

# WHAT'S IN A NAME: CABLE SYSTEMS, FILMON, AND JUDICIAL CONSIDERATION OF THE APPLICABILITY OF THE COPYRIGHT ACT'S COMPULSORY LICENSE TO ONLINE BROADCASTERS OF CABLE CONTENT

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## ABSTRACT

*The way we consume media today is vastly different from the way media was consumed in 1976, when the Copyright Act created the compulsory license for cable systems. The compulsory license allowed cable systems, as defined by the Copyright Act, to pay a set fee for the right to air television programming rather than working out individual deals with each group that owned the copyright in the programming, and helped make television more widely accessible to the viewing public. FilmOn, a company that uses a mini-antenna system to capture and retransmit broadcast network signals, is now seeking access to the compulsory license. In three concurrent legal cases in New York, California, and D.C., FilmOn argues that it meets the statutory requirements to classify as a cable system. This Issue Brief examines the legal history of cable systems and considers the effects of agency influence, policy concerns, and the lack of judicial or congressional resolution regarding FilmOn's contested legal status.*

## INTRODUCTION

In the past, it took commitment to view your favorite television shows – you had to be at home, in front of the TV, during the specific time when that program aired. With the advent of new technology, we are now able to record our chosen programs to watch later, and order shows on demand through our cable boxes. We are even able to watch TV shows anywhere we want on mobile devices using internet streaming services like Netflix and Hulu, or on applications run by cable companies.<sup>1</sup> Several of these new developments have faced copyright

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<sup>1</sup> See, e.g., *Watch TV Online*, TIME WARNER CABLE, <http://www.timewarnercable.com/en/tv/features/twc-tv.html> (last visited Nov. 20, 2016) (Time Warner

challenges from content creators, with each new technology usually being upheld by the courts.<sup>2</sup>

Online for-profit rebroadcasters like FilmOn, which uses a mini-antenna system to pick up cable network signals and rebroadcast them on demand, could be written off as just another technological advancement in this digital age when consumers expect increased accessibility to content online.<sup>3</sup> However, because FilmOn rebroadcasts these network signals to anyone in the world with an internet connection and a credit card, without the consent of the networks, FilmOn's streaming service presents copyright questions that are hotly contested by several federal district courts and agencies, and have the potential to drastically reshape the infrastructure of media consumption in general.<sup>4</sup>

Litigation against FilmOn has been near constant since it launched its streaming service in late 2010.<sup>5</sup> Angry that their content was being rebroadcast to FilmOn's subscribing audience in violation of their copyright over the material, a large group of cable television producers, marketers, distributors, and broadcasters (including ABC, NBC, CBS, FOX, and their holding companies) brought lawsuits against FilmOn in

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Cable's TWC TV App); *XFINITY Mobile Apps*, XFINITY, <http://tvgo.xfinity.com/apps> (last visited Nov. 20, 2016) (Comcast's Xfinity TV Go App).

<sup>2</sup> See generally, e.g., *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984) (challenging the "Sony Betamax" videocassette recorder); *Cartoon Network LP, LLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008) (challenging DVR technology that allowed viewers to record shows with their cable boxes to watch later); *Fox Broad. Co. v. Dish Network L.L.C.* 723 F.3d 1067 (9th Cir. 2013) (challenging technology that allows viewers to "hop over" commercials)

<sup>3</sup> Specifically, FilmOn uses a Lanner system, whereby "a single master antenna on the roof of a commercial data center" picks up signals from local and major channels and routes them to an antenna box where the signals are "amplified and captured by small antennas." *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1156 (C.D. Cal. 2015). A user picks from a list of available programming what they want to watch, and a dedicated antenna sends the chosen signal to that user's IP address, even if the chosen signal is from a market area that is different from the user's. See *id.* at 1156–57. FilmOn modified the broadcast by inserting a logo, omitting close captioning, and playing advertisements. See *id.* at 1156.

<sup>4</sup> FilmOn said that it had adapted its system to require the viewer to be located within a transmission's designated market area, but there was some dispute about the effectiveness of FilmOn's location checks. *Id.* at 1157.

<sup>5</sup> See *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-07532, 2013 WL 4828592, at \*1 (S.D.N.Y. Sept. 10, 2013) (discussing the factual background of the litigation).

three separate federal district courts.<sup>6</sup> Between August 2012 and September 2013, each court enjoined FilmOn from re-broadcasting copyrighted television programming online, finding that FilmOn did not have a license to ‘perform’ the material.<sup>7</sup> Nevertheless, FilmOn refused to stop streaming, and has modified its system multiple times to try and squeeze through legal loopholes to bring itself into compliance with the Copyright Act.<sup>8</sup> FilmOn has also been very responsive to court opinions, and has adapted its legal arguments in response to prior Supreme Court and Circuit Court holdings.<sup>9</sup> Instead of arguing that it does not infringe on the networks’ copyrighted material by rebroadcasting their signals, FilmOn now argues that it meets the statutory definition of a cable system under the Copyright Act, and, as such, should be entitled to pay a compulsory license fee to the cable networks in exchange for the rights to use their material.<sup>10</sup> This compulsory license, also called a § 111 license because of its origin in § 111 of the Copyright Act, would allow FilmOn to pay a fixed royalty fee to the Copyright Office in exchange for the right to use cable network content without needing to get permission from the cable networks.<sup>11</sup>

