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Internet TV: Hopefully Coming to a Computer Screen Near You

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I. INTRODUCTION

The inductive reasoning test aptly titled, “The Duck Test,” provides, “If it walks like a duck, swims like a duck, and quacks like a duck, it’s a duck.”¹ Judge George Wu echoed this humorous sentiment in *Fox TV Stations, Inc. v. Aereokiller* (“*FilmOn Cal*”) holding that FilmOn, an Internet-based retransmission service, was a cable service as defined by 17 U.S.C § 111(f)(3) of the Copyright Act of 1976 (hereinafter the “Copyright Act”).² Judge Wu did not rely on the legislative history or agency opinions—unlike the Second Circuit³—nor did he wax philosophical whether the Internet is a tangible place—unlike the District of Columbia (“DC”) District Court.⁴ Instead Judge Wu based his opinion on the plain language of the law and used common sense to determine a facility in this context. This comment focuses on the recent opinions from the Second Circuit, Central District of California, and DC District Court that address Internet retransmission services (sometimes referred to as “Internet TV”). The issue in all three cases is whether an Internet retransmission system, which streams copyrighted television programming live and over the Internet, can qualify as a cable system for purposes of § 111 of the Copyright Act of 1976 and, therefore, be eligible to obtain a “compulsory license” to retransmit broadcast signals.⁵ To put it concisely, the arguments boil down to whether an Internet retransmission service is a cable system.

The Copyright Act defines a cable system as follows:

[A] facility, located in any State . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and makes secondary

¹ See, e.g., *GE Betz, Inc. v. Zee Co.*, 718 F.3d 615, 630 (7th Cir. 2013) (citations omitted) (determining whether “a participant in a judicial proceeding [that] has all the qualities of a defendant . . . [is], in fact, [] a defendant.”); *BMC Indus. v. Barth Indus.*, 160 F.3d 1322, 1338 n. 28 (11th Cir. 1998) (The “duck test” has received wide support from the courts.).

² *Fox TV Stations, Inc. v. Aereokiller*, 115 F. Supp 3d 1152 (C.D. Cal. 2015) (“[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case.”) (“*FilmOn Cal*”).

³ *WPIX, Inc. v. Ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012) (“*Ivi II*”).

⁴ *Fox TV Stations, Inc. v. FilmOn X, LLC*, No. 13-758, 2015 U.S. Dist. LEXIS 161304 (DC Dist. Ct. Dec. 2, 2015) (“*FilmOn DC*”).

⁵ *Ivi II*, 691 F.3d at 279.

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.⁶

Parties that fall within this definition are eligible for a compulsory license granted by § 111. A compulsory license is “[a] statutorily created license that allows certain parties to use copyrighted material[,] without the explicit permission of the copyright owner[,] in exchange for a special royalty.”⁷ Therefore, a compulsory license granted by § 111 allows a cable system, without the express consent of any copyright owner, to retransmit broadcast television programming to its subscribers for a statutorily imposed fee and subject to several regulations.⁸

a. Potential Effect of FilmOn Cal

The difference of opinion centers around two Internet retransmission companies—Ivi and FilmOn—and their respective trials in the Second Circuit, Central District Court of California, and DC District Court. Both companies argued their particular system was a cable system for purposes of § 111(c).⁹

Applying *Chevron* deference, the Second Circuit held in *Ivi II* that Ivi was not a cable system for two separate reasons.¹⁰ First, the legislative history of § 111 suggests that an Internet retransmission company, such as Ivi, is not a cable company because: (1) Congress never expressly amended § 111 to apply to Internet retransmission services, and (2) Congress enacted the provision to address the difficulties of providing television reception by enabling the expansion of cable systems on a localized, rather than nationwide, platform—a purpose of which Ivi was not seeking

⁶ 17 U.S.C. § 111(f)(3) (2015).

⁷ BLACK’S LAW DICTIONARY 1060 (10th ed. 2014).

⁸ *Ivi II*, 691 F.3d at 278.

⁹ *Ivi II*, 691 F.3d at 279; *FilmOn Cal* 115 F. Supp. 3d at 1155-56; *FilmOn DC*, 2015 U.S. Dist. LEXIS 161304, at *18-19.

¹⁰ *Ivi II*, 691 F.3d at 277.

to address.¹¹ Second, the court adopted the agency’s interpretation of a cable system, which expressly excludes Internet retransmission services, under step two of *Chevron* deference.¹²

In *FilmOn Cal*, Judge Wu broke with the Second Circuit and ruled in favor of Internet retransmission services, stating that FilmOn should be considered a cable system *so long as* it is able to show that its system meets other specific requirements, such as satisfying localization requirements and complying with applicable Federal Communications Commission (hereinafter “FCC”) regulations.¹³ Although the case is pending an appeal in the Ninth Circuit, FilmOn has claimed that its new system—the Lanner System¹⁴—has improved localization services and will placate the Copyright Office and broadcasters’ concerns.¹⁵

Analyzing the very same definition that *Ivi II* and *FilmOn Cal* addressed, the court in *FilmOn DC* agreed with *Ivi II*’s outcome, but had a different line of reasoning. Unlike the Second Circuit, the DC District Court did not find the definition of a cable system to be ambiguous and held FilmOn is not a cable system because it uses the Internet, a pathway that it does not control, to retransmit content to subscribers.¹⁶ Additionally, applying *Skidmore* deference, the DC court found the Copyright Office’s interpretation persuasive, and for this reason denied FilmOn a compulsory license.¹⁷

¹¹ *Id.* at 281–83.

¹² *Id.* at 281–85.

¹³ *FilmOn Cal*, 115 F. Supp. 3d at 1171.

¹⁴ *Id.* at 1156.

¹⁵ *Id.* at 1156–58; Margaret Harding McGill, *FilmOn CEO Prods FCC to Bring Local Broadcast TV Online*, LAW360 (Oct. 09, 2015, 7:24 PM), <http://www.law360.com/articles/713112/filmon-ceo-prods-fcc-to-bring-local-broadcast-tv-online> (FilmOn has expressed its willingness to abide by any applicable FCC regulations and has recently spoken to the FCC about the issue).

