operates WUSA," RA162, which is the "main local . . . CBS . . . channel[]" "for the Washington, D.C. area." *See* RA694.

be no question that the plaintiffs in both cases are in privity with one another. *See Jefferson School of Social Science*, 331 F.2d at 83 ("a subsidiary corporation is held to be in privity with its parent in respect to the common corporate business."); *Wise v. United States*, 128 F.Supp.3d 311, 318 (D.D.C. 2015) (earlier action "brought nearly nine months before the instant case was filed" indicates no "equitable basis for departing from the usual rule in this Circuit for the application of the first-to-file rule."); *Stone & Webster, Inc. v. Georgia Power Co.*, 965 F.Supp.2d 56, 62 (D.D.C. 2013), *aff'd*, 779 F.3d 614 (D.C. Cir. 2015).

Inconsequential differences among the named parties and Plaintiffs' desire to litigate in the D.C. Circuit do not warrant denial of the stay motion. Nor is the fact that a case "may ultimately be decided slightly differently" a valid reason to deny a stay request. RA205; *Entines v. United States*, 495 F.Supp.2d 84, 85-86 (D.D.C. 2007) (It is "far better" for "litigation to proceed in a single location" where there is a "possibility of inconsistent results"). The first-to-file rule serves important comity interests between federal courts and aims to avoid the waste of the courts and the parties' scarce resources on duplicative litigation. *See Columbia Plaza Corp. v. Sec. Nat'l Bank*, 525 F.2d 620, 626 (D.C. Cir. 1975); *Furniture Brands Int'l, Inc. v. U.S. Int'l Trade Comm'n*, 804 F.Supp.2d 1, 4 (D.D.C. 2011).

No prejudice will result from a stay. Plaintiffs' interests are completely and adequately represented in the California Action. And, the nationwide injunction

issued by the district court below remains in place to prevent Defendants from retransmitting Plaintiffs' content pending final resolution of the California Action.

II. THE DISTRICT COURT ERRED FINDING FILMON X INELIGIBLE FOR A STATUTORY COPYRIGHT LICENSE.

The district court's opinion contradicts the plain language of the Copyright Act, congressional intent and the Supreme Court's reasoning in *Aereo*. As such, it should be reversed.

A. Congress Intended The Compulsory License To Encompass New Technologies.

1. Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," meaning that "[a] court must therefore interpret the statute as a symmetrical and coherent regulatory scheme . . . fit[ting], if possible, all parts into a harmonious whole." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 131 (2000) (Internal citations and quotations omitted); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (courts "must give effect, if possible, to every clause and word of a statute.")

Here, Congress used language in the Act's 1976 amendments to ensure that the revised statutory regime would survive technological advances and change:

- The Transmit Clause provides for a performance "by means of any device or process," 17 U.S.C. § 101;

- A protected work can be fixed in a tangible medium "now known or later developed," *id.*; and

- Section 111(f) sets forth a non-exhaustive retransmission list, mentioning "wires, cables, or other communications channels[.]" 17 U.S.C. § 111(f)(3).

Congress intended its amendments to be construed together "to achieve a similar end: to bring the activities of cable systems within the scope of the Copyright Act." *Aereo*, 134 S.Ct. at 2505-06. This Court should interpret Section 111 in a technology agnostic manner to fulfill the promise of the plain statutory text and the intent of Congress.

The word "or" in Section 111(f)(3) must be given its normal disjunctive meaning, evincing Congress' explicit provision for secondary transmissions made using channels other than wires and cables (or microwaves). *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 338-39 (1979); *see also Huls America Inc. v. Browner*, 83 F.3d 445, 451 (D.C. Cir. 1996) ("We think reading 'or' in accordance with its normal disjunctive meaning – as the EPA has done – comports with the structure and purpose of [the Act] as a whole."). Here Congress' words must be regarded as conclusive. *See Consumer Prod. Safety Comm'n, v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

2. Legislative History.

Congress carefully selected the language of the Act to encompass

technologies that would certainly develop after 1976. Seventh Circuit Judge Richard Posner explained the significance of flexible interpretation to include new technologies:

> The comprehensive overhaul of copyright law by the Copyright Act of 1976 was impelled by recent technological advances, such as xerography and cable television, which the courts interpreting the prior act, the Copyright Act of 1909, had not dealt with to Congress's satisfaction. This background suggests that Congress probably wanted the courts to interpret the definitional provisions of the new act flexibly, so that it would cover new technologies as they appeared, rather than to interpret those provisions narrowly and so force Congress periodically to update the act.

WGN Cont'l Broad. Co. v. United Video, Inc., 693 F.2d 622, 627 (7th Cir. 1982); *see also Aereo*, 134 S. Ct. at 2509-10.

Senator John L. McClellan, Chairman of the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee, sponsored the bill that resulted in 1976 Copyright Act, including compulsory license amendments. *See* 1974 Floor Debate, at 30,398. He noted the committee's contemplation of technological advancement:

> The general revision of the copyright law occurs infrequently. The country for many years will have to live with whatever bill is ultimately enacted. Therefore, the committee has taken particular care the language of the bill is sufficiently flexible to allow for further evolution in technology and communications.

Id. at 30403; *see also* 113 Cong. Rec. 8580, at 8587 (April 6, 1967) (statement of Rep. Dick Poff) ("We must . . . adapt the law to accommodate future changes in

the technology which progress is bound to bring.").

While the "typical [cable] system" in 1976 used a "network of cable" to make secondary transmissions, *see* RA85 (citing H.R. Rep. No. 94-1476, at 88 (1976), the House of Representatives also recognized in 1976 (and before) that retransmission technologies would necessarily evolve:

> During the past half century a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices, communications satellites, and laser technology *promises even greater changes in the future*. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works.

H.R. Rep. No. 94-1476, at 47 (emphasis added).

In fact, Barbara Ringer, the Register of Copyrights during enactment, testified that Section 111 "deals with *all kinds of secondary transmissions*, which usually means picking up electrical energy signals . . . off the air and retransmitting them simultaneously *by one means or the other* – usually cable *but sometimes other communications channels, like microwave* and apparently *laser beam transmissions that are on the drawing board if not in actual operation*." *Copyright Law Revision Hearings: Hearings before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 94th Cong. 1820 (1975) (statement of Barbara Ringer, Register of Copyrights) (emphasis added). Even though FilmOn X uses such communications channels, the district court found that

the unambiguous terms of Section 111(f)(3) do not cover FilmOn X. This was erroneous.

B. FilmOn X Satisfies The Statutory Definition Of A Cable System.

Congress defined a cable system in 17 U.S.C. § 111(f)(3), which provides:

> A "cable system" is [1] a facility, located in any State, territory, trust territory, or possession of the United States, [2] 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 [3] makes secondary transmissions of such signals or programs [4] by wires, cables, microwave, or other communications channels [5] to subscribing members of the public who pay for such service.

