ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FOX TELEVISION STATIONS, INC. *et al*,

Plaintiffs-Appellees,

v.

FILMON X, LLC, *et al.*,

Defendants-Appellants.

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

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES

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Dated: September 7, 2016

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

The undersigned attorney of record, in accordance with D.C. Cir. R. 28(a)(1), hereby certifies as follows:

A. Parties and Amici

Except for *amicus curiae* Chamber of Commerce of the United States of America, *amici curiae* Electronic Frontier Foundation, Washington Legal Foundation, Public Knowledge, Screen Actors Guild-American Federation of Television and Radio Artists, Directors Guild of America, Writers Guild of America, National Association of Broadcasters, the National Football League, the Office of the Commissioner of Baseball d/b/a Major League Baseball, the PGA Tour, Inc., and any other *amici* who have not yet entered an appearance in this Court, all parties and *amici* appearing before this Court are listed in the Appellants' and Appellees' briefs. All parties who appeared before the district court are listed in Appellants' and Appellees' briefs.

B. Ruling Under Review

Appellants challenge the District Court's memorandum opinion signed on November 12, 2015, which is reported at 150 F. Supp. 3d 1. The District Court entered partial judgment under Fed. R. Civ. P. 54(b) and certified immediate appeal in an order signed on January 4, 2016.

C. Related Cases

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

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

Pursuant to D.C. Circuit Rule 29(b), *amicus curiae* Chamber of Commerce of the United States of America (the "Chamber") has filed a notice of its intent to participate as *amicus curiae*. Pursuant to Fed. R. App. P. 29(c), the Chamber states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. All parties have consented to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *amicus curiae* certifies that a separate brief is necessary. *Amicus curiae* represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, from every region of the country, and in every industry, including those industries that must navigate and comply with copyright and patent law on a regular basis. A substantial number of the Chamber's members hold intellectual property—including copyrights—and the Chamber advances their interests by advocating for strong intellectual property rights. And as a matter of broad principle, the Chamber believes that private contracting is generally preferable to government-mandated licensing. Given the breadth of its membership and its interests, *amicus curiae* is distinctly situated

from other *amici* to assist the Court in its consideration of the scope of the compulsory-licensing provisions of Section 111 of the Copyright Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that the Chamber of Commerce of the United States of America ("Chamber") is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

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Plaintiffs	Plaintiffs-Appellees Fox Television Stations, Inc., *et al*.
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INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber thus regularly files *amicus curiae* briefs in cases raising issues of concern to the Nation's business community.

A substantial number of the Chamber's members hold intellectual property—including copyrights—and the Chamber advances their interests by advocating for strong intellectual property rights. And as a matter of broad principle, the Chamber believes that private contracting is generally preferable to government-mandated licensing, and in this particular case seeks to present its view that FilmOn X's technology is not encompassed within Section 111's grant of compulsory licenses to "cable systems." 17 U.S.C. § 111(f)(3).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Consistent with Copyright Clause of the Constitution of the United States, art. I, § 8, cl. 8 (authorizing Congress "[t]o promote the Progress of … useful Arts, by securing for limited Times to Authors … the exclusive Right to their respective Writings"), the Copyright Act confers upon copyright holders a bundle of property rights, including the "exclusive" right to "perform the copyrighted work publicly." 17 U.S.C. § 106(4). This right to perform a copyrighted work publicly includes the right "to transmit or otherwise communicate a performance ... of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times." *Id.* § 101. Because this right is exclusive, others who wish to perform a copyrighted work generally must negotiate with the copyright holder to obtain a license to perform the work.

Congress has delineated certain exceptions to the rights otherwise conferred upon copyright holders via the Copyright Act. Among them, 17 U.S.C. § 111 sets forth a compulsory-licensing scheme under which a "cable system" may retransmit broadcasts. *See* 17 U.S.C. § 111(c), (d). In particular, Section 111(f)(3) provides:

> A "cable system" is a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of

> the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

Id. § 111(f)(3). So long as the "cable system" satisfies the statutory requisites (including the "royalty fee" prescribed by a statutory algorithm), it may retransmit a copyrighted broadcast without liability for copyright infringement. 17 U.S.C. § 111(c), (d); *see also WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 278 (2d Cir. 2012) (explaining that a retransmitter that meets the statutory definition of "cable system" may "publicly perform and retransmit signals of copyrighted television programming to its subscribers, provided they pay royalties at government-regulated rates").