¹⁶ *FilmOn DC*, 2015 U.S. Dist. LEXIS 161304, at *54–55.

¹⁷ *Id.* at *76, 81.

b. *Solution Summary*

This comment will argue that the Ninth Circuit Court of Appeals should affirm the *FilmOn Cal* decision and create a circuit split because the district court properly defined a cable system under the Copyright Act and FilmOn’s system fits within said definition.

Part II of this comment will do the following: (1) summarize the history of cable systems and the compulsory license; (2) analyze the legislative intent behind the license; (3) provide an in-depth analysis of *Ivi II*, *FilmOn Cal*, *FilmOn DC*, and other related cases; and (4) discuss the philosophy that presently underlies the compulsory license.¹⁸ Part III will explain why the Ninth Circuit should affirm the *FilmOn Cal* decision and break with the Second Circuit and DC District Court.¹⁹

II. BACKGROUND

a. *History: From Satellites on Hilltops to TV on Your Lap*

i. *The Traditional Cable Systems*

The compulsory license emerged in response to two Supreme Court decisions from 1968 and 1974, which held the traditional cable systems at issue were not “performing” under the Copyright Act when they retransmitted broadcasters’ programming.²⁰ The first case, *Fortnightly Corp. v. United Artists Television, Inc.*, dealt with a cable system that used antennas placed on hills above cities to distribute copyrighted local television broadcasting to their subscribers’ homes.²¹ The Court determined that because the subscribers ultimately chose what they were viewing and the cable systems simply retransmitted uninterrupted and unedited programming, such systems did

¹⁸ See *infra* Part II.

¹⁹ See *infra* Part III.

²⁰ These decisions referred to cable systems as Community Antenna Television (hereinafter “CATV”) systems. Courts and academics now refer to CATV systems as cable systems. *ABC, Inc. v. Aereo, Inc.*, 134 U.S. 2498, 2505 (2014) (“*Aereo III*”).

²¹ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (1968).

not infringe any copyrights because the cable system functioned more like a viewer (who does not perform) than a broadcaster (who does perform).²² Therefore, *Fortnightly* allowed cable systems to retransmit copyrighted work to the masses and avoid paying rights holders for the retransmissions. As cable systems evolved, the Supreme Court determined in *Teleprompter v. Columbia Broad. Sys.* that new features of cable systems (e.g. their own broadcasting channels and selling commercial space) were still non-infringing and allowed cable systems “to compete more effectively with broadcasters for the television market.”²³ *Fortnightly* and *Teleprompter* essentially authorized cable systems “to retransmit broadcast television programming without incurring any costs to the copyright owners.”²⁴

ii. *The Copyright Act of 1976*

Congress—wanting to respect the rights of copyright holders and ensure that copyright holders received compensation for their works—made several amendments to the Copyright Act that affect cable systems.²⁵ Congress enacted the § 111(c) compulsory license requiring cable systems pay copyright owners to retransmit the owners’ content.²⁶ With this statute, Congress overturned *Fortnightly* and *Teleprompter*, declaring cable systems’ retransmissions to be performances and requiring cable systems pay a fee to retransmit such performances to the public.²⁷ The compulsory license balances two ideals: the societal benefit cable systems provide (expansive access to television programming) with the significance of respecting one’s property rights.²⁸ Further, Congress passed the statute to combat the undue burden of requiring cable

²² *Id.* at 400–01.

²³ *Id.*

²⁴ *WPIX, Inc. v. Ivi, Inc.* (“*Ivi I*”), 765 F. Supp. 2d 594, 602 (S.D.N.Y. 2011) (emphasis added).

²⁵ *Aereo III*, 134 U.S. at 2506.

²⁶ *Ivi II*, 691 F.3d at 271.

²⁷ *Aereo III*, 134 U.S. at 2505.

²⁸ See *Ivi II*, 691 F.3d at 282; U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 1 (2008) at 1, 3 (hereinafter “SHVERA Report”).

systems to negotiate with each and every copyright owner to retransmit broadcast signals.²⁹ The license is conditioned on reporting requirements, payment of royalties, a ban on the substitution or deletion of commercials, and geographical limitations on the license for programs broadcasted by Canadian or Mexican stations.³⁰

iii. *Satellites*

Not long after the amendments, satellite companies entered the retransmission market, requesting compulsory licenses. In *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, the Eleventh Circuit held that satellite carriers qualify as a cable system under § 111 and were entitled to compulsory licenses.³¹ Taking issue with this decision, the Copyright Office explained that satellites should not be entitled to a compulsory license because the localized intent of the license does not apply to national retransmission services and satellites are not regulated by the FCC.³²

In response, Congress enacted the Satellite Home Viewer Act, which denied satellite carriers a § 111(c) compulsory license, but provided them a separate statutory license.³³ Then in 1999 Congress enacted 17 U.S.C. § 122, authorizing satellite carriers—once criticized for supporting a nationwide service—to retransmit local broadcast programming back into a local market.³⁴ Congress has actively legislated in this area, amending § 122 five times since 2002.³⁵

iv. *Internet Retransmission Services: The Aereo Decision*

²⁹ H.R. REP. 94-1476, at 5569, 5704 (1976).

³⁰ *Id.* at 5704.

³¹ *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991).

³² 57 Fed. Reg. 3284 (Jan. 29, 1992) (codified at 37 C.F.R. § 201.17).

³³ See 17 U.S.C. § 119; 56 Fed. Reg. 31,580 (1991); 57 Fed. Reg. 3283 (1992).

³⁴ *FilmOn DC*, 2015 U.S. Dist. LEXIS 161304, at *56 n.17.

³⁵ *FilmOn Cal*, 115 F. Supp. 3d at 1162.

