

**United States Court of Appeals
for the Ninth Circuit**

FOX TELEVISION STATIONS, INC; TWENTIETH CENTURY FOX FILM CORPORATION; FOX BROADCASTING COMPANY, INC.; NBCUNIVERSAL MEDIA, LLC; UNIVERSAL NETWORK TELEVISION, LLC; OPEN 4 BUSINESS PRODUCTIONS, LLC; NBC SUBSIDIARY (KNBC-TV) INC; AMERICAN BROADCASTING COMPANIES, INC.; ABC HOLDING COMPANY, INC.; DISNEY ENTERPRISES, INC.; CBS BROADCASTING INC.; CBS STUDIOS INC.; BIG TICKET TELEVISION, INC.; TELEMUNDO NETWORK GROUP LLC; WNJU-TV BROADCASTING LLC,

Plaintiffs-Appellants,

– v. –

AEREOKILLER, LLC; ALKIVIADES DAVID; FILMON.TV NETWORKS, INC.; FILMON.TV, INC.; FILMON.COM, INC.; FILMON X, LLC; DOES, 1-3, inclusive,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CENTRAL CALIFORNIA, LOS ANGELES IN CASE NO. 12-CV-06921

**BRIEF OF *AMICUS CURIAE* THE COPYRIGHT ALLIANCE
IN SUPPORT OF APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

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

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Pursuant to Federal Rule of Appellate Procedure 29(a), *amicus curiae* the Copyright Alliance respectfully submits this brief in support of appellants Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, Inc., NBCUniversal Media, LLC, Universal Network Television, LLC, Open 4 Business Productions, LLC, NBC Subsidiary (KNBC-TV) Inc., American Broadcasting Companies, Inc., ABC Holding Company, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Big Ticket Television, Inc., Telemundo Network Group LLC, and WNJU-TV Broadcasting LLC (collectively, “Appellants”). This brief is submitted pursuant to the blanket consent granted by the parties.¹

INTEREST OF *AMICUS CURIAE*

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

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

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

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

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

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

However, regardless of the ways in which new technologies and businesses models evolve, the desire to bring new technologies to market does not merit the unprecedented extension of narrowly crafted and tailored statutory compulsory licenses to new distribution methods that clearly do not fall within the scope of these licenses. The Copyright Alliance submits this brief to help the Court understand how Judge Wu’s decision is inconsistent with the policies of the Copyright Act, which are designed to provide meaningful protections to authors whose works may be publicly performed and displayed, and to the investments made to make those works widely available to the public in legitimate ways. The Copyright Alliance also submits this brief to help the Court understand the negative impacts that affirmance would have on the substantial reliance interests of creators and innovators who work with different technology companies in the development of innovative new ways to transmit their works through the Internet – none of which have been built upon the Section 111 compulsory license.

SUMMARY OF THE ARGUMENT

As another judge considering the issues here recognized, “[t]his case involves a clash between two important national policies and interests.” *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), --- F. Supp. 3d ---, 2015 WL 7761052, at *1 (D.D.C. Dec. 2, 2015) (Collyer, J.) (“D.D.C. Op.”). The enactment of the compulsory license in Section 111 of the Copyright Act of 1976 reflects a carefully crafted, “delicate balance” between those two interests: the need to protect and reward copyright owners for creating valuable copyrighted works, and the promotion of competition and access to those works. *Id.* Since the dawn of the ability to distribute television programming via the Internet, the Copyright Office has consistently stated that the Section 111 license is limited to cable systems and does not apply to Internet transmission, just as the license does not apply to satellite or other specified models for television delivery. Congress has not disputed the Copyright Office’s view, and courts addressing the question of whether the Section 111 license applies to the Internet all have found that it does not.

Judge Wu’s ruling upsets the delicate balance that Congress struck over thirty years ago. His opinion is an outlier; it is the only rejection of the longstanding view that the Section 111 compulsory license – by letter and

spirit – is not designed to be stretched from a mechanism designed to help cable distribution to a bargaining substitute that covers the entirely different business model applicable to the Internet. *See* D.D.C. Op. at *18 n.20. Perhaps most troubling, the district court’s opinion disregards the interests of creators, even though Congress, the courts, and the Copyright Office have always considered these interests when interpreting compulsory licenses of all types so as to not impinge upon the incentives underlying the Copyright Act.