This flexible approach appears to have found some degree of success, as one federal court in California recently found for FilmOn when considering FilmOn’s newest legal argument,<sup>12</sup> and officials from the Federal Communications Commission (FCC) made comments suggesting that they would also support copyright access for internet rebroadcasters<sup>13</sup>. Meanwhile, the Second Circuit,<sup>14</sup> a D.C. district court<sup>15</sup>, and the Copyright Office<sup>16</sup> have all specifically rejected FilmOn’s argument that it qualifies as a cable system.

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<sup>6</sup> See *id.*; Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>7</sup> See *supra* note 6.

<sup>8</sup> See *Aereokiller*, 115 F. Supp. 3d at 1157.

<sup>9</sup> See *id.* at 1155.

<sup>10</sup> Defendant’s Reply in Support of Motion for Summary Adjudication, or, in the Alternative, Motion to Stay at \*19, Fox Television Stations, Inc. v. FilmOn X, LLC, No. 1:13-cv-00758, 2015 WL 4941632 (D.D.C. Aug. 13, 2015).

<sup>11</sup> See 17 U.S.C. § 111(c) (2012).

<sup>12</sup> *Aereokiller*, 115 F. Supp. 3d at 1171.

<sup>13</sup> See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2086 (proposed Jan. 15, 2015).

<sup>14</sup> See CBS Broad. Inc. v. FilmOn.com, Inc., No. 10-cv-07532, 2014 WL 3702568 (S.D.N.Y. Jul. 24, 2014).

<sup>15</sup> See Fox Television Stations, Inc. v. FilmOn X LLC, 120 F.Supp.3d 1 (D.D.C. 2015).

Part I of this Issue Brief examines the history of cable system litigation so far. Part II explains FilmOn's current arguments and recent court decisions. Part III questions the future of FilmOn litigation, the actual importance of the California ruling in support of FilmOn, and how agency influence might impact the final determination of whether Internet rebroadcasters qualify as cable systems.

## I. THE START OF CABLE SYSTEM LITIGATION

### A. *Origins of the Compulsory License*

In 1968, the Supreme Court considered for the first time whether a system of connected cables and antennas, designed to “carry the signals received by the antennas to the home television sets of individual subscribers” constituted copyright infringement.<sup>17</sup> This community antenna television (CATV) system was the precursor to modern cable systems.<sup>18</sup> Local area television broadcasters claimed that the CATV system erected by the Fortnightly Corporation infringed their exclusive right to public performance under the 1909 Copyright Act<sup>19</sup> because Fortnightly never obtained licenses to use the television programming that it re-broadcast to its own subscribers.<sup>20</sup> The Supreme Court found that the CATV system did not infringe the television broadcaster's copyright because its sole purpose was to enhance the viewer's ability to receive signals.<sup>21</sup> Thus, “like viewers and unlike broadcasters, [a CATV system did] not perform the programs that they receive and carry.”<sup>22</sup>

The Supreme Court considered cable television systems again in 1974 when several copyright holders accused CATV systems of intercepting their programs from broadcast transmissions and sending these copyrighted programs to CATV subscribers.<sup>23</sup> At that time, technological developments allowed CATV systems to make their own programming independent of broadcasters, solicit advertising time to commercial interests, and connect with other CATV systems to sell the

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<sup>16</sup> Letter from Jacqueline C. Charlesworth, Gen. Counsel & Assoc. Register of Copyrights, U.S. Copyright Office to Matthew Calabro, Aereo (July 16, 2014), [http://www.nab.org/documents/newsRoom/pdfs/071614\\_Aereo\\_Copyright\\_Office\\_letter.pdf](http://www.nab.org/documents/newsRoom/pdfs/071614_Aereo_Copyright_Office_letter.pdf) [hereinafter Letter from Jacqueline C. Charlesworth].

<sup>17</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968).

<sup>18</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2504 (2014).

<sup>19</sup> After the Copyright Act was amended in 1976, these rights are now located in 17 U.S.C. § 106 (2012).

<sup>20</sup> *Fortnightly*, 392 U.S. at 393.

<sup>21</sup> *Id.* at 401–02.

<sup>22</sup> *Id.* at 401.