The most recent development within this area of law (as well as the central focus of this comment) is *Aereo III*, where the Supreme Court determined that an Internet-based retransmission service *publicly performs* through its retransmissions of copyright owners' content.³⁶

Aereo—which is now defunct—provided retransmissions of TV broadcasts through thousands of small antennas, each of which were attributed to a single, active Aereo subscriber at any time (*i.e.*, no two Aereo subscribers would be assigned the same antenna at once).³⁷ The subscriber first selected a channel for Aereo's services to translate into data that could be used over the Internet.³⁸ The data was saved to one of Aereo's servers and retransmitted to that individual's computer for streaming.³⁹ If two subscribers clicked to view the same programming at the same time, they would each receive an individual copy made for them, but of the same material.⁴⁰

Aereo's main argument paralleled the arguments made by the cable systems in *Fortnightly* and *Teleprompter*.⁴¹ Aereo argued that it does not publicly perform the copyright, but rather provides equipment; any performance that may occur happens at the hands of the subscriber.⁴² If the court agreed that Aereo's retransmissions do not constitute a public performance, then Aereo would not be infringing the copyrights of the content it displayed. Additionally, Aereo argued that it only created and retransmitted personal copies of the content to their subscribers because there was only one active subscriber for any one antenna.⁴³ The Supreme Court disagreed, ruling: (1) Aereo was not just an equipment provider because their systems perform copyrighted material,

³⁶ *Aereo III*, 134 U.S. at 2511.

³⁷ *Id.* at 2503.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 2511.

⁴² *Id.* at 2504.

⁴³ *Id.* at 2508–09.

and (2) Aereo performs when it publicly displays “the same contemporaneous[] [programming to multiple people]” (*i.e.*, the public)—despite its “personal copies” assertion.⁴⁴ Therefore, Internet retransmission services, like Aereo, publicly perform when they retransmit copyrighted works. Absent a license from the proper rights holders, such retransmissions infringe the copyright holders’ rights.

In its opinion, the Supreme Court noted Aereo’s system bore an “overwhelming likeness to the cable companies targeted by the 1976 amendments” and stated an Internet-based service’s overall commercial objective is no different than a cable companies.⁴⁵ Further, at oral argument Justice Sonia Sotomayer stated, “I look at the definition of a cable company, and [Aereo] seems to fit.”⁴⁶ Using these comments, Aereo raised a new argument on remand in the SDNY: the comparisons laid out in the opinion and Justice Sotomayer’s statements held, or at the very least inferred, Aereo was a cable system.⁴⁷ In a short opinion, the court dismissed the notion that such statements or comments could have any legal effect and that the analogies made between cable systems and the CATV systems were only for the purposes of finding Aereo to publicly perform.⁴⁸ The court stated that simply because Aereo was found to perform publicly does not render it a cable system.⁴⁹

b. *Congress and the Copyright Office on the Compulsory License*

i. *Legislative Intent*

⁴⁴ *Id.* at 2506, 2510.

⁴⁵ *Id.* at 2508.

⁴⁶ Joe Mullin, *Analysis: New Motions Show Gaping Holes in Supreme Court’s Ruling*, ARS TECHNICA (Aug. 04, 2014, 4:52 PM), <http://arstechnica.com/tech-policy/2014/08/aereo-tells-court-its-bleeding-to-death-but-gets-no-relief/>.

⁴⁷ *ABC v. Aereo, Inc.*, 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at *17 (several other failed defenses were raised) (“*Aereo IV*”).

⁴⁸ *Id.* at *19–20 (“only the justices written opinions have the force of law”).

⁴⁹ *Id.* at *18.

Congress created § 111 to balance the societal benefits a cable system provides to the viewing public, with the security that must be honored and upheld with a copyright.⁵⁰ Further, Congress was aware of the impracticality of requiring a potential cable system to negotiate with every individual copyright owner it wished to retransmit.⁵¹ In order to address these competing interests, it created a statutorily defined royalty.⁵²

ii. *Copyright Office's Interpretation*

The Copyright Office does not believe Internet retransmission services should qualify for a compulsory license.⁵³ They consider some differences, such as the nature of delivery, to be fundamental and urge the withholding of a license.⁵⁴ Their principal concern, however, is whether Internet retransmissions can be controlled geographically.⁵⁵ The localization of transmissions serves several ends, such as allowing broadcasters to sell advertising space based on region and deliver content to viewers in different time zones appropriately.⁵⁶

The Copyright Office first examined the issue presented by Internet retransmission services in 1999, determining that it was too early to grant the services a compulsory license. In subsequent years, the Copyright Office has made clear its position that Internet retransmission services should not receive compulsory licenses.⁵⁷ However, when discussing “new distribution technologies” in a recent report, the Copyright Office included the following statement:

To be clear, the Office is not against new distribution models that use Internet protocol to deliver programming, but only opposes the circumstance where any online content aggregator would have the ability to use a statutory license to sidestep private agreements and free from any of the

⁵⁰ *Ivi II*, 691 F.3d at 281.

⁵¹ *See supra* Part II.a (The Copyright Act of 1976).

⁵² *See supra* Part II.a (The Copyright Act of 1976).

⁵³ Letter from J. Charlesworth, Copyright Office General Counsel (July 23, 2014), Pls.’ Appx. Ex. 1 at 3.

⁵⁴ Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000).

⁵⁵ Letter of Marybeth Peters, Register of Copyrights to the honorable Howard Coble (Nov. 10, 1999) (“Our principal concern is the extent to which Internet retransmissions of broadcast signals can be controlled geographically”).

⁵⁶ *Ivi II* 691 F.3d at 285.

⁵⁷ Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000)

limitations imposed on cable operators and satellite carriers by the Communications Act and the FCC's rules.⁵⁸

Additionally, the Office has acknowledged the issues presented by such an innovation are entangled with communications law and policy issues, the analysis of which is outside their expertise.⁵⁹

iii. *Current Ideology of the Compulsory License*

Internet retransmission services are not alone in being scrutinized by the Copyright Office; the Office actually has a longstanding opposition to the compulsory license itself.⁶⁰ The Copyright Office believes the compulsory license allows cable systems to carry local signals for a *de minimis* fee and that a government-administered license “prevents the marketplace from deciding the fair value of copyrighted works.”⁶¹ They see a better solution as allowing representatives from the several industries involved and the users to negotiate terms.⁶²

c. *Ivi II, FilmOn Cal, and FilmOn DC*

This section will discuss the systems and business model of the respective Internet retransmission systems of Ivi and FilmOn and will further unpack each court's analysis of the issue. Finally, it will situate the discussion within the greater, national context by examining one other case from the Southern District of New York (hereinafter the “SDNY”) where the same issue and argument took place.

i. *Ivi II*

⁵⁸ U.S. Copyright Office, *SHVERA Report* (2008) at 188.