The practical impacts of affirmance are several and significant. First, issuing a ruling that permits the expansion of a narrow exception to copyright owners’ exclusive rights to negotiate in the free market sets a dangerous precedent that runs counter to a fundamental principle of copyright law: that compulsory licenses are disfavored and should be administered in a careful and narrow fashion. The district court’s expansive view departs sharply from a deeply rooted history of narrow construction. And indeed, rather than crediting the experience of those tasked with administering the statute or giving due recognition of the history of the license, the district court improperly looked at the license in a vacuum.

Second, after years of the development and growth of distribution of television programming over the Internet, the district court’s pronouncement

that the Section 111 license now is applicable runs counter to the longstanding beliefs of all of the stakeholders that are involved in the growth of the industry. All parties in this ecosystem have substantial reliance interests involved in the growth of the distribution of television programming over the Internet, and the industry in turn has successfully made programming available via the Internet without the need of a compulsory license. If the ruling is affirmed, this Court will have effectively changed the terms of the industry, essentially legislating in ways that nobody expected or intended.

Finally, the ruling potentially places the United States – a leader in copyright protection – in violation of its obligations under several international agreements. These violations, in turn, weaken this country’s credibility and persuasiveness in encouraging other countries to give the type of protection copyright that has helped spur economic growth and incentivized the creation and distribution of diverse, expressive works. For these types of reasons, a canon of statutory construction nearly as old as the United States itself holds that if any reasonable interpretation exists that will not put the country in violation of its international obligations, the statute should be construed in such a way.

A reasonable, justifiable, equitable interpretation of the law exists: it is an interpretation that the government, private parties, and – with the sole exception of the district court below – the courts have adopted. That interpretation is that the Section 111 license is not available to those who retransmit programming through the Internet. The decision below should be reversed accordingly.

ARGUMENT

I. THE SECTION 111 COMPULSORY LICENSE IS TO BE CONSTRUED NARROWLY UNLESS AND UNTIL CONGRESS EXPANDS IT

The Copyright Act, and the underlying incentives that support it, depend on a careful balance. Ultimately, the Copyright Act is designed to protect and reward copyright owners for creating valuable intellectual property. To the extent that there is a perceived need to promote competition and expand access to television programming that is not being met under the current state of the law, it is Congress that decides whether and how to craft exceptions that may facilitate or expand the dissemination of copyrighted works. A district judge's preferences are not supposed to supplant this legislative role. Yet this is exactly what transpired below.

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

The entire framework of the Copyright Act shows that to the extent that an exception applies, the construction of that exception is to be narrow. As Congress explained in enacting the Copyright Act, the “approach of the bill is to set forth the copyright owner’s exclusive rights in broad terms in section 106[.]” H.R. Rep. No. 94-1476, at 61 (1976). The sections that follow contain “limitations, qualifications, or exemptions” as to those broad exclusive rights, *id.*, and as the courts have confirmed, where the Copyright Act “sets forth exceptions to a general rule, we generally construe the exceptions ‘narrowly in order to preserve the primary operation of the [provision].’” *Tasini v. N.Y. Times Co.*, 206 F.3d 161, 168 (2d Cir. 2000) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989) (brackets in original)). *See also Ryan v. CARL Corp.*, 23 F. Supp. 2d 1146, 1150 (N.D. Cal. 1998) (“when in doubt, courts should construe the rights of publishers narrowly rather than broadly in relation to those of authors”).

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

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

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

660, at 8-9 (2004) (noting that compulsory licenses constitute an “abrogation of copyright owners’ exclusive rights” and are “crafted to represent a careful balance” between the interests of satellite carriers and copyright owners). In opining on the proposed Google Books settlement, the Register of Copyrights observed that “Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored.”² *Competition and Commerce in Digital Books: The Proposed Google Book Settlement: Hearing Before the Comm. on the Judiciary*, 111th Cong. (2009) (statement of Marybeth Peters, Register of Copyrights), available at <http://www.copyright.gov/docs/regstat091009.html>. The Register further observed that when compulsory licenses are adopted, they “are scrutinized very strictly because by their nature they impinge upon the exclusive rights of copyright holders[.]” *Id.*

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

² As discussed in Part II.C., *infra*, no such marketplace failure exists.

composition . . . [and] must be construed narrowly, lest the exception destroy, rather than prove, the rule.” *Fame Publ’g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). The Copyright Office has recognized that this very Court has held consistently with its sister Circuits in recognizing the meaning and impact of a compulsory license, along with the need to construe it narrowly. *See Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944-01 (Apr. 16, 1984) (“In construing the compulsory license for mechanical reproduction of music under the former copyright law, the courts held that a compulsory license provision, because it derogates from the rights of copyright owners, should be narrowly construed.”) (citing *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir. 1972)).