<sup>23</sup> *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 394 (1974).

rights to redistribute programming among themselves.<sup>24</sup> Furthermore, programs could be transmitted over relatively great distances, allowing viewers access to non-local programming and enabling CATV to compete with local television broadcasters.<sup>25</sup> Despite these developments, the Supreme Court concluded again that there was no copyright infringement because CATV systems only “extend[ed] the range of viewability.”<sup>26</sup> The Court recognized that “[t]hese shifts in current business and commercial relationships” had a significant impact on “the organization and growth of the communications industry,” but held that ultimate resolution of any problems raised by the new form of cable systems “must be left to Congress.”<sup>27</sup>

Congress responded quickly. The 1976 Copyright Act overturned the Court’s narrow interpretation of “performance” and made clear in the Transmit Clause that the act of transmitting a performance to the public was itself a public performance.<sup>28</sup> Therefore, CATV systems were liable for copyright infringement if they retransmitted broadcast programs without permission from the copyright holder.<sup>29</sup> Congress also introduced a compulsory license to govern the retransmission of copyrighted program materials so that cable systems, including CATV systems, could pay a fixed royalty rate to copyright owners without having to negotiate with them or seek permission to use their content.<sup>30</sup> Cable systems that were eligible to use the § 111 compulsory license were defined 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 makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communication

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<sup>24</sup> *Id.* at 404.

<sup>25</sup> *Id.* at 400.

<sup>26</sup> *Id.* at 412.

<sup>27</sup> *Id.* at 414.

<sup>28</sup> 17 U.S.C. § 101 (2012) (providing that it constitutes a public performance “to transmit or otherwise communicate a performance . . . 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”).

<sup>29</sup> H.R. REP. NO. 94-1476, at 63 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5677 (“[A] cable television system is performing when it retransmits [a network] broadcast to its subscribers.”).

<sup>30</sup> *Id.* at 89–90.

channels to subscribing members of the public who pay for such service.<sup>31</sup>

### *B. Aereo and Antenna Systems*

With the question of whether cable rebroadcasters were “performing” seemingly settled by the Transmit Clause, the Supreme Court considered what constituted a “public” rebroadcasted performance in 2014.<sup>32</sup> Using a system similar to the one used by FilmOn, Aereo retransmitted broadcast television via the internet, using thousands of small antennas that could be tuned by Aereo’s servers.<sup>33</sup> When a subscriber selected a show to watch, a single antenna would be dedicated for their use only, and the server would stream the show over the internet from the dedicated antenna to the subscriber’s screen.<sup>34</sup> A group of television producers, marketers, distributors, and broadcasters sought an injunction against Aereo for using this system to infringe their exclusive right to public performance.<sup>35</sup> Aereo argued that the antenna system meant that subscribers, not Aereo, picked the content and thus performed the copyrighted program.<sup>36</sup> Furthermore, Aereo argued that performances under the antenna system were private because each antenna was dedicated to send the programming to only one subscriber.<sup>37</sup>

A divided Court concluded that Aereo was publicly performing and was liable for copyright infringement.<sup>38</sup> While the Court did not make any findings about whether antenna-based rebroadcasting systems could be cable systems, the reasoning it used in finding that Aereo’s actions constituted a public performance compared antenna systems to CATV cable systems. The Court reasoned that because “Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach,” and because Aereo’s antenna system “is for all practical purposes a traditional cable system,” then Aereo’s transmissions were also public performances.<sup>39</sup>

## II. FILMON’S EVOLVING ARGUMENTS

FilmOn was a contemporary of Aereo, and used a similar antenna-based system for delivering broadcast television to its users. By

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<sup>31</sup> 17 U.S.C. § 111(f)(3).

<sup>32</sup> *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2503 (2014).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 2503–04.

<sup>36</sup> *Id.* at 2507.

<sup>37</sup> *Id.* at 2508.

<sup>38</sup> *Id.* at 2511.

<sup>39</sup> *Id.* at 2506–07.

the time *Aereo* was decided in 2014, FilmOn had already been enjoined by three federal courts for copyright violations from using its own antenna system to retransmit broadcast programming<sup>40</sup>. After *Aereo*, however, FilmOn went back to court in each district, and argued that it was a cable system under the Copyright Act, and so should be entitled to a § 111 compulsory license, on the basis of the Supreme Court's comparison between antenna systems and CATV systems.<sup>41</sup>

#### A. *The New York Case*

The Second Circuit Court of Appeals first considered whether online rebroadcasters qualified as cable systems in 2012, when a company that live-streamed broadcast television to users defended itself against copyright infringement claims by arguing that it was entitled to a compulsory license.<sup>42</sup> The Second Circuit examined the statutory text, legislative history, and legislative intent of § 111 and concluded that while the text was ambiguous, "Congress did not intend for § 111 licenses to extend to Internet retransmissions."<sup>43</sup> The court then deferred to the position maintained by the Copyright Office: that internet retransmission services are not eligible for the compulsory license.<sup>44</sup>