⁵⁹ Copyright Office STELA Report (Aug. 29, 2011), Pls.' Appendix, Ex. 3 at 16.

⁶⁰ Statement of Marybeth Peters, Register of Copyrights, before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary (June 15, 2000)

⁶¹ *Id.*

⁶² *Id.*

Ivi's system worked like most cable systems because it captured and retransmitted broadcast signals from stations located across the country; the system differed from cable systems in two ways:

- (1) rather than being restricted to one's local market broadcasting, any Ivi subscriber was able to view, without altering their computer settings, live streams from any local station in New York, Los Angeles, Chicago, or Seattle;⁶³ and
- (2) Ivi's service did not comply with the applicable rules, regulations, or authorizations of the FCC.⁶⁴

After transmitting the signal to their subscribers, Ivi rendered the content unusable and prevented it from being viewed, captured, or passed along by its consumers.⁶⁵

To determine the statute's intent, *Ivi II* applied *Chevron* deference.⁶⁶ *Chevron* deference is generally warranted when an agency's interpretation of the statute is available, almost always through formal notice.⁶⁷ *Chevron* first requires the court to "consider whether Congress has clearly spoken on the issue."⁶⁸ If such intent is clear, no more analysis need be done, but if it appears ambiguous the court must turn to the legislative history to determine the statute's intent.⁶⁹ If still no affirmative intent can be gathered, step two instructs the court to "defer to an agency's interpretation of the statute, so long as it is reasonable."⁷⁰

⁶³ *Ivi II*, 691 F.3d at 282.

⁶⁴ *Ivi I*, 765 F. Supp. 2d at 599.

⁶⁵ *Id.* at 298.

⁶⁶ *Ivi II*, 691 F.3d at 279.

⁶⁷ *FilmOn DC*, 2015 U.S. Dist. LEXIS 161304, at *69 (citing *United States v. Mead Corp.*, 533 U.S. 218, 230–31 (2001)).

⁶⁸ *Ivi II*, 691 F.3d at 279 (citing *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 116 (2d Cir. 2007))

⁶⁹ *Ivi II*, 691 F.3d at 279.

⁷⁰ *Id.* (internal quotations omitted)

In applying step one, the court found Congress’s intent unclear.⁷¹ Specifically, the court could not conclude whether Ivi’s “service (1) *is or utilizes a ‘facility’* (2) that receives and retransmits signals (3) through [a prescribed communication channel].”⁷² Ivi attempted to fit within the definition of a cable system, arguing that it operated plainly a facility per the definition of a cable system; however, Ivi never “identified the location or nature of its facility.”⁷³

Since the court found § 111(f)(3) to be ambiguous, it looked to the legislative history and found that § 111’s intent was to address the issues of reception and remote access to broadcasting that supports localized, not nationwide, systems.⁷⁴ This analysis proscribed the compulsory license from applying to Ivi’s system because it provided nationwide service.⁷⁵ To remove any doubt about the validity of its interpretation of the statute, the court moved on to step two of the *Chevron* analysis and applied the Copyright Office’s interpretation of § 111 as it pertains to Internet retransmission services.⁷⁶ The court sided with the Copyright Office’s interpretation, finding it “reasonable and persuasive.”⁷⁷

ii. *FilmOn Cal*

Just prior to litigation, FilmOn employed two different retransmission systems: (a) a trailer system, and (b) a Lanner system.⁷⁸ The trailer system was largely similar to Aereo’s and was subsequently destroyed by FilmOn prior to litigation.⁷⁹ The Lanner system, on the other hand, features “a single master antenna placed on the roof of a commercial data center, which routes

⁷¹ *Id.* at 280.

⁷² *Id.* (emphasis added).

⁷³ *Id.* at 280 n.6.

⁷⁴ *See supra* Part II.a (The Copyright Act of 1976)

⁷⁵ *Ivi II*, 691 F.3d at 284.

⁷⁶ *Id.* at 283.

⁷⁷ *Id.* at 284. *See supra* Part II.b (ii).

⁷⁸ *FilmOn Cal*, 115 F. Supp. 3d at 1156.

⁷⁹ *Id.* at 1158 n.7.

signals to an antenna box where the signals are amplified and captured by small antennas.”⁸⁰ The user then selects a program to watch from a list on FilmOn’s website and that program is transmitted to their computer via FilmOn’s servers via the Internet.⁸¹ As a way of managing a subscriber’s access to their respective local channels, FilmOn processes its subscribers’ requests from a *local facility* within a subscriber’s region.⁸² In anticipation of their case in the Ninth Circuit, FilmOn also modified their system to enhance their localization services by requiring: (1) a user’s credit card address and (2) a viewing device to be in the market area of which it was receiving.⁸³ FilmOn’s system also employs a security measure in the form of an “encryption token” that ensures the user with the authorized IP address is the only one able to access the broadcast stream.⁸⁴

FilmOn, unlike Ivi, focused its arguments and efforts leading up to litigation on closing the alleged gap between a more traditional cable system and their system:

- (1) FilmOn restarted their operations as a Multichannel Video Programming Distributor to better fit within the FCC regulations;⁸⁵
- (2) FilmOn announced—and continues to express—their willingness and ability to comply with all applicable regulations, including FCC ones;⁸⁶ and
- (3) FilmOn’s system employs several localization safeguards to ensure subscribers are viewing only their local markets.⁸⁷

⁸⁰ *Id.* at 1156.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at *9–10.

⁸⁴ *Id.* at 1157.

⁸⁵ *Id.* at 1159 (“a multichannel video programming distributor (MVPD) is any person such as . . . a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming”).

⁸⁶ *Id.* at 1170.

⁸⁷ *Id.* at 1156–58.