Nowhere is there any requirement a cable system be "inherently localized" or "control" the transmission path. "Statutory definitions control the meaning of statutory words . . . in the usual case." *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949); *see also Colautti v. Franklin*, 439 U.S. 379, 392, n. 10 ("As a rule, '[a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.'"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)) ("when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'").

The record and the district court's factual findings confirm that FilmOn X satisfies each of the five elements of a "cable system." The district court found

FilmOn X's data "centers were physical facilities across the country, which contained the necessary electronic equipment to capture, store, *and* retransmit broadcast programming." *See* RA68 (Emphasis added). Additionally, FilmOn X's service used wires, cables, and other communications channels to make secondary transmissions of broadcast stations licensed by the FCC to subscribing members of the public who pay for the service. SRA539-541, RA1125, 1132, 1431, 1464-1466, 1564-1565, 2106. This Court should rule that FilmOn X is eligible for a statutory copyright license as a cable system.

1. FilmOn X Operated Facilities Located In States.

FilmOn X operated "physical facilities" in numerous states. *See* RA68, 85. The facility requirement is satisfied.

2. FilmOn X Facilities Received Broadcast Signals.

The district court found FilmOn X used antennas at its facilities to receive broadcast signals. RA68 ("[FilmOn X's centers were physical facilities across the country, *which contained the necessary electronic equipment to capture*, store, and retransmit broadcast programming.") (Emphasis added); *see also* RA 85; *AereoKiller*, 115 F.Supp.3d at 1156-57. This conclusion is not disputed.

3. FilmOn X Facilities Made Secondary Transmissions of Broadcast Signals.

The district court found FilmOn X's facilities "contained the necessary electronic equipment to capture, store, *and retransmit broadcast* programming."

RA68 (Emphasis added). This finding should be conclusive: FilmOn X's facilities both received (captured, stored) *and retransmitted* broadcast signals.

"[T]o transmit" is defined broadly in the 1976 Act: "to communicate it *by any device or process* whereby images or sounds are received beyond the place from which they are sent." 17 U.S.C. § 101 (emphasis added). Here, the record demonstrates that FilmOn X's facilities converted OTA broadcast video into packets of digital data and caused those packets to be transmitted to the subscriber's receiving device (such as a set-top box, laptop or tablet). SRA539-541, RA1125, 1132, 1431, 1464-1466, 1564-1565, 2106. Indeed, if FilmOn X's facilities did not make secondary transmissions, Plaintiffs' infringement allegations are specious.

4. FilmOn X Makes Secondary Transmissions By "Wires, Cables, Microwave Or Other Communications Channels."

Rather than constraining a cable system to "traditional" technologies, such as the wires or cables that existed in 1976, Congress provided that a cable system could make secondary transmissions over "other communications channels." 17 U.S.C. § 111(f)(3). That language was meant to accommodate technological advancement, which has continued since 1976.

As the statute requires, FilmOn X transmits to users over "wires, cables, microwave or other communications channels." A "communications channel" is

ordinarily and popularly understood as "a system or method that is used for communicating with other people," *see* "Communications Channel," Cambridge Online Dictionary (2015), *available at* http://www.dictionary.cambridge.org (last visited July 17, 2016), or "the ways in which people communicate" *see* Collins Dictionary (2015), *available at* http://www.collinsdictionary.com (last visited July 17, 2016).

As illustrated by scientific literature cited by Appellees' expert, Nigel Jones, and referenced by the district court, RA90, the technical definition of a "communications channel" is similar to its plain and ordinary meaning. *See* Dr. Claude Shannon, *A Mathematical Theory of Communication*, The Bell System Technical Journal, pp. 379-423, July 1948, Vol. 27, No. 3., *available at* https://archive.org/details/bstj27-3-379 (last visited July 17, 2016) ("1948 Paper"); *see also* Dr. Claude Shannon, *Communication In The Presence Of Noise*, Reproduced in Proceedings of the Institute of Electrical and Electronics Engineers, pp. 447-57, February 1998, Vol. 86, No. 2., *available at* https://web.stanford.edu/class/ee104/shannonpaper.pdf (last visited July 17, 2016) ("1949 Paper").

In 1948, Dr. Shannon introduced a mathematical theory of communications systems that created the field of information theory and laid the foundation for modern mobile telephone and digital networks. *See* 1948 Paper. He postulated

that there are five elements for a "communications system" (as he knew them to exist in 1948), with one being the "channel," which he explained was "*merely the medium used to transmit the signal from transmitter to receiver*." *Id.* at 380-82; *see also* RA90. He went on to provide some initial examples: "*It may be a pair of wires, a coaxial cable, a band of radio frequencies, a beam of light, etc*." 1948 Paper at 381 (emphasis added).

Consistent with Dr. Shannon's theory, FilmOn X's system makes secondary transmissions of quantized television signals over communication channels that serve as media to transmit the video from the transmitter to the receiver. The undisputed evidence shows that the equipment housed in FilmOn X's facilities converts the broadcast signals to digital form (if it is not already digital) and breaks the video into smaller packets of data, each representing parts of the original video. RA1132, 1464-1466. These packets are then transmitted across wires, cables, microwaves and other communications channels to the receiving device. SRA539-541; RA1132, 1464-1466, 1564-1565. The receiving device reassembles the stream by combining the packets in their proper order for display to the subscriber. SRA535, 539-541. The Internet does not reassemble the stream.

"Communications channel" is frequently used in connection with the Internet. *See CNET Networks, Inc. v. Etilize, Inc.*, No. C 06-05378 MHP, 2008 WL 5059727, at *5 (N.D. Cal. Mar. 4, 2008) ("The present invention can be

implemented over any type of communications channel, such as the Internet"); *Visto Corp. v. Seven Networks, Inc.*, No. 2:03-CV-333-TJW, 2005 WL 6220108, at *2 (E.D. Tex. Apr. 20, 2005) (discussing patent identifying Internet as communications channel); *Gross v. Dev. Alternatives, Inc.*, 946 F.Supp.2d 120, 122 (D.D.C. 2013) (noting group "establish[ed] internet connections using multiple redundant devices in order to improve intergroup communications channels and then train those in the Cuban Jewish Community to use [group] devices to connect to the internet so that they can have regular and direct contact with each other[.]") (Internal quotations and citations omitted). Likewise, Appellees' expert testified that the physical layer of the Internet is made up of wires, cables, microwave links and other communications channels. *See* RA1132, 1464-1466.