Also in 2012, a district court in New York enjoined FilmOn from retransmitting broadcast television online.<sup>45</sup> Nevertheless, FilmOn continued to use its antenna system in the summer of 2014 to retransmit programming, believing that the *Aereo* decision had "rendered it qualified to become a cable company under § 111."<sup>46</sup> Perhaps unsurprisingly, given that FilmOn had previously been held in contempt of the New York injunction in 2013 for continuing to retransmit

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<sup>40</sup> See Stipulated Consent Judgment and Permanent Injunction at \*14, *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-07532, (S.D.N.Y. Aug. 9, 2012); *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138 (C.D. Cal. 2012); *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>41</sup> See *id.*

<sup>42</sup> *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 277 (2d Cir. 2012).

<sup>43</sup> *Id.* at 284.

<sup>44</sup> *Id.* at 283; see also U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT 188 (2008) [hereinafter SHVERA REPORT] ("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.").

<sup>45</sup> Stipulated Consent Judgment and Permanent Injunction at \*14, *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-07532, (S.D.N.Y. Aug. 9, 2012).

<sup>46</sup> *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-07532, 2014 WL 3702568, \*5 (S.D.N.Y. Jul. 24, 2014).

programming then as well,<sup>47</sup> the cable network companies applied for an order to hold FilmOn in contempt for violating the injunction.<sup>48</sup> Rejecting FilmOn's view that *Aereo* had named it a cable system, the District Court for the Southern District of New York reaffirmed Second Circuit precedent and found that *Aereo* did not abrogate *ivi*, which had firmly established that online retransmission services did not qualify as cable systems.<sup>49</sup> The court found that the Supreme Court had not made "a judicial finding that *Aereo* and its technological peers" were cable systems because "an implication is not a holding."<sup>50</sup> Again, FilmOn was found to be in contempt of the injunctions and was ordered to pay civil sanctions.<sup>51</sup>

FilmOn appealed the contempt charge by challenging the lower court's discretion.<sup>52</sup> Later, FilmOn argued that it qualified as a cable system because "the law is in flux," and there is doubt as to its eligibility for a compulsory license.<sup>53</sup> On February 16, 2016, the Second Circuit Court of Appeals rejected these arguments, upholding the contempt finding and the sanctions against FilmOn, including attorneys' fees for the networks.<sup>54</sup> The court held in no uncertain terms that "under the current law of the Second Circuit, 'Internet retransmission services do not constitute cable systems under § 111.'"<sup>55</sup> FilmOn has not appealed this holding.

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<sup>47</sup> See *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-07532, 2013 WL 4828592, at \*9 (S.D.N.Y. Sept. 10, 2013). That case also dealt with a claim of contempt against Alkiviades David, FilmOn's CEO, for maintaining a website that hosted videos inciting viewers to join a class action suit against CBS that had already been settled, in violation of a separate clause in the Injunction Order. *Id.* at \*7–8. Interestingly, David's website is still in operation and currently hosts a video of him alleging that CBS supports child abuse. CBS YOU SUCK, <http://www.cbsyousuck.com> (last visited Nov. 20, 2016).

<sup>48</sup> *CBS Broadcasting*, 2014 WL 3702568, at \*3.

<sup>49</sup> *Id.* at \*2.

<sup>50</sup> *Id.* at \*4.

<sup>51</sup> *Id.* at \*6–7.

<sup>52</sup> Brief & Special Appendix for Defendant-Appellant and Respondent-Appellant at \*16, *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 14-03123-cv, 2014 WL 6997529 (2d Cir. Dec 5, 2014).

<sup>53</sup> Reply Brief for Defendant-Appellant & Respondent-Appellant at \*13, *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 14-03123-cv, 2015 WL 1395553 (2d Cir. Mar. 20, 2015).

<sup>54</sup> *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 99–100, 104 (2d Cir. 2016).

<sup>55</sup> *Id.* at 99 (citing *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012)).



### *B. The California Case*

In California, FilmOn was enjoined from performing copyrighted programming from broadcast networks at the end of 2012.<sup>56</sup> While this preliminary injunction remains in place, a court recently agreed with FilmOn's compulsory license eligibility.<sup>57</sup> In the summer of 2015, Central District Court Judge George Wu made a landmark ruling when he concluded that § 111's definition of a cable system clearly included FilmOn.<sup>58</sup> Next, the court questioned whether it was required to defer to agency opinion about FilmOn's eligibility for a compulsory license.<sup>59</sup> Ultimately, the court held that the Copyright Office's approach (rejection of FilmOn's status as a cable system) did not require deference because while the Copyright Office had expressed their opposition to internet retransmitters qualifying for the compulsory license, there was never a formal notice and comment process that formalized the Copyright Office's opinion.<sup>60</sup>

Recognizing the importance of his ruling, Judge Wu authorized an immediate appeal to the Ninth Circuit.<sup>61</sup> The network cable companies' appeal was docketed on September 17, 2015.<sup>62</sup> Several briefs have been exchanged between the networks and FilmOn, and oral argument in the case took place on August 4, 2016.<sup>63</sup> This pending appeal will be the next big battle in the war between cable networks and FilmOn, and the trajectory of FilmOn's cable system argument will depend on the outcome. Given that the California District Court is the only court to have found favorably for FilmOn, the Ninth Circuit Court of Appeals' decision will be essential to FilmOn's fight for a compulsory license.