Defendants-Appellants FilmOn X *et al*. ("FilmOn X") provide an Internet-based retransmission service. As Plaintiffs-Appellees ("Plaintiffs") explain, the "critical" element of this service is that, after receiving broadcast signals from Plaintiffs' television stations, FilmOn X retransmits those signals to its subscribers via the Internet. *See* Plaintiffs' Response Br. 14.

Seeking the benefit of Section 111's compulsory license, FilmOn X contends that its service constitutes a "cable system" within the meaning of the Copyright Act. As FilmOn X would have it, any entity that receives broadcast signals and retransmits them to customers by any means is a "cable system" entitled to the Section 111 compulsory license. Naturally, that would include

FilmOn X's service, which "convert[s] broadcast video into packets of digital data and cause[s] those packets to be transmitted [over the Internet] to the subscriber's receiving device (such as a set-top box, laptop or tablet)." FilmOn X's Opening Br. 24. In other words, the nature of the "facility" that retransmits the signal is irrelevant; a facility is a "cable system" if it retransmits broadcasts signals by any means to subscribers who live anywhere.

The Chamber, however, agrees with the vast majority of courts to have considered the issue, *see WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2012); *FilmOn X, LLC v. Window to the World Commc'ns, Inc.*, No. 13-CV-8451, 2016 WL 1161276 (N.D. Ill. 2016); *Fox Television Stations, Inc. v. FilmOn X, LLC*, 150 F. Supp. 3d 1 (D.D.C. 2015); *CBS Broadcasting, Inc. v. FilmOn.com, Inc.*, 10-CV-7532, 2014 WL 3702568 (S.D.N.Y. July 24, 2014), that Section 111(f)(3)'s definition of "cable system" does not include FilmOn X's service. The Chamber writes separately to explain its view (1) that the text, structure, and history of Section 111 demonstrate that FilmOn X's service is not a cable system and thus not entitled to a compulsory license; and (2) that longstanding principles of statutory construction weigh strongly against adopting an atextual reading of "cable system" that reaches FilmOn X's service.

ARGUMENT

I. The Text, Structure, and History of Section 111 Demonstrate that FilmOn X's Service is Not a "Cable System."

Text. FilmOn X's service fails to meet at least two separate textual elements of the definition of "cable system." First, FilmOn X does not retransmit broadcast signals by any of the means contemplated in the statute. Under Section 111, a "cable system" retransmits broadcast signals "by wires, cables, microwave, or other communications channels." *See* 17 U.S.C. § 111(f)(3). FilmOn X does not claim to retransmit signals via "wires, cables, [or] microwave"; it effectuates retransmission via the Internet. But the Internet is not a "communications channel" as that phrase is used in Section 111(f)(3).

Under the *ejusdem generis* canon of statutory construction, "'where general words follow specific words,' the general words 'are construed to embrace only objects similar in nature to those objects by the preceding specific words.'" *Edison Elec. Inst. v. Occupational Safety & Health Admin.*, 411 F.3d 272, 281 (D.C. Cir. 2005) (citation omitted); *Dolan v. Postal Service,* 546 U.S. 481, 486-89 (2006); *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 384 (2003); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001). In other words, the specific terms "wires, cables, [and] microwave" in Section 111(f)(3) limit the scope of more general term "communications channel" to items of a similar nature. Wires, cables, and

microwave have long been considered similar in that they are all "inherently localized transmission media of limited availability." *Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997) ("1997 Rulemaking"); *see also ivi*, 691 F.3d at 282 ("Through § 111's compulsory license scheme, Congress intended to support localized—rather than nationwide—systems."). When Congress used the phrase "other communications channels," then, it thus meant "other communications channels" that are "inherently localized" and "of limited availability."