Moreover, other cable systems already use IP to stream OTA programming to subscribers. RA1132-1133, 1490-1494, 1891, 1958. For example, AT&T U-Verse uses existing communications channels built, owned and operated by third parties to stream content to the public. RA1133. "The delivery of the programming is not limited to AT&T U-Verse's own network – the AT&T U-Verse app on a user's device (*e.g.*, a tablet) receives streams of video delivered across third party (such as the Sonic or Verizon) network infrastructure." *Id.*

FilmOn X is substantially similar to these systems, which use the same communications channels.[7]

5. FilmOn X Had Paid Subscribers.

It is largely undisputed that FilmOn X satisfies the requirement that a cable system make secondary transmissions to "subscribers who pay for such service." 17 U.S.C. § 111(f)(3); *see also* RA69 ("In the past, FilmOn X charged for both monthly and annual local channel packages."). FilmOn X had paid subscribers, and has designed its future system to limit retransmissions of broadcast signals to paid subscribers. RA1127, 1138-1144, 1437-1440, 2111. Accordingly, the district court's findings in this respect should be affirmed.

C. *Aereo* Recognized Section 111's Technology Agnosticism.

Aereo was found to publicly perform because it is "substantially similar to" and "is for all practical purposes a traditional cable system[,]" which Congress intended to regulate when it amended the Copyright Act in 1976. *Aereo*, 134 S. Ct. at 2506-07. The Supreme Court repeatedly compared Aereo to traditional cable

[7] The district court attempted to distinguish AT&T U-Verse from FilmOn X on the ground that AT&T "controls" its transmission path because it has entered into contracts with the third parties who own and operate the communication channels that are used to transmit secondary transmissions of broadcast signals. RA101, n.21. But Appellees' expert was not personally familiar with AT&T U-Verse's system, RA1490-1493, and there is no evidence in the record of the kind of "control" that AT&T U-Verse purportedly exercises over its "managed network." *Id.* Moreover, any user of AT&T U-Verse may access OTA content over public or another company's wifi, which may not be owned or controlled by AT&T or the provider of the transmission. RA1132-1133.

systems, using the word "cable" 44 times. *See id*. at 2511 ("In sum, having considered the details of Aereo's practices, we find them highly similar to those of the CATV systems in *Fortnightly* and *Teleprompter*. And those are activities that the 1976 amendments sought to bring within the scope of the Copyright Act."); *see also id*. at 2507. The *Aereo* Court concluded that the mere "substitut[ion] of new technologies for old" does not take cable systems out of the comprehensive regulatory scheme established by Congress. *Id*. at 2509.

Though *Aereo* did not expressly overrule *WPIX, Inc. v. ivi, Inc.*, 765 F.Supp.2d 594, (S.D.N.Y. 2011) ("*ivi I*"), *aff'd* 691 F.3d 275 (2d Cir. 2012) ("*ivi II*"), the opinion rejected the Second Circuit's technology-specific interpretations of the 1976 amendments. *See AereoKiller*, 115 F.Supp.3d at 1163, n. 14 (*Aereo* unwound "a convoluted legal doctrine" in the Second Circuit that emphasized the technical structure of a cable system over its function).[8] The Second Circuit's reasoning in *ivi II* contradicts the plain text and legislative history of the 1976 Act,

[8] In any event, *ivi II* is factually distinguishable. ivi did not identify any facility "located in any State, Territory, Trust Territory, or Possession," as Section 111(f)(3) requires. *See ivi II*, 691 F.3d at 280, n. 6. In the absence of such a physical facility, the Second Circuit opined that it is "unclear whether the Internet itself is a facility, as it is neither a physical nor a tangible entity; rather, it is a global network of millions of interconnected computers." *Id.* at 280 (internal quotations and citation omitted). The Second Circuit then conflated "communications channels" (*i.e.*, the cables, wires, and microwaves of the Internet) and "facility" (*i.e.*, the physical location where broadcast signals are received and retransmitted). The district court, like other courts, followed the Second Circuit into these murky waters. RA83-89; *Window to the World Communications, Inc.*, Dkt. 109 at 25.

which was meant to encompass evolving technology. *See ivi I*, 765 F.Supp.2d at 604 (observing that "ivi's [technical] architecture bears no resemblance to the cable systems of the 1970s"); *see also* RA88; *Window to the World Communications, Inc.*, Dkt. 109 at 25. This Court should reject that interpretation, which contradicts the plain language of the Act and its statutory history.

D. The District Court Invented New Statutory Requirements For A Cable System Not Found In The Plain Text.

The Copyright Act does not require that a cable system's facility "encompass" the entire distribution path from the facility to the subscriber. Nor does it require that a cable system be "inherently localized." If accepted, the district court's invention of new requirements "would largely freeze for section 111 purposes both technological development and implementation. And, by consequence, it would force both primary and secondary transmitters alike to forego available, economically feasible technology. [This Court should] reject this stand still status quo oriented view of the compulsory licensing provisions." *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 777 F.2d 393, 400 (8th Cir. 1985) (holding that a cable system may retransmit broadcasting to non-local customers under the passive carrier exemption); *see also Nat'l Broad. Co., Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991) ("*SBN I*") (finding system utilizing no closed transmission path was a "cable system" for purposes of the Copyright Act), *superseded by regulation as stated in* 17 F.3d 344 (11th Cir.

1994) ("SBN II").

1. A Cable System Need Not Own, Control Or Otherwise "Encompass" The Entire "Distribution Medium."

The district court held that "any system that fails to encompass the distribution medium and does not retransmit the signals directly to the subscriber does not qualify as a 'cable system.'" *See* RA86. This holding is unsupported by the statutory text.

Section 111(f)(3) provides that the cable system facility receives OTA transmissions and then makes secondary transmissions "by wires, cables, microwave, or other communications channels." Nothing in that language provides that this "facility" must own, control or otherwise encompass all of the "wires, cables, microwave, or other communications channels" in a transmission path. In fact, it is the opposite – the facility retransmits "by" using cables, wires, microwave and other communications channels. The preposition "by" expresses the relationship between the "facility" and the "secondary transmissions." The word "by" does not signify a relationship of ownership or control; it signifies use. *See* "*By*," Black's Law Dictionary (6th ed. 1990) ("Through the means, act, agency or instrumentality of."). It is undisputed that FilmOn X used wires, cables, microwave and other communications channels when it retransmitted to paying subscribers.

Communications channels are used by the cable system facility. Nowhere is it required that a cable system own communications channels. *NFL v. Insight Telecomms. Corp.*, 158 F.Supp.2d 124, 132 (D. Mass 2001).[9] This is true even if "traditional" or "typical" cable systems may have acquired some ownership interest in certain cables or wires. The Act reflects no such requirement, and this Court should reverse the district court's attempt to add it.