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<sup>56</sup> *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1150–1151 (C.D. Cal. 2012).

<sup>57</sup> *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1154 (C.D. Cal. 2015).

<sup>58</sup> *Id.* at 1167 (explaining that, although FilmOn had many warehouses across the United States, each "facility" was located wholly in a state and "receive[d] signals transmitted or programs broadcast by one or more television broadcast stations" that it retransmitted out using "wires, cables, microwave, or other communications channels"). *See also* 17 U.S.C. § 111(f)(3) (2012).

<sup>59</sup> *AereoKiller*, 115 F. Supp. 3d at 1164–65, 1169.

<sup>60</sup> *Id.* at 1164.

<sup>61</sup> *Id.* at 1154.

<sup>62</sup> Notification by Circuit Court of Appellate Docket, *Fox Television Stations, Inc. v. AereoKiller*, No. 15-56420 (9th Cir. Sept. 21, 2015).

<sup>63</sup> *See Previous Oral Argument Dates & Locations*, UNITED STATES COURTS FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/calendar/archive.php> (last visited Nov. 20, 2016).

### *C. The D.C. Case*

In D.C., FilmOn was enjoined by a preliminary injunction from using its antenna system to transmit broadcast network content in late 2013.<sup>64</sup> One month later, FilmOn resumed streaming copyrighted material belonging to the networks.<sup>65</sup> The networks alleged that FilmOn had infringed the injunction, and again the courts found FilmOn in contempt.<sup>66</sup> FilmOn then sought either a summary judgment in its favor based on the Judge Wu's decision in California, or a deferment to allow the California case to be resolved.<sup>67</sup> However, in November 2015, the D.C. District Court denied FilmOn's motion for declaratory judgment and held that "it is unlikely that Congress intended for any entity that happens to employ wires and cables as a mere part of its transmission path to qualify as a cable system."<sup>68</sup> The court drew on the plain text and legislative history of the Copyright Act and the overall statutory scheme to determine that FilmOn does not classify as a cable system.<sup>69</sup>

Despite that holding, FilmOn filed an interlocutory appeal in the U.S. Court of Appeals for the District of Columbia in February 2016.<sup>70</sup> Meanwhile, litigation continues in the District Court case, with discovery deadlines recently extended so that the ongoing discovery process should be completed by early 2017 in preparation for a post-discovery status conference scheduled for April 26, 2017.<sup>71</sup> In addition to litigation in California, FilmOn will have pending cases in both the District and Appeals Courts in D.C. for the foreseeable future, or at least for as long as the company can sustain the costs.

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<sup>64</sup> Fox Television Stations, Inc. v. FilmOn X LLC, 966 F. Supp. 2d 30 (D.D.C. 2013).

<sup>65</sup> Order at \*1, Fox Television Stations, Inc. v. FilmOn X LLC, No. 1:13-cv-00758, (D.D.C. Nov. 26, 2013).

<sup>66</sup> *Id.*

<sup>67</sup> Defendant's Reply in Support of Motion for Summary Adjudication, or, in the Alternative, Motion To Stay, Fox Television, Inc. v. FilmOn X LLC No. 1:13-cv-00758, 2015 WL 4941632 (D.D.C. Aug. 13, 2015).

<sup>68</sup> Fox Television Stations, Inc. v. FilmOn X LLC, 120 F.Supp.3d 1, 21 (D.D.C. 2015).

<sup>69</sup> *Id.* at 22.

<sup>70</sup> Notice of Appeal, Fox Television Stations, Inc. v. FilmOn X LLC, No. 1:13-cv-00758 (D.C. Cir. Feb. 10, 2016).

<sup>71</sup> Joint Stipulation to Continue Certain Discovery Deadlines, Fox Television Stations, Inc. v. FilmOn X LLC, No. No. 1:13-cv-00758 (D.D.C. Sept. 7, 2016).