And, just last week, the Department of Commerce’s Internet Policy Task Force, in opining on possible compulsory licenses for remixes, echoed the well-established tenet of the limited, specific nature of “the more drastic approach of a statutorily imposed license.” U.S. Dep’t of Commerce Internet Policy Task Force, *White Paper on Remixes, First Sale, and Statutory Damages*, at 25 (Jan. 28, 2016), available at https://www.ntia.doc.gov/files/ntia/publications/white_paper_remixes-first_sale-statutory_damages_jan_2016.pdf. The Administration’s report

stated what others have thought to be true: “[w]hile there are a handful of compulsory licenses in the Copyright Act, they have been enacted sparingly as exceptions to the normal structure of exclusive rights.” *Id.* (citing authorities at n.159).

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

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

Therefore, because “[c]ompulsory licenses are limitations to the exclusive rights accorded to copyright owners, [such licenses] must be construed narrowly to comport with their specific legislative intention.” *Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580-01 (July 11, 1991).

The Copyright Office has long “assume[d] that courts will construe the compulsory license strictly, since the burden of responsibility is on cable systems to prove that they have satisfied the legislature’s conditions for a compulsory license in derogation of the otherwise recognized (in 17 U.S.C. § 106) proper rights of copyright owners.” *Compulsory License for Cable Systems*, 49 Fed. Reg. 14,944-01, 14,950-51 (Apr. 16, 1984). In finding that FilmOn X met that burden, the district court erred. As Judge Collyer properly found, Congress has traditionally considered the unique characteristics of delivery systems and their business models that affect each industry, and Congress certainly did not consider the unique nature of the Internet when enacting Section 111 in 1976. D.D.C. Op. at *20. Nor has any action that Congress has taken since (including amending the license to include “microwave” as a channel for retransmissions) indicated that the Section 111 license has been extended to encompass Internet transmissions within its scope. *Id.* Rather, “to the extent commercial actors or other

interested entities may be concerned with the relationship between the development and use of [new] technologies and the Copyright Act, they are of course free to seek action from Congress.” *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2511 (2014) (citing Digital Millennium Copyright Act, 17 U.S.C. § 512). “But in the absence of a congressional solution [to problems created by the interaction of copyright law with a new technology], courts cannot avoid difficult problems by refusing to apply the law.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 500 (1984) (Blackmun, J., dissenting). In the absence of clear intent to expand the Section 111 license, courts must be deferential to traditional copyright principles unless and until Congress legislates. *See id.* These principles compel a finding that Judge Wu’s ruling disregarded the bounds of the compulsory license and erred in extending a cable license to an Internet system.

II. THE DISTRICT COURT IMPROPERLY DISREGARDED THE WELL-REASONED AND EXPERIENCED VIEWS OF THE U.S. COPYRIGHT OFFICE

The district court’s ruling suggests that during the entire developmental history of Internet delivery systems, the Copyright Office’s repeated statements confirming that the Section 111 license did not apply to those services were simply aspirational statements or complete errors. And,

moreover, Congress was too politic to inform the Copyright Office that the Section 111 license *does* apply to Internet retransmissions. The industry, too, developed according to the understanding that the Section 111 license did not apply to Internet retransmissions – *even FilmOn X at one time did not try to avail itself of the Section 111 license*. But, for the district court’s ruling to make sense, all of these actors must have been oblivious to the fact that the Section 111 license was available.

Of course, the above scenario makes no practical sense, and nor does the district court’s opinion. Had Judge Wu given proper deference to the Copyright Office’s experience and history in this matter, he would have realized that disregarding the Copyright Office’s observations means disrupting the longstanding views of the government and the private industries that have developed around those views. For a court to elevate its views over all of this is cavalier at best and erroneous in any case.

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

For over 35 years, the Copyright Office has administered the Section 111 licensing regime, and its involvement with the cable copyright debate extends back further in time. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am.* 836 F.2d 599, 609 (D.C. Cir. 1988) (“The Copyright Office certainly has greater expertise in such matters than do the federal

courts.”); *ivi II*, 691 F.3d at 284 (recognizing Copyright Office’s expertise); D.D.C. Op. at *16; *ivi I*, 765 F. Supp. 2d at 605 (“[The Copyright Office] has a great deal of relative expertise in this technical and esoteric area of the law”). *Compare Alaska Stock, LLC v. Houghton Mifflin Harcourt Publ’g Co.*, 747 F.3d 673, 677-78, 685 (9th Cir. 2014) (noting government’s urging to give deference to Copyright Office’s interpretation on registration procedures, and finding Copyright Office’s interpretation persuasive).