2. A Cable System Need Not Be An "Inherently Localized Transmission Medium" Under Section 111.

The district court erroneously held that "[Section] 111 was intended for an inherently localized transmission media of limited availability." RA98-99 (Internal quotations and citation omitted). The district court initially held (correctly) that the second sentence of Section 111(f)(3) "merely provides how commonly-owned cable systems should be treated for purposes of royalty computation *and does not impose additional requirements onto the definition of 'cable system.'*" *Id.* at *12, n. 16 (emphasis added).[10] Later, however, the district

[9] In *Insight Telecommuns. Corp.*, 158 F.Supp.2d at 132, the court held that an entity does not need to hold legal title to the "wires, cables, or other communication channels" mentioned in Section 111(a)(3) to qualify for a statutory copyright license under the passive carrier exception. That court wisely reasoned that "[n]othing in the authorities or legislative history . . . suggest[s] that Congress intended [Section 111] be read in such a crabbed fashion." *Id.*

[10] The district court also stated later in footnote 16: "This does not mean that this sentence should be ignored when deciding what qualifies as a cable system." RA83-84, n. 16. Obviously, the district court cannot have it both ways, and these

court relied on this second sentence to impose additional eligibility requirements upon a cable system, by adopting the reasoning of the Office as persuasive. *See id.* at *19-20 ("Although the words "communities" and "headend" relate to the royalty computation provision in subsection (d)(1), they bear some significance as to the actual definition of a cable system."). This was not only logically inconsistent, it was error.

The second sentence concerns the calculation of royalty fees, nothing more: "*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) (emphasis added). This sentence was discussed in *Liberty Cable*. *See* 919 F.Supp. at 688. There, the court explained that it "is a Congressional safeguard designed to thwart the artificial fragmentation of a cable system" to deter the cable systems from "reduc[ing] their reportable gross receipts and the royalty revenues derived therefrom." *Id.* at 688; *see also AereoKiller*, 115 F.Supp.3d at 1168.

Moreover, the fact that the words "community" and "local service area" appear in certain provisions in Section 111 does not suggest that a cable system must be "inherently localized" or cannot retransmit to multiple communities. If anything, it suggests the opposite. Where Congress intended to limit the

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two statements are at loggerheads in any light. Appellants do not see the distinction between "what qualifies" and "requirements" in this context.

retransmissions of broadcast signals on a geographic basis, it did so expressly. For instance, Section 111(c) contains detailed rules regarding carriage of signals of Canadian and Mexican broadcast stations on a geographic basis. *See* 17 U.S.C. § 111(c)(4). The fact Congress set up a two-tiered royalty computation structure that explicitly contemplates payment of different rates for carriage of broadcast signals, depending on whether those signals are transmitted on a local or distant basis, further cuts against the district court opinion. *See* 17 U.S.C. § 111(d); *see also* 37 C.F.R. § 256.2. There simply is no statutory requirement in the Act that a Section 111 cable system restrict retransmissions to local markets.[11]

3. With Its 1994 Amendment of the Copyright Act, Congress Rejected The Office's "Technology-Specific" Section 111 Interpretation.

The district court misconstrued the legislative history when it asserted that the 1994 amendment to the Copyright Act supports a narrow technology-specific reading of the cable system definition. RA91. This reasoning turns the legislative history upside down: Congress *considered* and *rejected* the same technology-specific reasoning that the district court erroneously relied upon.

[11] In any event, FilmOn X, which has served almost 130 letters on broadcasters providing notice of its intent to operate as an MVPD and asking them to elect must-carry status or retransmission consent, *see* RA1195, has geographically restricted its retransmissions in the past and has developed improved technology to do so in the future. SRA529-531, 535-560, 1502-1503; RA1127, 1501, 2111-2113. Using GPS and other technology, FilmOn X can more precisely locate customers than OTA broadcasters.

As the House Report makes clear, Congress added the term "microwave" to Section 111(f)(3) to "overturn an erroneous interpretation of the definition of 'cable system' by the Copyright Office[.]" H.R. Rep. 103-703, at 7 (1994). Previously, the Office had determined that microwave carriers were ineligible for a Section 111 license. Even though microwave links are a communications channel, the Office had determined it is "counter-intuitive to assert that Congress intended a technology neutral compulsory license in 1976[.]" 1992 Rulemaking at 3,295-96. It also distinguished microwave carriers from traditional cable systems, which distributed "signals to its subscribers by wired closed transmission paths" and are "highly regulated by the FCC." *Id.* at 3296.

The Senate Report emphasized that the 1994 amendment was meant to "clarify" that the definition of a cable system "applies not only to traditional wired cable television systems, but also to [new wireless technologies]. S. Rep. 103-407, at 14. The House Report was even more critical of the Office's narrow reading: "This amendment *is necessary because of an unnecessarily restrictive* interpretation by the Copyright Office of the phrase 'or other communication channels' in the same definition." *See* H.R. Rep. 103-703, at 7 (1994) (emphasis added). Thus, the 1994 amendment of the Copyright Act – resembling legislative history before the 1976 Act – confirms a broad, technology agnostic reading of Section 111. It does not support the specious claim that Congress intends to amend

the Copyright Act every time a new retransmission technology emerges to replace traditional wired systems.

4. Congress Enacted The Compulsory Satellite License For Reasons Inapplicable Here.

The district court gave great weight to the post-enactment legislative history when deciding whether Congress intended to cover emerging and unknown technologies in the Copyright Act of 1976 and Section 111. While courts consult pre-enactment legislative history to reveal the meaning of ambiguous statutory language, they are disinclined to rely on post-enactment legislative history. By definition, post-enactment legislative history "had no effect on the congressional vote," *D.C. v. Heller*, 554 U.S. 570, 605 (2008), and "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States v. Price*, 361 U.S. 304, 313 (1960); *see also Verizon v. F.C.C.*, 740 F.3d 623, 639 (D.C. Cir. 2014) ("Such subsequent legislative history, however, provides an unreliable guide to legislative intent.") (Internal quotations and citations omitted).

The district court found "support for its reading of the cable system definition in the treatment of satellite carriers," RA86, and cited several cases from the Eleventh Circuit and opinions from the Office for support. RA86-88. But the full history of these authorities actually undercuts the district court. *See, e.g.*, *SBN*

II, 17 F.3d at 346, n. 2 ("However, Section 119—which will expire on Dec. 31, 1994—offers little guidance in interpreting § 111[.]").

In *Pacific & S. Co. v. Satellite Broadcasting Networks, Inc.*, 694 F.Supp. 1565 (N.D. Ga. 1988), "a district court in Georgia held that a satellite broadcaster was not a 'cable system' for purposes of § 111." RA86. While that is an accurate depiction of what happened in the district court, that ruling was actually reversed on appeal. The Eleventh Circuit found that a satellite carrier who retransmitted broadcasts was entitled to a Section 111 license based on the intent of Congress and the plain language of Section 111. *See SBN I*, at 1469-70. That court, less than fifteen years after the 1976 Act, noted that "[t]he legislative history supports [the] conclusion that Congress intended to paint with a broad brush[.]" *Id*. at 1470, n. 5. Interestingly, the district court's opinion here does not mention this first trip to the Eleventh Circuit (in 1991), but instead jumps right to the second visit in 1994.