### III. THE FUTURE FOR FILMON

#### A. Agency Influence

For over fifteen years, the Copyright Office has consistently interpreted § 111's definition of cable systems to exclude internet rebroadcasters.<sup>72</sup> The Copyright Office believes that expanding the § 111 license to include online rebroadcasters like FilmOn would unnecessarily take control from program producers and reduce the bargaining power of content owners by undercutting private negotiations.<sup>73</sup> Aereo applied to the Copyright Office for a compulsory license after it lost at the Supreme Court, and while the Office accepted the application on a provisional basis, it explained its belief that § 111 license was not meant to encompass online retransmission on a national scale.<sup>74</sup> The Copyright Office was clear that the Court's findings in *Aereo* "would not alter this conclusion."<sup>75</sup> FilmOn received a similar response from the Copyright Office, with the Office provisionally accepting FilmOn's application fees with a statement that the Office did not believe that FilmOn qualified for a compulsory license.<sup>76</sup>

Regardless of the Copyright Office's stance, the *ivi* and *Aereokiller* cases show that the Office's actual influence on a court's § 111 eligibility determination varies heavily based on the individual court's understanding of the statutory text and how persuasive it finds long-held agency opinions expressed without formal rulemaking procedures.<sup>77</sup> The Copyright Office could potentially go through a notice and comment rulemaking process to give more weight to its long-held belief that internet rebroadcasters would not be classified as cable systems eligible for a compulsory license. However, it seems highly unlikely that it would do so given that the Office deferred to future judicial resolution when it dealt with Aereo's license application.<sup>78</sup>

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<sup>72</sup> See U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS, 97 (1997) (explaining that online retransmissions are "so vastly different from other retransmission industries now eligible for compulsory licensing" that it would be "inappropriate" to "bestow the benefits of the compulsory license" on the industry).

<sup>73</sup> SHVERA REPORT at 188, *supra* note 44.

<sup>74</sup> Letter from Jacqueline C. Charlesworth, *supra* note 16.

<sup>75</sup> *Id.*

<sup>76</sup> Plaintiffs' Opposition to Defendants' Motion for Summary Adjudication, or, in the Alternative, Motion to Stay, Fox Television Stations, Inc. v. FilmOn X LLC, No. 1:13-cv-00758, 2015 WL 4941628 (D.D.C. July 30, 2105).

<sup>77</sup> See WPIX, Inc. v. *ivi*, Inc., 691 F.3d 275 (2d. Cir. 2012); Fox Television Stations, Inc. v. *AereoKiller*, 115 F. Supp. 3d 1152 (C.D. Cal. 2015).

<sup>78</sup> See Letter from Jacqueline C. Charlesworth, *supra* note 16.

Additionally, the networks have developed their own legal arguments supporting the position that the long duration of the Copyright Office's approach justifies deference to the Office's interpretation, even though it was not established through formal rulemaking.<sup>79</sup>

In contrast to the Copyright Office's consistency, the FCC is considering creating new regulations in this area that might impact litigation over the § 111 license.<sup>80</sup> A Notice of Proposed Rulemaking on "promoting innovation and competition in the provision of multichannel video programming distribution services" was published in the Federal Register in February 2015.<sup>81</sup> This NPRM contemplates modifying the definition of multichannel video programming distributors (MVPDs) to include "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."<sup>82</sup> FCC Chairman Tom Wheeler, who first proposed the changes in 2014, said that the NPRM remains a priority for him,<sup>83</sup> but no final rule has been passed. Meanwhile, other online companies that have worked out private licensing agreements to stream broadcast network content, like Amazon and Netflix, are lobbying against the new proposed rules because the expansion of the MVPD definition would also bring them under regulation.<sup>84</sup> The companies argue that this move would stifle innovation by forcing outdated regulatory burdens on a new and thriving industry.<sup>85</sup>

If finalized, the proposed rule would make FilmOn an MVPD subject to FCC regulations and the Communications Act rather than the

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<sup>79</sup> Plaintiffs' Opposition to Defendants' Motion for Summary Adjudication, or, in the Alternative, Motion to Stay, *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 1:13-cv-00758, 2015 WL 4941628 (D.D.C. July 30, 2015). ("[C]ourts will normally accord particular deference to an agency interpretation of 'longstanding' duration." (quoting *Barnhart v. Walton*, 535 U.S. 212, 220 (2002)).

<sup>80</sup> David Oxenford, *FCC Regulation of Internet Video?—Dates Set for Comments on Treating Over-the-Top Video Providers like Cable and Satellite TV*, BROADCAST LAW BLOG (Jan. 15, 2015), <http://www.broadcastlawblog.com/2015/01/articles/fcc-regulation-of-internet-video-dates-set-for-comments-on-treating-over-the-top-video-providers-like-cable-and-satellite-tv/>.

<sup>81</sup> Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2086 (proposed Jan. 15, 2015).

<sup>82</sup> *Id.* at 2078.