Proving their eagerness to operate accordingly, FilmOn mailed over a hundred letters to broadcasters requesting knowledge of whether the broadcasters would elect “must-carry” status as required by FCC regulations.⁸⁸ Additionally, per the Copyright Office’s compulsory license requirements, FilmOn submitted to them their statements of accounting and paid corresponding fees.⁸⁹

Breaking from *Ivi II*, the court in *FilmOn Cal* did not inquire into the legislative history or move onto the second step of *Chevron* because it did not have the same questions as *Ivi II*, determining Congress’s definition of a cable system to be clear.⁹⁰ Namely, Judge Wu did not probe whether the Internet is a facility.⁹¹ The buildings located wholly in particular states and host FilmOn’s retransmitting antennas are the facilities.⁹² Before any content is retransmitted, these physical facilities receive the broadcasters’ signals.⁹³ From there the content it retransmitted via “wires, cables, microwave, or other communication channels to the corresponding subscribers.”⁹⁴ Therefore, per the Copyright Act’s definition of a cable system, FilmOn maintains and controls the facilities that are used for the retransmissions and the operation that in fact *precedes* the Internet in FilmOn’s scheme.⁹⁵ The court went on to distinguish *Ivi II* by determining the terms “headends” and “contiguous communities” do not have any bearing on the definition of a cable system, but “merely provide[] that certain commonly owned cable systems will be treated as a single system for purposes of computing a royalty.”⁹⁶ As such, due to the unambiguous, express

⁸⁸ *Id.* at 1159.

⁸⁹ *Id.* at 1159 (during this period FilmOn failed to pay royalties to the opposing parties involved in this matter).

⁹⁰ *Id.* at 1167 (“[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case”).

⁹¹ *Id.*

⁹² *Id.* at 1167 (adding that the Copyright Office employed a “strange reading of the words ‘facility’ and ‘communications’ channel,” and that *Ivi II*’s reading of § 111 was “overly narrow”).

⁹³ *Id.*

⁹⁴ *Id.* at *40.

⁹⁵ *Id.* at 1167–68 (emphasis added).

⁹⁶ *Id.* at 1168.

language of Congress, the court stopped at the first step of *Chevron* deference, deciding that FilmOn was a cable system and therefore entitled to a compulsory license granted under § 111.⁹⁷ No legislative history analysis or agency deference would be necessary as stipulated through *Chevron* deference.⁹⁸

iii. *FilmOn DC*

Less than five months after Judge Wu’s decision, *FilmOn DC*, a concurrent case involving the same parties as *FilmOn Cal* and over the same matter, concluded, but reached a different result—while the verdict had the same overall outcome as *Ivi II*, the DC court’s analysis was different.⁹⁹ The court first held that FilmOn’s reliance on the Internet rendered it incapable of being a cable system under § 111(f)(3) because its physical facilities first retransmit the signals to Internet service providers, as opposed to the subscribers directly.¹⁰⁰ Despite the fact that FilmOn’s system uses “cables, wires, and microwaves,” it involves a process that utilizes “a global network of interconnected computers.”¹⁰¹ The court interpreted § 111(f)(3) to read, “any system that fails to encompass the distribution medium and does not retransmit the signals directly to the subscriber does not qualify as a cable system.”¹⁰² Since FilmOn does not control the entirety of its retransmissions path to subscribers it is not a cable system.¹⁰³ Specifically, the court found Internet retransmission systems differ from the cable systems in 1976 that “controlled the entire transmission path leading directly to the subscribers.”¹⁰⁴

⁹⁷ *Id.* at 1171.

⁹⁸ *Id.* at 1166.

⁹⁹ *FilmOnDC*, 2015 U.S. Dist. LEXIS 161304, at *55.

¹⁰⁰ *Id.* at *54

¹⁰¹ *Id.*

¹⁰² *Id.* at *55.

¹⁰³ *Id.* at *55.

¹⁰⁴ *Id.* *57–58 (“The Internet also relies on multiple other types of distribution media, such as satellite, cellular networks, and wifi”)

The court also denied the language, “or other communications channels” in § 111(c) expressed Congress’s intent for the compulsory license to encompass evolving technologies.¹⁰⁵ The court cited the ancient canon *eiusdem generis*, which “teach[es] that when a statute sets out a series of specific items ending with a general term, that general term is confined to covering subjects comparable to the specifics it follows.”¹⁰⁶ The court concluded that the Internet is not similar to or of the same kind as “wires, cables, or microwave” because it “operates through nebulous international connections in cyberspace thus not constituting a ‘channel’ similar to ‘wires, cables or microwave.’”¹⁰⁷

Additionally, the court broke from *Ivi II* by denying to apply *Chevron* deference due to the absence of any formal rulemaking by the Copyright Office.¹⁰⁸ Instead, the DC court applied *Skidmore* deference.¹⁰⁹ When determining whether to apply *Skidmore* deference, courts must “look to the degree of [an] agency’s care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency’s position.”¹¹⁰ The court found that the Copyright Office has consistently interpreted § 111(f)(3) to deny Internet retransmission services are cable systems because they are not “an inherently localized transmission media of limited availability.”¹¹¹ The court found this interpretation “persuasive because it is grounded in the statute’s text and legislative history,” and, therefore, allowed *Skidmore* deference to be applied.¹¹² Due to the

¹⁰⁵ *Id.* at *60–61.

¹⁰⁶ *Id.* at 61.

¹⁰⁷ *Id.* (brackets omitted). The court also refused a broad interpretation because it may violate international obligations. *Id.* at *65.

¹⁰⁸ *Id.* at *69–71 (“the Court will not apply *Chevron* deference in the absence of formal rulemaking here because the Copyright Office issued regulations after notice-and-comment in other situations, such as those concerning satellite carriers”)

¹⁰⁹ *Id.* at *71.

¹¹⁰ *Id.* at *71.

¹¹¹ *Id.* at *75–76.

¹¹² *Id.* at *75–76.