After oral argument in *SBN I*, the Office issued a January 29, 1992 formal regulation, determining that satellite carriers were not cable systems. *See* 1992 Rulemaking. The Office reasoned that (1) the retransmission facilities of a satellite carrier are not located in any state or the same state,[12] (2) the compulsory license applies only to localized retransmissions, and (3) satellites were not "other

[12] The Office has deemed this a "critical requirement" of the statute. *See* 1992 Rulemaking, at 3,290.

communications channels" as used in Section 111(f)(3). *See Satellite Broadcasting and Communications Ass'n of America v. Oman*, 1993 WL 276785, *2 (N.D. Ga. January 27, 1993) (unpublished) (citing 1992 Rulemaking). Subsequently, based on statutory ambiguity as to whether a satellite carrier satisfies the requirement that a cable system make secondary transmissions from a "facility, located in any State," the Eleventh Circuit ruled that the Office's final regulation (passed after a notice-and-comment period) was not arbitrary or capricious. *SBN II*, 17 F.3d at 345, 348.

For several reasons, *SBN II* is distinguishable. Unlike satellite carriers, FilmOn X has terrestrial facilities located in various states that both receive and make secondary transmissions. In addition, the Office has never passed a final rule or regulation regarding Internet retransmission services. Thus, the lack of a "critical requirement," the perceived statutory ambiguity and presence of formal rule-making procedures that justified deference to the Office in *SBN II* are not present here.

5. The District Court's Interpretation Renders "Or Other Communications Channels" Meaningless.

It is a court's duty to construe a statute so that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (Internal citation and quotation omitted). But the district court's

construction of Section 111 renders "or other communications channels" irrelevant and meaningless.

Even the Office has recognized that Congress did not intend "to restrict the compulsory license solely to the specific cable system technology of 1976" and "did not intend to freeze the compulsory license in a way that would discourage technological development and implementation." RA612. When Congress created a statutory satellite license in 1988 and amended Section 111 to add "microwave" in 1994, Congress did not disturb the original intention that Section 111 be interpreted in an expansive manner. *See* H.R. Rep. No. 887, pt. I, at 14, 27 (1988) ("[N]othing in this Act is intended to reflect any view concerning whether, prior to enactment of this Act, or following the termination of this Act, an entity that retransmits television broadcast signals by satellite to private homes could qualify as a 'cable system' under section 111(f) or as a passive carrier under section 111(a)(3)"); S. Rep. 103-407, at 14; H.R. Rep. 103-703, at 7. In addition to ignoring this legislative history, the district court ignored that Congress added the term "microwave" *yet left* "or other communications channels" to embrace future technologies. By requiring that Congress amend Section 111 to include any new technology, such as an Internet-retransmission services, the district court rendered the phrase "or other communications channels" meaningless.

III. THE DISTRICT COURT CORRECTLY DECLINED *CHEVRON* DEFERENCE TO THE COPYRIGHT OFFICE, BUT DEFERRING UNDER *SKIDMORE* WAS ERROR.

The policy views of the Office are not due *Chevron* or *Skidmore* deference for a multitude of reasons. Setting aside the dispositive fact that there is no ambiguity in the statutory definition of cable system, it remains uncontested that the Office has never issued a formal rule or regulation regarding Section 111 eligibility of Internet-based retransmission systems after a notice-and-comment period. *See* RA95 ("Of course, however, there is no formal regulation governing Internet-based retransmission services that might apply here" because prior regulations "did not specifically address the question of whether an Internet-based retransmission service qualifies as a cable system."); *see also AereoKiller*, 115 F.Supp.3d at 1167-68.

At most, the Office has provided an informal "interpretation" of what "cable system" means that does not carry the force of law. Even if Section 111(f)(3) is found ambiguous, this Court should not defer under *Skidmore* to views expressed by the Office when the plain text and legislative history clearly counsel otherwise.

A. No Deference Is Warranted Because The Intent Of Congress Is Plain And Unambiguous.

The informal policy views of the Office do not control here, where Congress left no gap to be filled by the Office. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521-22 (1992) ("We must give effect to this plain language unless there

is good reason to believe Congress intended the language to have some more restrictive meaning.") (Citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). Section 111(f)(3) broadly defines a cable system in a manner that clearly encompasses FilmOn X, and there is no "good reason" to believe Congress intended a hyper technical "more restrictive meaning." *Id*.

B. *Chevron* Deference Is Inapplicable.

1. The Office Is Not Permitted to Execute The Statute In This Instance.

The Office is part of the legislative branch and cannot execute the law. *See United States v. Brooks*, 945 F.Supp. 830, 834 (E.D. Pa. 1996); *see also INS v. Chadha*, 462 U.S. 919 (1986). While "[t]he Register of Copyrights is authorized to establish regulations . . . for the administration of [its] functions and duties," *see* 17 U.S.C. §§ 701, 702, its authority arises out of largely ministerial duties for Section 111, consisting of processing statements of account, collecting and distributing royalty payments, and resolving royalty disputes. *See* 17 U.S.C. § 111(d) (authorizing the Register of Copyrights to issue rules governing the payment of compulsory license royalty fees); *see also* 37 C.F.R. § 201.17(c)(2).[13]

[13] For example, in *Cablevision Systems Development Co. v. Motion Picture Ass'n of America, Inc.*, 836 F.2d 599 (D.C. Cir. 1988) ("*MPAA*"), this Circuit held that the Office had express authority under subdivision (d) of Section 111 to issue regulations concerning royalty payments. Given that the final regulation at issue fell squarely within the Office's regulatory authority and the statutory language was ambiguous, this Circuit deferred to the regulation. *Id*. at 608-09, 611. In

Importantly, the Office itself – less than a year after passage of the Act – noted that "[f]actual or other determinations as to the application of [Section 111's] definition [of cable system] to any particular activity or facility are beyond the province of the Copyright Office." 42 Fed. Reg. at 15,067. This statement *alone* should be dispositive of the deference issue because it confirms the Office is not authorized by statute to determine the application of Section 111(f)(3)'s definition of cable system "to any particular activity or facility." *Id.* Indeed, the Office has accepted FilmOn X's filings on a "provisional basis" and has left it to the courts to determine FilmOn X's eligibility for a Section 111 license. RA1197-1198.

2. The District Court Correctly Declined *Chevron* Deference.

"The overwhelming number of cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication." *United States v. Mead Corp.*, 533 U.S. 218, 219 (2001) (Citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Courts consistently decline *Chevron* deference to informal agency opinions. *See, e.g.,*

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contrast, here, the Office was not given any express authority to interpret the plain definition of a cable system and has not issued any specific final rule or regulation on that issue. Hence, the district court's reliance on *MPAA*, *see* RA93-95, is misplaced. In any event, *MPAA* recognized that Congress understood the need for and intended a technology agnostic interpretation of the 1976 Act: "Given Congress' *awareness of the rapid changes taking place in the cable industry* we cannot believe that Congress intended that there be no *administrative overseer* of this scheme." *Id.* at 608 (Emphasis added).