<sup>83</sup> Margaret Harding McGill, *FilmOn CEO Prods FCC To Bring Local Broadcast TV Online*, LAW 360 (Oct. 9, 2015), <http://www.law360.com/articles/713112/filmon-ceo-prods-fcc-to-bring-local-broadcast-tv-online>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

Copyright Act's compulsory license, possibly providing another route for FilmOn to continue offering its streaming services. A final Report and Order that changed the definition of MVPD might create "a parallel path to program access for Internet retransmitters."<sup>86</sup> Under the Communications Act, local broadcasters have a duty to negotiate "in good faith" with MVPD rebroadcasters,<sup>87</sup> so the big networks currently in lawsuits against FilmOn might find themselves having to make a deal allowing FilmOn to stream their programming. However, over a year has passed since the comment period ended for the NPRM on the definition of MVPDs, and it seems unlikely that such change will happen now. Amazon, Netflix, Hulu, and other streaming sites that have already made private deals with cable companies will surely be a strong lobbying force against the rule, and the growth and success of Internet rebroadcasting through such websites has proven that regulation to protect the relatively new industry is not necessary. The FCC might propose new rules that could affect FilmOn in other ways in their bid for a compulsory license, as cable systems must comply with FCC regulations to be eligible,<sup>88</sup> but FilmOn has been willing to modify its broadcasting system to comply with specific regulations and continue to broadcast copyrighted content.<sup>89</sup> Given the time that has passed since it was proposed, and the lack of action so far on what is now an outdated suggestion, it is unlikely that there will be much movement on the NPRM that would have allowed FilmOn to become a MVPD. Additionally, even if other rules are passed, they likely won't have a significant impact on FilmOn's bid for a compulsory license.

Government agencies can influence the eventual legal outcome of FilmOn's bid for legitimacy without clearly ruling on whether or not FilmOn qualifies as a cable system. The proposed FCC regulations are worth following, particularly with the powerful lobbying interests involved. More than anything, the FCC's new proposals and the Copyright Office's long-held convictions indicate that issues involving online retransmissions of copyright network content are being debated in several forums at the same time without consensus.

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<sup>86</sup> See *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1170 (C.D. Cal. 2015).

<sup>87</sup> 47 U.S.C. § 251(c)(1) (2012).

<sup>88</sup> 17 U.S.C. § 111(c)(1) (2012).

<sup>89</sup> See *Aereokiller*, 115 F. Supp. 3d at 1157 (explaining that FilmOn attempted to develop a code that would impose limits on locational access to retransmitted content in response to the networks' argument that the ability to broadcast nationally and allow viewers to access programs they would not otherwise be able to see would preclude it from being a cable system).

### *B. Impact of Judicial Holdings*

While one District Court did find FilmOn eligible to be a cable system, this likely will not be a significant advantage for FilmOn in its battle with the cable networks. Ultimately, even if FilmOn was able to qualify as a cable system, it has never been able to satisfy the technical requirements for a § 111 compulsory license.<sup>90</sup>

Furthermore, the court's approach in *Aereokiller* is similar to the approach taken by the Supreme Court in *Teleprompter*, the early CATV case that explicitly left regulation of the new emerging CATV communication technology to Congress.<sup>91</sup> For example, the court specified that while "plaintiff's policy may be the better one. . . this Court does not presume to make policy."<sup>92</sup> The court further explained that while it had to follow what it believed was the letter of the law, the court might not be equipped to resolve the important policy questions at play.<sup>93</sup> Indeed, the court held that "it will ultimately be up to Congress to say what the law will be" and suggested that "nothing the courts say in this litigation is likely to be the last on the issue."<sup>94</sup> With the level of agency involvement and judicial disagreement, the court was right to recognize that the judicial system alone cannot decide the appropriate regulations for online rebroadcasts. In fact, because *Aereokiller* left the preliminary injunction against FilmOn in place, it effectively has done little more than signal to Congress the existence of a possible loophole in the Copyright Act.

### *C. Other Compulsory License Schemes*

In the late 1980s, satellite carriers attempted to argue in the courts that they should be entitled to a § 111 compulsory license based on their own similarity to cable systems.<sup>95</sup> In response, Congress passed the Satellite Home Viewer Act (SHVA) of 1988 as § 119 of the Copyright Act, which created a separate compulsory licensing scheme just for broadcasters using satellite systems in space to retransmit broadcasts.<sup>96</sup> Congress considered satellite carriers so different from the traditional cable systems considered by the § 111 compulsory license when it was created that it thought the public interest would be best

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<sup>90</sup> *See id.* at 1152.

<sup>91</sup> *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 413 (1974).

<sup>92</sup> *Aereokiller*, 115 F. Supp. 3d at 1171.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *See Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991).