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

The Copyright Office’s interpretations of Section 111 are owed deference if reasonable. *Cablevision Sys.*, 836 F.2d at 609; *Motion Picture Ass’n of Am., Inc. v. Oman*, 750 F. Supp. 3, 8 (D.D.C. 1990) (giving deference to Copyright Office’s interpretation of cable license); *see also*

Garcia v. Google, Inc., 786 F.3d 733, 741 (9th Cir. 2015) (giving credit to “expert opinion” of Copyright Office on question of whether performance gave rise to a copyright claim); *Inhale, Inc. v. Starbuzz Tobacco, Inc.*, 755 F.3d 1038, 1041-42 (9th Cir. 2014) (finding Copyright Office’s reasoning on conceptual separability to be persuasive, and deferring accordingly). Given the Copyright Office’s history in the cable licensing arena, a court should be hard-pressed to say that they are not. Indeed, both the Second Circuit and the district court for the District of Columbia deferred to the Copyright Office’s interpretation of Section 111 as being reasonable and persuasive on the question of whether Internet retransmission services are eligible for the Section 111 compulsory license. *See ibi II*, 691 F.3d at 284; D.D.C. Op. at *19. Why the district court below did not do the same is unexplained and, considering the depth of expertise on which the court could have relied, the court’s failure to give it due credence is unexplainable.

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

The Copyright Office has consistently taken the position that Internet-based retransmission services are not cable systems and do not fall within Section 111. *See, e.g., ibi II*, 691 F.3d at 283; D.D.C. Op. at **18-19. Citing the same concerns discussed in Part I, *supra*, the Copyright Office has also opposed an Internet statutory license that would permit any website on

the Internet to retransmit television programming without the consent of the copyright owner: “Such a measure, if enacted, would effectively wrest control away from program producers who make significant investments in content and who power the creative engine in the U.S. economy.” U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 188 (2008) (“SHVERA Report”), available at <http://www.copyright.gov/reports/section109-final-report.pdf>.

Congress has neither corrected nor rejected the Copyright Office’s repeated statements that the Section 111 license does not cover Internet retransmissions. *See ivi I*, 765 F. Supp. 2d at 616. Nor has Congress taken steps to expand the scope of the Section 111 license. *See id.* As Judge Collyer detailed two months ago, “Congress was fully aware of the Copyright Office’s longstanding interpretation” of Section 111, but “[d]espite this awareness, Congress has neither amended the text of § 111 nor enacted a separate compulsory-licensing scheme to include Internet-based retransmission services.” D.D.C. Op. at *19. This was not for want of giving attention to the compulsory licensing provisions: Congress has amended certain relevant portions of the Copyright Act without rejecting or altering the Copyright Office’s interpretation of the law. *See id.*; *see also ivi II*, 691 F.3d at 282 (“Congress did not . . . intend for § 111’s compulsory

license to extend to Internet transmissions. . . . [I]f Congress had intended to extend § 111's compulsory license to Internet retransmissions, it would have done so expressly . . .”).

This history is consistent with the way Congress has addressed the application of compulsory licenses to new technology. “In enacting each license, Congress has traditionally considered the unique historical, technological, and regulatory circumstances that affect each industry.” Satellite Home Viewer Extension and Reauthorization Act of 2004, H.R. Rep. No. 108-660, at 9 (2004). To put it in more illustrative terms, “[i]f it were true that Congress intended the definition of cable system to embrace any and all new technologies, Congress . . . would not have enacted separate licensing schemes for satellite providers retransmitting distant signals, *see* 17 U.S.C. § 119, and local broadcast signals, *see id.* § 122.” D.D.C. Op. at *15. Indeed, in discussing the fact that at one point, in conjunction with the 1999 Satellite Home Viewer Act, an amendment was being considered that clearly made Internet services ineligible for the statutory license, Senator Hatch opined that the removal of such an amendment did not mean that Internet services *were* eligible for the license; rather, no such amendment was necessary. Citing a letter from the Register of Copyrights, Senator Hatch commented:

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

145 Cong. Rec. S14990-91 (daily ed. Nov. 19, 1999) (statement of Sen. Orrin Hatch). This commentary made clear that the absence of any reference to the Internet in the legislation should not be interpreted to mean that Internet services were eligible for the license under the amendments to the Section 111 and 119 licenses. *See id.*

Congress's position has not varied even with the development of more powerful and sophisticated digital television distribution models in recent years. Since *ivi*, there have been multiple hearings on these issues: one as part of the House Judiciary Committee's ongoing copyright review process, and the other in the House Energy and Commerce Committee. *See Compulsory Video Licenses of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 113th Cong. (2014), available at http://judiciary.house.gov/_cache/files/8664e82b-7957-43af-b195-be71e0216ae2/113-89-87800.pdf; *Innovation Versus Regulation in the Video Marketplace: Hearing Before the Subcomm. on Comm'n & Tech. of the H. Comm. on Energy & Commerce*, 113th Cong. (2013), available at

<http://energycommerce.house.gov/hearing/innovation-versus-regulation-video-marketplace>. During the former, the Committee even referred to Aereo. This shows that Congress was aware of the very model that FilmOn X employs while discussing cable compulsory licenses. Had Congress thought that the compulsory license applied to online video, logic dictates that someone would have expressly indicated as much at some point during these hearings.

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

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

Id. at 315-16 (citations omitted); *see also Guardians Ass’n v. Civil Service Comm’n of City of N.Y.*, 463 U.S. 582, 592 (1983) (interpretations of statute by agency charged with enforcement should not be rejected absent clear inconsistency with the face or structure of the statute or the mandate of legislative history, and particularly not where statute was consistently administered for nearly two decades without interference by Congress); *Zenith Radio Corp. v. U.S.*, 437 U.S. 443, 450 (1978) (“When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration.”) (internal quotations and citation omitted).

That Congress did not expressly take action to state that the Copyright Office’s position was correct does not mean that the position is incorrect. Rather, it means that nothing further needs to be said. In light of the Copyright Office’s depth in matters involving Section 111, it was unreasonable for the district court to think that Congress’s near-silence on the issue was due to its desire to let a court have the first word to counter the Copyright Office’s consistent and reasonable interpretation that the cable license does not apply to the Internet. As black-letter law and common sense demonstrate, the reason that Congress has not spoken is because the Copyright Office has never gotten the question wrong.

C. The Industry Has Relied on the Copyright Office's Interpretation of Section 111.

A broad and balanced ecosystem exists in the context of retransmission of broadcast television, and the license fees are well-understood. The fees include the statutory license fees that Congress implemented under Sections 111, 119, and 122, and the negotiated fees for video-on-demand and other television licenses, including licenses for retransmission over the Internet. Licensed Internet and mobile services such as Netflix, Hulu, iTunes, and ABC.com have flourished and thrived, consistent with the longstanding understanding that these services do not fall within the Section 111 compulsory license. The evolution of this ecosystem has been premised on the same understanding that the Copyright Office has had for several years: that Section 111 is limited to cable transmission and Internet retransmissions of broadcasts require a marketplace-negotiated license.

Judge Wu's ruling, which cuts against all of these understandings, threatens to upset all of these relationships and destabilize the industry overall. As the Copyright Office noted in its SHVERA Report, adding a government-mandated Internet license "would likely undercut private negotiations leaving content owners with relatively little bargaining power in the distribution of broadcast programming." SHVERA Report at 188.

Moreover, as the above-mentioned success of the distribution of television over the Internet shows, “there is no proof that the Internet video market is failing to thrive and is in need of government assistance through a licensing system.” *Id.* By all accounts, the lack of a statutory license has been a good thing: it creates incentives and helps the market to grow. *Id.*

Judge Wu’s unprecedented decision, which cuts against everything the market believed and understood about the applicability of the Section 111 license, is unsustainable for that very reason. As this Circuit has explained, “[a] longstanding administrative interpretation upon which private actors have relied aids in construction of a statute precisely because private parties have long relied on it.” *Alaska Stock*, 747 F.3d at 685. Given these “substantial reliance interests” on the Copyright Office’s interpretation, the Office’s longstanding construction should “not be disturbed except for cogent reasons.” *Id.* at 686 (citation and internal quotations omitted); *see also Zenith Radio Corp.*, 437 U.S. at 457-58 (where Secretary of Treasury’s interpretation of statute was not modified by Congress, despite reenactment of statute without modification of the relevant language, and where Secretary’s position was incorporated into treaties and private expectations built thereon, Secretary’s construction would not be disturbed except for cogent reasons).