FilmOn X's service fails here, because its service is neither localized nor of limited availability. To ignore these limitations and read "other communications channels" to mean any "system or method that is used for communicating with other people," FilmOn X's Opening Br. 25—in other words, "any other communications channel at all"—would render wholly superfluous the preceding list of "wires," "cables," and "microwave." 17 U.S.C. § 111(f)(3). There would be no reason to include those three specific terms if they did not help define what constitutes a "communications channel"; the statute would simply say "communications channels" and omit the rest.[1]

[1] Several other provisions of the statute confirm that the "other communications channels" referenced in Section 111(f)(3) must be "inherently localized" because they make reference to the particular "*communities*" served by "cable systems." *See, e.g.*, 17 U.S.C. § 111(c)(4) ("the community of the cable

Second, FilmOn X's service does not employ the type of "facility" contemplated under Section 111. Under Section 111(f)(3), FilmOn X's "facility" itself must *both receive* television broadcast signals *and retransmit* them to subscribers. *See* 17 U.S.C. § 111(f)(3) ("a facility … that in whole or in part *receives* signals transmitted or programs broadcast by one or more television broadcast stations … *and makes secondary transmissions* … to subscribing members of the public" (emphasis added)); *see also ivi*, 691 F.3d at 280. FilmOn X's service employs facilities and equipment that receive broadcast signals, but it is undisputed that FilmOn X effectuates retransmission via the Internet.[2]

Structure. As explained above, FilmOn X advances a reading of "cable system" that would encompass any retransmission, regardless of the means employed to effectuate that transmission. Such a reading is incompatible not only with the definition of "cable system" itself but the entire compulsory license regime for "cable systems" because it would afford a compulsory license to *any*

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system"); *id.* § 111(f)(3) ("two or more cable systems in contiguous communities"); *id.* § 111(e)(1)(E) ("the community where the transmission is made or in the nearest community where such system maintains an office").

[2] If the Internet could properly be considered part of FilmOn X's "facility," then that facility would cease to be "located in any State, territory, trust territory, or possession of the United States." 17 U.S.C. § 111(f)(3). As the district court emphasized, "the Internet is 'a global network of millions of interconnected computers' that provides for the distribution of content worldwide." *Fox*, 150 F. Supp. 3d at 20 (quoting *ivi*, 691 F.3d at 280).

entity that were to engage in secondary transmissions of broadcast signals. To construe the statute in this fashion would reduce the phrase "cable systems" to a nullity. As Plaintiffs emphasize, "Congress would not have had to provide in Section 111 that the license is available only to 'secondary transmissions to the public by a *cable system* of a performance or display of a work embodied in a primary transmission made by a broadcast station,' it could have simply omitted the italicized phrase." Plaintiffs' Response Br. 32 (quoting 17 U.S.C. § 111(c)(1)).

This would create a significant superfluity in the statute, as the compulsory license regime is centered upon "cable systems"—a term used no less than 68 times in Section 111. *See generally* 17 U.S.C. § 111. The surplusage canon thus weighs especially heavily against FilmOn X's atextual reading of the statute. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("We are … reluctant to treat statutory terms as surplusage in any setting. We are especially unwilling to do so when the term occupies so pivotal a place in the statutory scheme.") (citation and quotation marks omitted)).

History. The history of the Copyright Act further demonstrates that Congress did not intend "cable systems" to include all new retransmission technologies, as FilmOn X suggests. Congress repeatedly has amended the Copyright Act to accommodate new retransmission technologies. For example, Congress enacted the Satellite Home Viewer Act in 1988 to provide a separate,

six-year license for satellite television companies that retransmitted certain broadcast signals. *See* 17 U.S.C. § 119; Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3935 (1988). Congress has reauthorized similar licensing regimes for satellites many times since then. *See* Satellite Home Viewer Act of 1994, Pub. L. No. 103-369, 108 Stat. 3477 (1994); Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501 (1999); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809 (2004); Satellite Television Extension and Localism Act of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010); *see generally* 2–8 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 8.18 (2015) (outlining Congress's repeated reauthorization of compulsory licenses for satellites). Congress also amended the Copyright Act in 1994 to add "microwave" to the list of enumerated "communications channels" in Section 111. *See* 17 U.S.C. § 111(f)(3); *see ivi, Inc.*, 691 F.3d at 282. Congress thus has frequently demonstrated that it will authorize compulsory licenses for new retransmission technologies where circumstances would make the use of compulsory licenses appropriate.

Congress's history of enacting compulsory-licensing provisions for new technologies is particularly meaningful given the Copyright Office's longstanding position that such services do not fall within the compulsory-license regime for "cable systems." For decades, the Copyright Office has interpreted "cable systems"

to be inherently local enterprises that do not include Internet retransmission services. *See Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3,284, 3,292 (Jan. 29, 1992) ("[T]he compulsory license applies only to localized retransmission services."); 1997 Rulemaking, 62 Fed. Reg. at 18,707 ("[A] provider of broadcast signals [must] be an inherently localized transmission medium of limited availability to qualify as a cable system.").