<sup>96</sup> Satellite Home Viewer Act (SHVA) of 1988, Pub. L. No. 100-667 tit. II, 102 Stat. 3935, 3949 (1988).

served by creating “a new statutory license that is tailored to the specific circumstances of satellite-to-home distribution.”<sup>97</sup> It is thus conceivable that online retransmission systems could also be considered so different from cable systems that Congress would want to consider their specific circumstances as well. Nonetheless, it is unlikely that Congress would create an alternate licensing system for online retransmissions because, more recently, Congress expressed a desire to eventually phase-out and repeal compulsory license schemes altogether.<sup>98</sup> The Satellite Television Extension and Localism Act (STELA) of 2010 directed the Copyright Office to submit proposals for how to achieve the removal of § 111, § 119 and § 122 (which created a compulsory license for satellite retransmission of local television programming).<sup>99</sup>

There are many unknowns that will determine whether online rebroadcasters can be classified as cable systems. Based on the timing of court filings, it is unlikely that either of the D.C. courts will make a ruling until the California case is resolved. If the Ninth Circuit upholds the *Aereo* ruling, then FilmOn’s bid for access to a compulsory license will almost certainly be appealed to the Supreme Court because the Second Circuit arrived at the opposite ruling.<sup>100</sup> If the Ninth Circuit reverses, litigation will still proceed in the D.C. case, and the networks will likely appeal the Ninth Circuit’s decision anyway. FilmOn’s case is likely to get to Supreme Court, as long as FilmOn can afford to continue litigation.

Meanwhile, any new FCC rulemaking could potentially moot FilmOn’s pursuit of a cable system title by offering it an alternate path to access network content. Moreover, regulation of online rebroadcasters presents important policy questions that Congress should weigh in on, as it did with the creation of a separate compulsory license for satellite carriers.<sup>101</sup> From the clear recent interest in removing compulsory license schemes,<sup>102</sup> it seems likely that Congress would not support FilmOn’s license bid.

Indeed, a compulsory licensing system may be unnecessary for online broadcasters in this technological day and age. For example, many online video distributors, like Amazon, Netflix, and Hulu have been able to work out their own private deals with cable network

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<sup>97</sup> H.R. Rep. 100-887(I) (1988), *reprinted in* 1988 U.S.C.C.A.N. 5577, 5617.

<sup>98</sup> Satellite Television Extension and Localism Act (STELA) of 2010, Pub. L. No. 111-175, 124 Stat. 1218 (2010).

<sup>99</sup> *Id.*

<sup>100</sup> *See* CBS Broad., Inc. v. FilmOn.com, Inc., No. 1:10-cv-07532, 2014 WL 3702568, at \*3 (S.D.N.Y. July 24, 2014).

<sup>101</sup> SHVA, Pub. L. No. 100-667 (1988).

<sup>102</sup> *See* STELA, Pub. L. No. 111-175 (2010).

companies for access to network content without violating the Copyright Act.<sup>103</sup> These online video distributors have contracted with individual networks to allow the viewers to pick specific episodes of specific shows to watch on demand. By contrast, FilmOn could almost be viewed separately from these MVPDs because it retransmits network content wholesale without any permission from or compensation given to content owners.

At the very least, even if Congress decides not to regulate online rebroadcasts, there will need to be some formal boundary provided for what online retransmitters are allowed to do. It seems clear the companies like Hulu are allowed to contract for network content. Hulu has even recently been able to obtain the rights to stream some shows ad-free.<sup>104</sup> But what is it that stops Hulu from attempting to extract a better deal from the cable networks, as FilmOn searches for when it argues that it should be entitled to a compulsory license, and essentially be able to pay one fee for the right to rebroadcast any content it wants without input from the networks? Perhaps the statutory definition of a cable system, or agency interpretation of copyright law, or notions of fairness in regulating copyrighted material. While the FilmOn debate continues, no clear answer exists.

With so many different considerations at play, it is likely that any court holdings or agency opinions will merely be a precursor to eventual *Congressional resolution*.

#### CONCLUSION

There are many factors at work in FilmOn's fight for recognition as a cable system under the Copyright Act. The situation is so complex that it is unlikely that the courts and agencies will be able to resolve all of the particular policy questions that surround regulating an unprecedented online retransmitting technology. While litigation continues, agency involvement could further complicate the copyright issue in the wider regulation of online video services, and the need for a Congressional resolution is becoming increasingly clear.

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<sup>103</sup> See, e.g., Shalini Ramachandran, *Hulu Strikes Deal for FX Networks Shows*, Wall Street Journal, (Dec. 18, 2014), <http://blogs.wsj.com/cmo/2014/12/18/hulu-strikes-deal-for-fx-networks-shows/> (discussing the terms of FX Networks' exclusive deal with Hulu for the rights to stream FX content after negotiations all of the major subscription video on demand players because Netflix and Amazon were unwilling to pay FX more for "stacking" rights, which are the rights to stream full current seasons of shows as they air).

<sup>104</sup> See *Your Guide to the No Commercials Add-On*, HULU HELP CENTER, <https://help.hulu.com/articles/52427902> (last visited Jan. 30, 2017) (explaining the addition of an ad-free plan on Hulu for shows from certain networks).