Internet’s worldwide capabilities, the court held FilmOn’s system is not inherently localized and is inconsistent with the Copyright Office’s interpretation.¹¹³

d. Other Similar Cases

i. *FilmOn SDNY*

Following *Aereo III*, FilmOn relied on the comparisons made by the Supreme Court between the traditional cable systems in *Fortnightly* and *Teleprompter* and Internet retransmission systems, arguing that in light of such comparisons, FilmOn qualifies as a cable system.¹¹⁴ The court disagreed, holding FilmOn placed “too much importance” on the Supreme Court’s cable system analogies, and that such analogies were “not the same as a judicial finding” that *Aereo* is a cable system.¹¹⁵ Further, the court relied on its precedent from *Ivi II*.¹¹⁶

e. Current State of the Law

Unlike with the satellite carriers, Congress has yet to codify a statutory provision for Internet-based retransmission services, despite several courts litigating the issue.¹¹⁷ In addition, despite the well-documented history of displeasure from the Copyright Office,¹¹⁸ the compulsory license remains an integral part in providing broadcasting to the public and continues to be relied upon for business arrangements. This leaves Internet TV with nowhere to turn but the courts in their fight to provide the public with a new, yet familiar way to consume broadcasting.

i. *FCC Taking Sides?*

¹¹³ *Id.* at *78.

¹¹⁴ *CBS Broad., Inc. v. FilmOn.com* (“*FilmOn SDNY*”), 10 Civ. 7532 (NRB), 2014 U.S. Dist. LEXIS 101894, at *9 (S.D.N.Y. July 24, 2014).

¹¹⁵ *Id.* at *11

¹¹⁶ *Id.* at *12

¹¹⁷ *Ivi I*, 765 F. Supp. 2d at 616.

¹¹⁸ *See supra* Part II.b (iii)

The FCC is in the process of creating a proposal to determine whether Internet-based services qualify as “multichannel video programming distributors” (hereinafter “MVPD”) under communications law.¹¹⁹ The FCC Chairman summarized the proposed regulations:

With this Notice of Proposed Rulemaking, the Commission moves to update the Commission’s rules to give video providers who operate over the internet—or any method of transmission—the same access to programming that cable and satellite operators have. *Big company control over access to programming should not keep programs from being available over the Internet.*¹²⁰

The proposal would widen the FCC’s interpretation of MVPD to include any technology that provides a linear stream or programming (*i.e.*, services that provide scheduled TV programming without DVR systems).¹²¹ Therefore, the outcome of this proposal may very well decree Internet retransmission services compatible with FCC regulations. In *FilmOn Cal* Judge Wu acknowledged this, but stated the notice would not affect his decision.¹²²

III. ANALYSIS

This section will set out the arguments for why the Ninth Circuit should affirm its district court’s decision holding FilmOn’s Internet retransmission service to be a cable system for purposes of § 111 of the Copyright Act. First, the application of *Chevron* deference in *Ivi II* is misapplied because it is not at all obvious that that style of deference was warranted as the opinion’s missing analysis would have you believe, and if any agency deference were to be applied, the Copyright Office’s reasoning does not apply to FilmOn because FilmOn’s system answers their primary concerns about Internet retransmission services.¹²³ Second, Judge Wu provided a straightforward, fair reading of § 111(f)(3) and correctly determined FilmOn’s Internet-based service fits well

¹¹⁹ Notice of Proposed Rulemaking (hereinafter “NPM”), In the Matter of Promotional Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, FCC 14-210 (Dec. 19, 2014) (emphasis added).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *FilmOn Cal*, 115 F. Supp. 3d at 1170.

¹²³ *See infra* Part III.a.

within it.¹²⁴ Finally, the Ninth Circuit should take notice of the several analogies made between Internet retransmission systems and cable systems throughout the several Internet TV opinions; while it may not definitively show that the systems are cable systems, it provides further evidence of their striking similarities.¹²⁵

a. Agency Deference

i. *The Second Circuit's Misapplication of Chevron Deference*

By applying *Chevron* deference, *Ivi II* held that Ivi was not a cable system by looking at the legislative history of the compulsory license and definition of a cable system.¹²⁶ To begin this analysis, the Second Circuit stated, “[T]he Copyright Office . . . has spoken on the issue of whether § 111’s compulsory licenses extend to Internet retransmissions. Accordingly, we utilize [*Chevron* deference].”¹²⁷ This bare assertion, however, is not a correct analysis of the law because *Chevron* deference is not simply warranted merely by an agency’s interpretation through administrative statements.¹²⁸ The scope of when *Chevron* deference may be applied has been limited by recent decisions.¹²⁹ Generally, interpretations that lack the force of law do not warrant *Chevron* deference (*e.g.*, opinion letters, policy statements, agency manuals).¹³⁰ Even though the absence of a final regulation is not necessarily determinative, “the overwhelming number of cases [that have applied] *Chevron* deference have reviewed the fruits of notice and comment rulemaking or formal adjudication.”¹³¹

¹²⁴ See *infra* Part III.b(i).

¹²⁵ See *infra* Part III.b(ii).

¹²⁶ *Ivi II*, 765 F. Supp. 2d at 289 (emphasis added).

¹²⁷ *Id.* at 279 (emphasis added).

¹²⁸ *FilmOnDC*, 2015 U.S. Dist. LEXIS 161304, at *68–69.

¹²⁹ *Id.*

¹³⁰ *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹³¹ *FilmOn DC*, 2015 U.S. Dist. LEXIS 161304, at *69 (citing *Mead*, 533 U.S. at 219) (quotation marks omitted).

The Copyright Office, although consistently opining that Internet retransmission services are not entitled to compulsory licensing, has never issued regulations formally on the matter.¹³² Its position comes from a collection of statements, policy documents, and congressional testimonies.¹³³ Having to speculate why the Second Circuit did what it did, *FilmOn DC* refused to follow *Ivi II* due to the Second Circuit’s failure to explain why *Chevron* deference was warranted.¹³⁴ While the absence of a final regulation may not be determinative, “the Copyright Office [has] issued [formal] regulations . . . in other [similar] situations, such as those concerning satellite carriers,” but clearly refused here despite their continuing statements on the matter.¹³⁵

Ivi II was as much an administrative law decision as it was a copyright law one. Given the Copyright Office’s longstanding opposition to Internet retransmission systems, and the compulsory license in general, it is no surprise that the Second Circuit ruled against Internet retransmission systems. *Chevron* deference should not have been applied in *Ivi II* because of the lack of formal rulemaking from the Copyright Office.

ii. *Eliminating the Copyright Office’s Concerns*

Although *Ivi II* and *FilmOn DC* did not apply the same degree of deference, the two courts still utilized the same set of facts and opinions expressed by the Copyright Office. The Office’s stance on the issue expressly rejects the idea that a service such as FilmOn could constitute a cable system.¹³⁶ Utilizing *Chevron* deference, *Ivi II* adopted this interpretation, while *FilmOn DC* employing, *Skidmore* deference, acknowledged the Office’s views were persuasive.¹³⁷

¹³² *Id.* at *69.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at *69–71.