More to the point, "[t]he Copyright Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for Section 111 compulsory licenses." *ivi*, 691 F.3d at 283. For example, it has been the Copyright Office's bipartisan position for almost two decades that it would take an Act of Congress "to grant Internet retransmitters the benefits of compulsory licensing." *See* U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* xiii (Aug. 1, 1997) ("Copyright Office Review"), http://goo.gl/m1Y53K; Letter from Marybeth Peters, Register of Copyrights, to Sen. Orrin Hatch (Nov. 10, 1999), *reprinted in* 145 Cong. Rec. S14986-03, S14990 (Nov. 19, 1999) ("I believe that the section 111 license does not and should not apply to Internet transmissions."); *see also* U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* 188 (2008) ("The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television

programming without the consent of the copyright owner."), http://goo.gl/3XtJK5; U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report* 48 (2011) ("The Office itself has opposed (and continues to oppose) the formation of a statutory license for the retransmission of broadcast signals over the Internet."), http://goo.gl/l00nT. At the very least, this consistent, longstanding view of the Copyright Office supports Plaintiffs' straightforward construction of Section 111 as excluding Internet retransmission services from the definition of "cable systems."

II. Section 111's Compulsory-Licensing Provision Should Be Construed Narrowly.

As explained above, a straightforward analysis of Section 111's text, structure, and history compels the conclusion that the compulsory-licensing regime for "cable systems" does not apply to FilmOn X's technology. FilmOn X's contrary reading of Section 111 should be rejected for two additional reasons. First, in general, statutes such as Section 111 authorizing compulsory licenses should be construed narrowly. Second, construing Section 111 not to apply to FilmOn X's service would be consistent with the obligations and duties of the United States under several of its international trade agreements.

A. In General, Compulsory-Licensing Statutes Should Be Construed Narrowly.

Members of Congress, the Copyright Office, and the federal courts long have expressed a preference for private contracting over government-mandated licensing. Committee reports of both houses of Congress, for example, have recognized that compulsory licenses act "in derogation of the exclusive property rights granted by the Copyright Act to copyright holders" in emphasizing that Congress thus "needs to act as narrowly as possible to minimize the effects of the government's intrusion on the broader market in which the affected property rights and industries operate." S. Rep. No. 106-42, at 10 (1999); *see also* H.R. Rep. No. 108-660, at 11 (2004) ("The Committee has consistently considered market-negotiated exclusive arrangements that govern the public performance of broadcast programming in a given geographic area to be preferable to statutory mandates.").

The Copyright Office has long held the same position. As the Register of Copyrights explained in 2000, a compulsory license "prevents the marketplace from deciding the fair value of copyrighted works through government-set price controls." *Copyrighted Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts & Intellectual Property of the H. Comm. on the Judiciary,* 106th Cong. (June 15, 2000) (Statement of Marybeth Peters, Register of Copyrights), http://goo.gl/mWlgeP. In the agency's view, "[p]rivate negotiation has the virtue of recognizing the ownership rights of authors, leaving the decisions

in the hands of those who are most affected by them, and avoiding the rigidity of government licenses which require legislation or administrative proceedings to alter or amend them each time market conditions change." Copyright Office Review, *supra*, at 32. For that reason, the Copyright Office has instructed that "[c]ompulsory licenses … must be construed narrowly to comport with their specific legislative intention." *Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580, 31,595 (July 11, 1991); *see also Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the Comm. on the Judiciary*, 111th Cong. (Sept. 10, 2009) (statement of Marybeth Peters, Register of Copyrights) (advising that compulsory licenses "are scrutinized very strictly"), http://goo.gl/tHbesD.

Similarly, the courts have recognized that compulsory licenses may limit the freedom of contract that otherwise might be enjoyed by copyright holders. *See Fame Pub. Co. v. Alabama Custom Tape, Inc*., 507 F.2d 667, 670 (5th Cir. 1975) ("[A] compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his composition."); *see also WPIX, Inc. v. ivi*, *Inc.*, 765 F. Supp. 2d 594, 604 (S.D.N.Y. 2011) ("[W]e must consider the practical impact of our decisions construing Section 111 in a technological world unimaginable to Congress in 1976."). This Court itself has "emphasized that the compulsory licensing scheme was a break from the traditional copyright regime

of individual contracts." *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1988).