Fogo De Chao (Holdings) Inc. v. U.S. Dep't of Homeland Sec., 769 F.3d 1127 (D.C. Cir. 2014) (denying *Chevron* deference to a federal administrative agency); *Fox v. Clinton*, 684 F.3d 67 (D.C. Cir. 2012) (denying *Chevron* deference to Bureau of Consular Affairs opinion letter); *Sehie v. City of Aurora*, 432 F.3d 749, 753 (7th Cir. 2005); *Sierra Club v. EPA*, 671 F.3d 955, 963 (9th Cir. 2012).

Where an agency's interpretation lacks the force of law, it is generally "beyond the *Chevron* pale." *Mead*, 533 U.S. at 234; *accord Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000). In this case, the Office has not issued any rules or regulations "determin[ing] the *particular matter* at issue in the *particular manner* adopted." *City of Arlington, Tex. v. FCC*, 133 S. Ct. 1863, 1874 (2013) (emphasis added). Even assuming that this Court finds the Office has spoken on this particular matter via informal opinions and statements applicable to all cable systems under Section 111, such views should be disregarded because congressional intent is clear by simple reference to the unambiguous statute and confirmed by the legislative history.

3. The Copyright Office's Policy-Based Interpretation Is Not A Reasonable Construction Of Section 111.

Congress defined a "cable system" in Section 111(f)(3) and did not leave an express gap for the Office to fill based on its policy judgments. The Office's opinion – endorsed by the district court – that a cable system is limited to "inherently localized transmission mediums of limited availability" is not a

reasonable construction of the statutory text. It is arbitrary and capricious, reflecting the Office's long-standing hostility to the compulsory license regime.

In 1981, five years after Congress created Section 111, the Office argued that "[a] compulsory license mechanism is in derogation of the rights of authors and copyright owners. It should be utilized only if compelling reasons support its existence. Those reasons may have existed in 1976. They no longer do." C*opyright/Cable Television: Hearings on H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870, and H.R. 5949 Before the Subcomm. On Courts, Civil Liberties, and the Admin. of Justice of the Comm. on the Judiciary*, 97th Cong. 959-60 (1981) (statement of David Ladd, Register of Copyrights).

But "when a statute is clear and unambiguous, an agency may not substitute its own policy for that of the legislature." *Louisiana Federal Land Bank Ass'n, FCLA v. Farm Credit Admin.*, 180 F.Supp.2d 47, 57 (D.D.C. 2001) (citing Singer, *Statutes and Statutory Construction* § 65.01 (5th ed. 1992)), *rev'd*, 336 F.3d 1075 (D.C. Cir. 2003); *see also Public Citizen, Inc. v. Department of Health and Human Services*, 151 F.Supp.2d 64, 70 (D.D.C. 2001) ("When a statute is clear and unambiguous, consideration of administrative interpretation contrary to such language is inappropriate; the agency cannot by its interpretation, override the

congressional will as memorialized in the statutory language.") (Internal citations and quotations omitted).

Aside from this obvious (and improper) animosity, the words "inherently localized transmission media of limited availability" appear nowhere in Section 111. Nor is this concept implied by the statutory text.[14] Limiting the Section 111 license to "inherently localized" technologies like those commonly used by "traditional" or "typical" cable systems in 1976 would clearly frustrate Congress' intent when it drafted the Act in 1976.

As the legislative history and plain text show, Congress took "particular care" to draft the 1976 amendments in a manner that "is sufficiently flexible to allow for further evolution in technology and communications" so that Congress would not be forced to amend the Copyright Act in response to changing technologies. *See* 1974 Floor Debate, at 30,403 (statement of Sen. McClellan, Chairman of Subcommittee on Patents, Trademarks and Copyright); *see also AereoKiller*, 115 F.Supp.3d at 1163 ("[C]ourts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation"). It is not the province of the Office to usurp the role of the FCC by encroaching upon such regulatory issues

[14] In fact, this language first appeared in Appellee ABC's comments to the Office's proposed rulemaking regarding satellite eligibility for the Section 111 license. *See Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580, at 31,582, comment no. 13 (July 11, 1991) ("1991 Proposed Rulemaking").

as whether an Internet-based cable system must limit its secondary transmissions on a geographic basis or implement certain security measures.

The Office's position that Internet retransmission services are not entitled to a compulsory license conflicts with the plain language of the statute and the underlying logic of the district court. In the 2000 testimony of the Register of Copyrights, Ms. Marybeth Peters made various policy arguments: that "the Internet [is] a poor candidate for a compulsory license," that "copyright owners of broadcast programming do not need to turn to someone else to place their content on the Internet," that "it is all too easy for recipients of [Internet] transmissions to find ways to circumvent" security measures, and that "it is unclear how the retransmission of those signals could be limited to their local markets . . .." RA222-224.

Yet, "no matter how strong the policy arguments for treating traditional cable services and Defendants' service differently, 17 U.S.C. § 111(f)(3) simply does not draw the distinction [the district court] urge[s]." *AereoKiller*, 115 F.Supp.3d at 1168; *see also id.* at 1166 ("the Office's policy views appear to have found expression in a very strange reading of the words 'facility' and 'communications channels'"). This is a prime example of an arbitrary determination by the Office that should be ignored, not championed. *See Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158, 171 (1989) ("Even

contemporaneous and longstanding agency interpretations must fall to the extent they conflict with statutory language."), *superseded by statute as stated in Meacham v. Knolls Atomic Power Laboratory*, 554 U.S. 84 (2008).

Moreover, Congress has not acquiesced to the Office's informal policy views. This Circuit has "consistently required *express* congressional approval of an administrative interpretation if it is to be viewed as statutorily mandated." *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Brock*, 835 F.2d 912, 915 (D.C. Cir. 1987) (emphasis added). Silence alone is not enough to give force of law to an interpretation by an administrative agency. "It is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." *Id.* (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)).

Most recently, the Office stated that because of cases like the one before this Court, it "will not refuse FilmOn X's filings but will instead accept them on a provisional basis." RA94 (quoting RA1197-1198). The Office's various informal statements on the subject are not the type of policy statements entitled to *Chevron* deference.

C. *Skidmore* Deference Is Not Warranted.

To determine whether deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1994) is warranted, "courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the

agency's position." *Mead*, 533 U.S. 218 at 227. Here *Skidmore* deference is inappropriate because "the [Office's] application runs counter to the relevant statute['s] plain language," among other reasons. *See Hornbeck Offshore Transp., LLC v. U.S. Coast Guard*, 424 F.Supp.2d 37, 49-50 (D.C. Cir. 2006).

1. The Office's Positions Contradict The Statute.

The Office's positions do not warrant *Skidmore* deference because those positions contradict the unambiguous statute and are therefore unpersuasive. *Skidmore*, 323 U.S. at 139-40. The Office has opposed the entire Section 111 license regime for the last 30 years. It is no surprise that the Office has "sought to cabin the statute wherever possible." *AereoKiller*, 115 F.Supp.3d at 1164. These views in conflict with the statute deserve no deference.