¹³⁶ *See supra* Part II.b(ii).

¹³⁷ *FilmOnDC*, 2015 U.S. Dist. LEXIS 161304, at *80–81.

The Copyright Office’s interpretation of § 111, supports the notion to qualify for a compulsory license, a cable system must retransmit localized content.¹³⁸ While there should be no doubt to this, this was a major concern in *Ivi II* because Ivi’s service was not at all localized, allowing for a subscriber in New York to stream a Seattle broadcast.¹³⁹ FilmOn, however, is the catalyst in this equation because, unlike Ivi, FilmOn fully supports localization and plans to prove that their system is capable of retransmitting localized broadcasts to the appropriate subscribers within their specific region.¹⁴⁰ As noted by *FilmOn Cal* and *FilmOn DC*, FilmOn has implemented several measures to ensure their retransmissions are properly localized.¹⁴¹ Therefore, the Copyright Office’s geographical concern with Internet retransmission services in general, as cited by the *Ivi II* and *FilmOn DC* decisions, will not apply to FilmOn so long as FilmOn can show on appeal their service’s proficient localization measures.¹⁴²

Another attribute of § 111 is that its “operation . . . hinge[s] on the FCC rules regulating the cable industry.”¹⁴³ Similar to the above analysis, FilmOn is not arguing that they will not or cannot comply with FCC regulations, as Ivi did.¹⁴⁴ Instead, FilmOn understands the importance of compliance and has expressed its willingness and capability to observe all appropriate FCC regulations.¹⁴⁵ Additionally, the Copyright Office has given compulsory licenses to similar Internet retransmission companies like AT&T U-Verse and Verizon Fios, which are not subject to the Communications Act.¹⁴⁶ Finally, the FCC is in the process of creating a proposal that would

¹³⁸ See *supra* Part II.b(ii).

¹³⁹ See *supra* Part II.b(ii).

¹⁴⁰ See *supra* Part II.c(i).

¹⁴¹ See *supra* Part II.c(iii).

¹⁴² *FilmOn Cal*, 115 F. Supp. 3d at 1171.

¹⁴³ *Ivi II*, 691 F.3d at 284.

¹⁴⁴ *FilmOn Cal*, 115 F. Supp. 3d at 1170.

¹⁴⁵ *Id.*

¹⁴⁶ The FCC governs those subject to the Communications Act.

allow Internet retransmission services to fall within their regulation.¹⁴⁷ Despite opposition from many of the same plaintiffs in the FilmOn and Ivi cases, FCC Chairman Tom Wheeler has recently advocated to expand the definition of a cable system from the traditional definition utilized by the FCC, to allow for a more competitive market.¹⁴⁸

b. *If It Walks Like a Duck . . .*

The Ninth Circuit should affirm the District Court’s decision, holding FilmOn to be a cable system under the Copyright Act because FilmOn operates physical facilities that receive broadcaster signals and retransmit those signals; this is to say that the Internet is not the receiving “facility,” per § 111(f)(3). Additionally, providing some clarity to a controversial question, FilmOn and its competitors mirror cable systems in seemingly every way.¹⁴⁹

- i. *“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”*¹⁵⁰

Applying the definition of a cable system, *Ivi II* and *FilmOn DC* both stopped at the same inquiry: Is the Internet a facility?¹⁵¹ *Ivi II* left its inquiry at “unclear,” but acknowledged that the Internet is not a “tangible entity” that is required of a physical facility.¹⁵² *FilmOn DC* stated the Internet could not be a facility as defined by § 111(f)(3).¹⁵³

¹⁴⁷ See *supra* Part II.e.

¹⁴⁸ See *supra* Part II.e.

¹⁴⁹ See *infra* Part III.a (2)

¹⁵⁰ *Chevron, U.S.A., Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 841–43 (1984).

¹⁵¹ See *Ivi II*, 691 F.3d at 280; *FilmOnDC*, 2015 U.S. Dist. LEXIS 161304, at *53.

¹⁵² *Ivi II*, 691 F.3d at 280 (“[the Internet] is neither a physical nor a tangible entity; rather, it is ‘a global network of millions of intercneced computers.’” (Citations omitted)).

¹⁵³ *FilmOnDC*, 2015 U.S. Dist. LEXIS 161304, at *53.

The definition of a cable system on its face requires: (1) there to be a facility that “receives” the broadcasters’ signals; (2) that that facility be located in a state or territory; and (3) that the facility retransmit the signals via “wires, cables, microwaves, or other communication channels to subscribing members of the public.” The definition does not limit cable systems to those that “encompass the distribution medium,” nor does it require a system’s retransmissions be “direct.”¹⁵⁴

FilmOn Cal—rather than “focus[ing] on the mysterious ‘ether’” (a/k/a the Internet)—simply found that FilmOn’s “antennas, located in particular buildings wholly within particular states,” are the receiving facilities in accordance with § 111(f)(3).¹⁵⁵ These facilities then retransmit the signals through familiar means, such as “wires, cables, microwave, or other communication channels.”¹⁵⁶ Therefore, the Internet is not the facility here.¹⁵⁷ As *FilmOn Cal* observed, all of the electrical instrumentalities—which FilmOn has control over and operates—precede the Internet in its operation.¹⁵⁸ Therefore, applying § 111’s definition of a cable system to the facts, FilmOn’s operational facilities receive the signals, are physically located in several states, and retransmit the signals through a prescribed communication channel to a localized geographical region. Additionally, despite what *FilmOn DC* held, § 111(f)(3) makes no mention of a requirement for signals to directly retransmit to subscribers.¹⁵⁹ Furthermore, even if legislative history purports otherwise, that history was broken when AT&T Uverse and Verizon Fios were granted a § 111(c) compulsory license because they use the Internet.