Accordingly, like Congress and the Copyright Office, "the courts [have] held that a compulsory license … should be narrowly construed." *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944-01, 14,950 n.38 (Apr. 16, 1984) (citing *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972)); *see ivi*, 765 F. Supp. 2d at 603 n.10 ("Compulsory licenses are exceptions to the copyright laws, and they must not be expanded beyond Congress' intent."). This approach serves as a safeguard "lest the exception destroy, rather than prove, the rule." *Fame*, 507 F.2d at 670; *see also Tasini v. New York Times Co.*, 206 F.3d 161, 168 (2d Cir. 1999); *Duchess Music*, 458 F.2d at 1310.

B. The Narrow Construction Of Section 111's Compulsory License Is Consistent With The United States's International Trade Obligations.

Finally, FilmOn X's reading of Section 111 also is in substantial tension with multiple free trade agreements to which the United States is a signatory. "Since the days of Chief Justice Marshall, the Supreme Court has consistently held that congressional statutes must be construed wherever possible in a manner that will not require the United States 'to violate the law of nations.'" *South African Airways v. Dole*, 817 F.2d 119, 125 (D.C. Cir. 1987) (quoting *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). The reason for this canon is

simple. "If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *see also Serra v. Lappin*, 600 F.3d 1191, 1198 (9th Cir. 2010) (explaining that the purpose of this canon is to "avoid the negative 'foreign policy implications' of violating the law of nations"). As a result, "courts will not blind themselves to potential violations of international law where legislative intent is ambiguous." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (citing *Charming Betsy*, 6 U.S. (2 Cranch) at 118).

More broadly, this canon reflects a healthy respect for our tripartite system of government by avoiding judicial entanglement in the "conduct of foreign relations." *Commodity Futures Trading Comm'n v. Nahas*, 738 F.2d 487, 493 n.13 (D.C. Cir. 1984). Courts thus should hesitate to adopt a construction of a statute, "absent clear congressional intent, … that arouses foreign sensibilities and implicates international law concerns." *Id.*

Here, the United States is a party to at least nine free trade agreements that restrict the signatory countries' ability to permit Internet retransmission of television signals without copyright holders' consent. *See* U.S.-Panama Trade Promotion Agreement, art. 15.5.10(b), June 28, 2007; U.S.-Colombia Trade

Promotion Agreement, art. 16.7.9, Nov. 22, 2006; U.S.-Peru Trade Promotion Agreement, art. 16.7.9, Apr. 12, 2006; U.S.-Oman Free Trade Agreement, art. 15.4.10(b), Jan. 19, 2006; U.S.-Bahrain Agreement on the Establishment of a Free Trade Area, art. 14.4.10(b), Sept. 14, 2004; Dominican Republic-Central America-U.S. Free Trade Agreement, art. 15.5.10(b), Aug. 5, 2004; U.S.-Morocco Free Trade Agreement, art. 15.5.11(b), June 15, 2004; U.S.-Austl. Free Trade Agreement, art. 17.4.10(b), May 18, 2004; U.S.-Singapore Free Trade Agreement, art. 16.4.2(b), May 6, 2003. In some form or another, each of these agreements state that "neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without the authorization of the right holder or right holders of the content of the signal and, if any, of the signal." U.S.-Panama Trade Promotion Agreement, art. 15.5.10(b).

In pressing its construction of Section 111, FilmOn X risks "arous[ing] foreign sensibilities and implicat[ing] international law concerns" relating to these (and possibly other) free trade agreements. *Nahas*, 738 F.2d at 493 n.13. The Court may avoid such judicial entanglement by rejecting FilmOn X's atextual reading of Section 111.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that this Court affirm the district court's decision.

Respectfully submitted,

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Dated: September 7, 2016

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify the following:

This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) because it contains 3,646 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2015 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of September, 2016, a true and correct copy of the foregoing was filed with the Clerk of the United States Court of Appeals for the D.C. Circuit via the Court's CM/ECF system, which will send notice of such filing to all counsel who are registered CM/ECF users.

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