2. The Office Has Inconsistently Applied Section 111.

"[T]he degree of the agency's care, its consistency, formality, and . . . persuasiveness" does not support deference here. *Mead*, 533 U.S. 218 at 227. When determining that *Skidmore* deference was appropriate, the district court first asserted that the Office has "consistently opined that Internet-based retransmission services do not qualify for a § 111 compulsory license." RA96. Moving beyond the glaring conflict between that position and apparent congressional intent, there has been little consistency in the Office's relevant positions.

Over the years, the Office has expressed varying views on its own role in determining an entity's eligibility for a Section 111 license and the scope of that license. The Office has recognized it lacks authority to make "[f]actual or other determinations" as to whether any "particular activity or facility" meets the definition of a cable system, *see* 42 Fed. Reg. at 15,067, but nonetheless has issued some rulemakings and policy reports purportedly providing guidance on that subject. On occasion, the Office has adopted a narrow construction of Section 111. S*ee* 1991 Rulemaking, at 31,590; *see also id.* at 31,592 ("Nothing in the legislative history suggests that Congress intended an open-ended definition of the entities qualifying for the license. To the contrary, the compulsory license is hedged and qualified by strict limitations.") On other occasions, it has endorsed a broad construction. *See* 2008 SHVERA Report[15] at 199 (stating that "Section 111(f) defines 'cable system' quite broadly," and concluding that "both AT&T, as well as Verizon, meet each of the elements of the cable system definition."). For its part,

[15] In the 2008 SHVERA Report, the Office stated: "The principal finding here is that new systems that are *substantially similar* to those systems that already use Section 111, should be subject to the license." 2008 SHVERA Report at 181 (emphasis added). Although the district court purported to defer to the Office's interpretation, it specifically rejected the argument that systems that are "substantially similar" to traditional cable systems are entitled to a Section 111 license. *See* RA78-79 (ruling FilmOn X ineligible for a license even though the Supreme Court ruled in *Aereo* that a virtually identical Internet-based retransmission service is "substantially similar to" traditional cable systems). While the district court and the Office may have arrived at the same result, their logic and reasoning cannot be reconciled.

Congress specifically amended the definition of a cable system in 1994 because of "an unnecessarily restrictive interpretation by the Copyright Office[.]" *See* H.R. Rep. No. 103-703, at 7 (1994). Indeed, "the purpose of th[at] legislation [wa]s to place wired and wireless cable systems *on a level playing field*[.]" *Id.* (emphasis added). The Office ignored that portion of the 1994 amendment.

a. The Office Previously Extended The Section 111 License To Nationwide Retransmission Services.

In 1992 the Office stated that "[n]othing in the statute or its legislative history suggests that Congress intended section 111 to apply to nationwide retransmission services such as satellite carriers[.]" *See* 1992 Rulemaking, at 3,292. However, the Office recently acknowledged that AT&T U-Verse and Verizon FiOS – which use IP technology – "are both 'national' in scope as each of their systems aggregate programming at different technological points across many states and jurisdictions" and are "quite different than those used by traditional cable operators and satellite carriers in the past." 2008 SHVERA Report at 181. Nevertheless, rather than deny a Section 111 license to these companies, the Office applied the statute in a technology agnostic manner, reasoning that "it would be patently unfair, and it would thwart Congressional intent [in creating the open video system model], to deny the benefits of statutory licensing to open video systems when similar benefits are enjoyed by traditional cable systems, satellite

carriers, SMATV systems,[16] and MDS and MMDS[17] operations." *Id.* at 198 (citing U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast* Signals 97, at ix-x (1997) (footnotes added). In contrast, the Office has inconsistently refused to extend similar treatment to smaller, less established companies (like FilmOn X) that use IP technology to deliver programming, reasoning that "Section 111 is meant to encompass 'localized retransmission services" that are 'regulated as cable systems by the FCC.'" RA157 (quoting 1992 Rulemaking, at 3,292).

b. The Office Previously Found Economic Considerations Irrelevant To The Statutory License.

The Office also has cited concerns with the alleged absence of a "market failure" as reason to deny a Section 111 license to Internet retransmission services. *See* 2008 SHVERA Report at 181. But contrary to that belief (and the district court's opinion), the Office earlier recognized that economic considerations *do not* determine whether a service is entitled to a compulsory license. *See Cable*

[16] The Office adopted a similarly broad, technology-agnostic reading of a cable system when it proposed that [satellite master antenna television] ("SMATV") systems are entitled to a Section 111 license. *See* 1991 Proposed Rulemaking, at 31,593 (the "Office believes that although the legislative history of section 111 does not directly address SMATV operations (they were not in existence in 1976), there is nothing in that history that would preclude a determination by the Office that SMATV operations may qualify as cable systems under the Act.").

[17] "MMDS is essentially wireless cable; instead of laying cables and wires, microwave frequencies bring cable television to the viewer." *ivi I*, 765 F.Supp.2d at 606, n. 13.

Compulsory License; Definition of a Cable System, 62 Fed. Reg. 18,705-02 (April 17, 1997) ("1997 Rulemaking") at 18,706 ("The viability of a provider of broadcast signals with or without the compulsory license is not the question; the question is whether Congress intended the providers to be included in section 111."). This is the essence of inconsistency.

The district court erred when it relied on the 2008 SHVERA Report for its statement that there is "no proof that the Internet video market is failing to thrive and is in need of government assistance through a licensing system" as reason to deny a compulsory license to FilmOn X. RA97. That reliance was misplaced in light of the Office's statutory-based reasoning in its 1997 Rulemaking, and is a shortsighted view of market realities. In fact, the FCC – the agency charged with regulating the industry – has found that consumers increasingly expect to watch programming online, and "[i]t would frustrate" "competition and diversity in the video programming market" to exclude from coverage "providers using new technologies such as Internet delivery." RA1708; *see also* Comments of AT&T Services Inc., *In the Matter of Section 109 Report to Congress*, July 2, 2007, comment no. 5 at 1-2 ("The statutory license is as relevant and necessary today as it was over 30 years ago. The transaction costs and logistical barriers associated with obtaining licenses through hundreds or even thousands of separate negotiations with the multitude of copyright owners whose programs are shown on

broadcast television would be enormous and insurmountable. That was true in 1976 and it is true – perhaps even more so – today.")

c. The Office Previously Determined That An Entity Need Not Be Affirmatively Regulated By The FCC To Be Eligible For A License.

The Office also has cited the fact that Internet retransmission services are not affirmatively regulated by the FCC as reason to deny such services a statutory license. *See* RA157 (quoting 1992 Rulemaking, at 3,292) (reasoning that "Section 111 is meant to encompass 'localized retransmission services' that are 'regulated as cable systems by the FCC.'").