Next *Ivi II* and *FilmOn DC*, agreeing with the Copyright Office, stated the terms “headends” and “contiguous communities,” found in the second sentence of the cable system

¹⁵⁴ *Id.* at *55

¹⁵⁵ *FilmOn Cal*, 115 F. Supp. 3d at 1167–68.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1167.

¹⁵⁸ *Id.* at 1167–68.

¹⁵⁹ *See* 17 U.S.C. § 111(f)(3) (2015).

definition, evinced a localized service and not a nationwide one; providing further proof that Internet-based retransmission services system are not cable systems.¹⁶⁰ This should not affect the Ninth Circuit’s determination because: (1) as Judge Wu held, the second sentence of the definition of cable system is intended to distinguish “larger [cable] system[s] for purposes of the royalty determination,” instead of modifying the definition of cable systems; and (2) even if we were to accept this reading, FilmOn’s service still fits within it so long as localization safeguards exist.¹⁶¹ To the first point, larger cable systems are treated as a single one to ensure they may contribute larger per-subscriber royalty payments—this is the extent of this sentence’s purpose.¹⁶² To the latter point, FilmOn has recently implemented a litany of localization measures and Judge Wu granted them the opportunity to display such safeguards on appeal.¹⁶³ So long as they do so, FilmOn will have removed its service from the likes of national ones (e.g. satellites, Aereo, and Ivi) and rendered itself compatible with the localized intent of § 111.

ii. Likened to Cable Systems

It is not uncommon for a company to often be involved in reoccurring litigation with the same issue or entity. Several overlapping broadcasting companies were Internet TV’s adversaries in the FilmOn, Aereo, and Ivi cases. Aereo’s litigation dealt with a separate issue: whether an Internet retransmission service publicly performs.¹⁶⁴ Throughout *Aereo III* the Supreme Court made undeniable comparisons between Aereo’s system and the traditional cable systems.

The Supreme Court in *Aereo III* explicitly related Aereo to cable systems in its opinion.¹⁶⁵ First, after analyzing the history of the copyright act and compulsory license, the Court noted

¹⁶⁰ *Ivi II*, 691 F.3d at 284.

¹⁶¹ *FilmOn Cal*, 115 F. Supp. 3d at 1167–68

¹⁶² *Id.*

¹⁶³ *Id.* at *50–51.

¹⁶⁴ *Aereo III*, 134 U.S. at 2511.

¹⁶⁵ *See, e.g., id.* at 2506 (“[A]n entity that acts like a CATV system itself performs.”); (“Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.”); *Id.* at 2510 (“For

Aereo's activities were "substantially similar" to traditional cable systems.¹⁶⁶ Immediately following this sentence the Supreme Court cited a House Report, which stated a cable system's main operation is "based on the carriage of copyrighted program material."¹⁶⁷ Second, the Supreme Court noted any technological differences between Aereo's system and cable systems—not just traditional cable systems—did not distinguish Aereo's system in general, its commercial objective, nor its subscribers' viewing experience.¹⁶⁸

FilmOn SDNY and *Aereo IV* dismissed the argument that such remarks by the Supreme Court established Internet retransmission services as cable systems.¹⁶⁹ The courts were correct that this was not the holding in *Aereo III* and the respective Internet retransmission companies were misguided to only argue this, however, to dismiss the Supreme Court's unambiguous analogies would be another kind of fallacy. The courts limited the quotes to only bear on the issue of public performance for purposes of the Transmit Clause, but their words and placement may suggest more. Firstly, the court in *Aereo IV* mischaracterized the analogies as only pertaining to traditional cable systems because the second example in the preceding paragraph describes an instance where the Supreme Court relates it to cable systems in general; cable systems commercial objective; and the eventual subscriber viewing experience.¹⁷⁰ In examining the Transmit Clause, the Supreme Court made clear the general operation of a cable system is no different than Internet retransmission systems. This is to say that Aereo, and by comparison other Internet TV systems,

one thing, the history of cable broadcast transmissions that led to the enactment of the Transmit Clause informs our conclusion that Aereo "perform[s]").

¹⁶⁶ *Aereo III* at 2506, 2510.

¹⁶⁷ *Id.*

¹⁶⁸ *Aereo III* at 2508 ("[The technological differences] do not render Aereo's commercial objective any different from that of *cable companies*. Nor do they significantly alter the viewing experience of Aereo's subscribers")

¹⁶⁹ *Aereo IV*, 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at *19-20.

¹⁷⁰ *Aereo III*, 134 U.S. at 2508.

communicate retransmissions to subscribers analogous to those cable systems already entitled to compulsory licensing.

Furthermore, the antagonistic broadcast companies even argued in *Aereo II* “that Aereo’s [re]transmissions of broadcast television programs . . . are analogous to the retransmissions of network programming made by cable systems.”¹⁷¹ The broadcasters would go on to declare Aereo’s system was “functionally equivalent to a cable television provider.”¹⁷² Given the analogies made by the Supreme Court and the broadcast companies, once FilmOn is able to display its improved localization safeguards and comply with applicable regulations, what more bridges need be gapped to show it is a cable system? Indeed an implication is not a holding, but it is a significant connection that the Ninth Circuit should take notice of in its impending decision.

IV. CONCLUSION

The *Ivi II*, *FilmOn Cal*, and *FilmOn DC* decisions provide insight to how one statute can be interpreted several different ways. The decision can become more confusing when legislative history from 40 years ago and an agency’s opinion enter the fray. *FilmOn Cal* establishes the best, clear-cut interpretation of § 111. By reading the statute for what it is and correctly refraining from the Copyright Office’s discouraging opinion, Judge Wu was able to correctly determine that FilmOn’s system is a cable system within the definition and would be entitled to a compulsory license following a display of its improved measures.

¹⁷¹ *WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676, 686 (2d Cir. 2013).

¹⁷² *Id.* at 693.