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

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

747 F.3d at 686. Similarly here, failing some particularly cogent reason – and there is none – to extend the cable license to Internet retransmissions, this Court should undo the district court's outlying ruling that threatens to negatively impact not only copyright owners in the television industry, but also their Internet technology partners.

III. TO THE EXTENT THERE IS AMBIGUITY IN THE SCOPE OF SECTION 111, THE COURT SHOULD RESOLVE IT IN FAVOR OF AVOIDING VIOLATIONS OF THIS COUNTRY'S INTERNATIONAL OBLIGATIONS

As in *Zenith Radio*, the positions of the Copyright Office are reflected in international agreements. These agreements include those to which the United States is a party, and under which all parties to the agreement are precluded from according compulsory licenses to retransmissions of programming over the Internet. *See, e.g.*, U.S.-Australia Free Trade Agreement, art. 17.4.10(b), May 18, 2004, K.A.V. 7141 (“[N]either 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, if any, of the content of the signal and of the signal.”).³ Affirming that FilmOn X should be granted a compulsory license could violate this international obligation. *See* D.D.C. Op. at *16; *ivi I*, 765 F. Supp. 2d at 611, 613.

This potential violation provides yet another reason why the district court’s decision was improper. A 210-year-old canon of statutory construction holds that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); *see also* Restatement (Third) of the Foreign Relations Law of the United States § 114 (1987); Note, *The Charming Betsy Canon, Separation of Powers, and Customary International Law*, 121 Harv. L. Rev. 1215, 1215 (2008) (discussing the “deeply embedded” canon of construction). Certainly, for the reasons stated above, other possible constructions of Section 111 –

³ Similar prohibitions exist in the U.S.-Bahrain Free Trade Agreement (“FTA”) at art. 14.4.10(b), Sept. 14, 2004, K.A.V. 6866; U.S.-S. Kor. FTA at art. 18.4.10(b), Feb. 10, 2011, *available at* <http://www.ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>; U.S.-Morocco FTA at art. 15.5.10(b); U.S.-Oman FTA at art. 15.4.10(b), Jan. 19, 2006, K.A.V. 8673; U.S.-Pan. Trade Promotion Agreement at art. 15.5.10(b), June 28, 2007, K.A.V. 9546; U.S.-Peru Trade Promotion Agreement at art. 16.7.9, Apr. 12, 2006, K.A.V. 8674; U.S.-Singapore FTA at art. 16.4(2)(b), May 6, 2003, K.A.V. 6376; U.S.-Dom. Rep.-Cen. Am. FTA at art. 15.5.10(b), Aug. 5, 2004, K.A.V. 7157.

including those that the Copyright Office has long endorsed and Congress has tacitly approved – remain.

It is important, not just to *amicus* and its members, but to the U.S. economy overall, to ensure that the country is engaged in “full participation in the dominant system of international copyright protection.” *Golan v. Holder*, 132 S. Ct. 873, 894 (2012). This includes “exemplary compliance” with the United States’ international obligations. *Id.* See also *Subafilms, Ltd. v. MGM-Pathe Commc’ns Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994) (en banc) (warning about an approach that might “undermine Congress’s objective of achieving effective and harmonious copyright laws among all nations.”). Accordingly, judicial rulings that could place the country in violation of our international obligations would undercut the country’s positions and the perception that the United States is a trusted partner in multilateral endeavors. See *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957) (cautioning against courts “run[ning] interference in such a delicate field of international relations . . . [without] the affirmative intention of Congress clearly expressed.”).

The district court’s ruling represents an aberration in this country’s deliberate effort to “play a leadership role” in the evolution of the

international copyright system. *Eldred v. Ashcroft*, 537 U.S. 186, 195 (2003). Considering how integral the Internet has become to the global distribution and enjoyment of copyrighted works, other countries are likely to take notice of a judicial choice to unwind this Nation's consistent position that Internet distribution is a matter of marketplace negotiation. This Court has the opportunity to correct this looming problem, and it should take advantage of that opportunity by ratifying the proper interpretation of the law – that Internet transmitters of television content are not eligible for the Section 111 license.

CONCLUSION

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

Dated: New York, New York
February 3, 2016

s/ Eleanor M. Lackman

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I hereby certify that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,005 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), as counted by Microsoft® Word 2007, the word processing software used to prepare this brief.

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Dated: February 3, 2016

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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