In the past, however, the Office has correctly recognized that other retransmission services – SMATV systems – were entitled to a license, even though those services were not covered by FCC regulations at the time. 1997 Rulemaking, at 18,707. This determination reflects positions articulated in the 1991 Proposed Rulemaking and later report(s) to Congress. *See* 1991 Proposed Rulemaking, at 31,593 (reasoning that the "FCC leaves open the possibility that it may regulate certain SMATV operations as cable systems . . . Although most SMATV's are exempt from the FCC's regulation of cable systems, SMATV systems can be deemed affirmatively authorized by the FCC to retransmit broadcast signals"); *see also* 2008 SHVERA Report at 199 (concluding that AT&T U-Verse and Verizon FiOS "may use the Section 111 license to retransmit

broadcast signals, provided that they [voluntarily] adhere to all of the FCC's broadcast signal carriage rules.").

The Office's inconsistent treatment of AT&T U-Verse, Verizon FiOS and SMATV systems, on the one hand, and FilmOn X, on the other hand, is arbitrary and capricious. As a result of the Office's inconsistent differential treatment of cable systems, the Office – rather than the marketplace – is picking winners and losers.

D. United States' International Obligations Are Irrelevant.

Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) does not apply because the statute is not ambiguous. *See United States v. Carvajal*, 924 F.Supp.2d 219, 241 (D.D.C. 2013) ("[T]he *Charming Betsy* canon guides interpretation of ambiguous statutes as a matter of international comity, not as a hard-and-fast rule.").

Second, the *Charming Betsy* law of nations "violation" the district court invokes is based on Free Trade Agreements ("FTA") with various countries, ratified *decades after* the 1976 Copyright Act. Accordingly, the principles found in these FTAs "shed no light on the proper interpretation of [the Copyright Act] that was enacted in 1976." *Quality King Distribs. v. L'anza Research Int'l*, 523 U.S. 135,153-54 (1998). Congress repeatedly clarified that entry into such agreements would not amend or modify U.S. law beyond changes included in

implementing statutes. Each FTA Implementation Act contains language abrogating provisions of the agreement that may come into conflict with U.S. law.[18] Congress has thus been clear that even if there were a conflict, U.S. law prevails. As a canon intended to preserve the separation of powers,[19] *Charming Betsy* has no application in the face of clear Congressional intent that an international obligation does not control domestic law. *See Cook v. United States*, 288 U.S. 102, 120 (1933) (international commitments do not bind U.S. law where Congress has "clearly expressed" intent to abrogate the international commitment).

This is a domestic dispute with no clear implications beyond U.S. borders. Courts have wisely noted in these instances that *Charming Betsy* has little to no applicability. *See Serra v. Lappin*, 600 F.3d 1191, 1199 (9th Cir. 2010) ("We have never employed the *Charming Betsy* canon in a case involving exclusively

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[18] For example, the U.S.-Australia FTA Implementation Act Section 102(a) states that:

> (1) United States law to prevail in conflict.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.
>
> (2) Construction.—Nothing in this Act shall be construed—
>
> (A) to amend or modify any law of the United States, or
>
> (B) to limit any authority conferred under any law of the United States, unless specifically provided for in this Act."

United States-Australia Free Trade Agreement Implementation Act, Pub. L. 108-286, § 102 note 118 Stat. 920; 19 U.S.C. § 3805 note, 118 Stat. 919 (2004).

[19] Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 Geo. L.J. 479, 484 (1997).

domestic parties and domestic acts, nor has the Supreme Court.") (Internal citations omitted). International treaties are irrelevant here.

E. The FCC Regulates Over-The-Top (Internet) Distributors.

Congress left it to the FCC to determine what, if any, regulations a cable system must comply with to benefit from the statutory copyright license. *See* 17 U.S.C. § 111(c)(1) (a cable system's secondary transmissions must be "permissible under the rules, regulations, or authorizations of the Federal Communications Commission"). Accordingly, the district court's various policy concerns with respect to the retransmission of broadcast signals over the Internet, including signal quality and piracy, local program exclusivity and network non-duplication are properly left to the FCC. *See, e.g.*, RA101. Indeed, the Office has recognized that the FCC's proposal to regulate over-the-top providers (such as FilmOn X) as MVPDs "could impact the analysis under Section 111." RA1198, n. 3.

In its December 2015 notice of proposed rulemaking, the FCC proposed a "technology-neutral MVPD definition" that will facilitate efforts to deliver broadcast programming to the public over the Internet. RA1707-1708. After carefully considering the statutory language, the intent of Congress and marketplace realities, the FCC proposed to update its rules to treat certain Internet retransmission services (such as FilmOn X) as MVPDs under the Communications Act. Id. Under the FCC's proposal, FilmOn X and other similar services likely

would become affirmatively regulated by the FCC. RA1703, 1714 (discussing FilmOn X). In fact, the FCC already has sought comment on a range of regulatory issues relating to the retransmission of broadcast content over the Internet, including program carriage, good faith negotiation with broadcasters for retransmission consent, signal leakage, closed captioning, emergency information, inside wiring and other regulatory topics. RA1697-1753. These issues fall within the unique expertise of the FCC.

Like other MVPDs (including microwave carriers), FilmOn X relies on Section 111 to secure the necessary rights to retransmit the signals regulated by the FCC to the public. If this Court holds as a matter of law that Internet retransmission services are ineligible for a Section 111 license, it would render current FCC regulatory proceedings meaningless and would create an unnecessary obstacle to broad public access to broadcast television over the Internet.

CONCLUSION

The district court abused its discretion in declining to stay this case in light of the California Action. This Court should reverse and stay this action pending resolution of the California Action. Absent a stay, this Court should reverse the ruling of the district court on FilmOn X's eligibility for a Section 111 Copyright license and remand this case for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify the following, in compliance of Rule 32(a)(7) of the *Federal Rules of Appellate Procedure*:

1. This opening brief complies with the type-volume limitation of Rule 32(a)(7)(B). This brief contains 13,848 words, excluding parts of the brief exempt by Rule 32(a)(7)(B)(iii). As authorized by Rule 32(a)(7)(C), I have relied on the word count of Microsoft Word, the word processing system used to prepare this brief.

2. This brief has been prepared in Times New Roman 14-point font, a proportionally spaced typeface, using Microsoft Word. Accordingly this brief complies with the typeface and style requirements of Rule 32(a)(5)-(6).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing:

1. APPELLANTS' CONSOLIDATED OPENING BRIEF
2. ADDENDUM TO APPELLANTS' CONSOLIDATED OPENING BRIEF
3. JOINT APPENDIX
   PUBLIC APPENDIX - SEALED MATERIAL IN SEPARATE SUPPLEMENT [VOLUME I – IX]
4. JOINT APPENDIX
   SUPPLEMENT – UNDER SEAL [VOLUME I – IV]

with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on July 18, 2016.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF System and by Federal Express on July 18, 2016.

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