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Raquel Doering

I. INTRODUCTION

On December 19, 2014, the FCC released a notice of proposed rule making (NPRM), which tentatively concluded to define online video program distributors providing linear streams of programming as multichannel video programming distributors (MVPDs) under the Communications Act.¹ The FCC claims the change will insure that MVPDs have nondiscriminatory access to programming.² However, the new definition does not offer MVPDs eligibility for Section 111 compulsory licenses.³ Section 111 compulsory licenses are tools online video providers have been battling for in the courtroom.⁴

The 1976 Copyright Act adopted the Section 111 compulsory licenses for cable systems.⁵ In 2012, the Second Circuit's *ivi II* decision held that Internet retransmission services did not constitute cable systems under Section 111 and therefore, were not entitled to Section 111 compulsory licenses.⁶ In *Fox TV Stations, Inc. v. AereoKiller* (more commonly known as *Fox v. FilmOn*), decided on July 16, 2015, Judge Wu of United States District Court for the Central District of California interpreted Section 111 as allowing FilmOn, an online streaming service, to

¹ Robyn Polashuk, *Inside FCC Proposal To Regulate Online Video Distributors*, LAW360 (Sept. 18, 2015), https://www.cov.com/~media/files/corporate/publications/2015/02/inside_fcc_proposal_to_regulate_online_video_distributors.pdf.

² John Eggerton, *NCTA: FCC Can't Redefine OVDs as MVPDs*, Multichannel News (Apr. 3, 2015), <http://www.multichannel.com/news/technology/ncta-fcc-cant-redefine-ovds-mvpds/389403>.

³ Polashuk, *supra* note 1.

⁴ See *Fox TV Stations, Inc. v. AereoKiller*, No. CV 12-6921-GW(JCx), 2015 U.S. Dist. LEXIS 97305 at *36-37, 50 (C.D. Cal. July 16, 2015).

⁵ *Fox TV Stations, Inc. v. AereoKiller*, No. CV 12-6921-GW(JCx), 2015 U.S. Dist. LEXIS 97305 at *19-20 (C.D. Cal. July 16, 2015).

⁶ *Id.* at 36-37 (citing *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 277-80 (2d Cir. N.Y. 2012)).

be eligible for a Section 111 compulsory license.⁷ In *Fox Television Stations, Inc. v. FilmOn X LLC*, decided on December 2, 2015, Judge Collyer of the District Court of the District of Columbia held that FilmOn X was not entitled to a Section 111 compulsory license.⁸

While the Supreme Court decided *Aereo III* in 2014, the decision is not on point.⁹ The legal issues in *Fox v. FilmOn* are close and have significant commercial importance and Judge Wu disagrees with the Second Circuit's decision in *ivi II*.¹⁰ As a result, Judge Wu authorized an immediate appeal to the Ninth Circuit.¹¹ The *FilmOn* case from the District Court of the District of Columbia was not yet decided when Judge Wu made his July ruling.¹²

This Note is divided into five parts. Part I of this Note serves as the Introduction. Part II of this Note covers a brief history of the Copyright Act and highlights the two portions, which are crucial to the Note's argument: (1) the Transmit Clause and (2) the Section 111 Compulsory license. Part III analyzes the current circuit splits regarding the entitlement of Section 111 licenses for online video program distributors. While the Second Circuit and District of Columbia assert online video program distributors are not entitled to Section 111 compulsory licenses, the District of Central California holds that online video program distributors fit under Section 111's definition of a cable system and may obtain compulsory license, as long as they comply with the other provisions in the section. Part IV discusses the Federal Communications Commission's attempts to regulate online video program distributors. Part V serves as the conclusion.

⁷ *Fox TV Stations*, 2015 LEXIS 97305 at *50.

⁸ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052, at *2 (D.D.C. Dec. 2, 2015).

⁹ *Fox TV Stations*, 2015 U.S. Dist. LEXIS 97305 at *27.

¹⁰ *Id.* at 50.

¹¹ *Id.*

¹² *Fox TV Stations*, 2015 WL 7761052, at *2.

In this Note, I will argue that Judge Wu’s interpretation of Section 111 is correct and that online video program distributors should be eligible for Section 111 compulsory licenses, if they so chose and follow the requisite requirements. Further, I will establish that the FCC proposed changes for online streaming services are unnecessary, unhelpful, and premature. Ultimately, it will be up to Congress to enact legislation for online streaming services once the industry has had more time to develop and thrive.

II. A BREIF HISTORY OF THE 1976 COPYRIGHT ACT

A. Pre-Section 111

In 1968, the Supreme Court decided *Fortnightly Corp.*¹³ The cable system in question included antennas on hills with connecting cables on utility poles.¹⁴ The cables carried the antenna’s signals to the television sets of the subscribers.¹⁵ The Court held that the cable system did not infringe on the copyright holder, because the system “no more enhance[d] the viewer’s capacity to receive the broadcaster’s signals” and operated no differently than if the individual erected his own antenna and strung his own cables.¹⁶

In 1974, the Supreme Court decided *Teleprompter Corp.*¹⁷ By this time, cable systems were originating their own programs, selling commercials, and interconnecting with other cable television systems.¹⁸ Such advancements permitted cable systems to compete with broadcasters for the television market. Nonetheless, the Court still held cable systems to be non-infringing.¹⁹ The Court recognized that the changes and expansions occurring in the industry could not be controlled through “litigation based on copyright legislation enacted . . . when neither broadcast

¹³ *Id.* at 17.

¹⁴ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 392 (U.S. 1968).

¹⁵ *Id.*

¹⁶ *Id.* at 399-400.

¹⁷ *Fox TV Stations*, 2015 LEXIS 97305 at *18.

¹⁸ *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394, 405 (U.S. 1974).

¹⁹ *Id.*

television nor CATV was yet conceived.”²⁰ Rather, Congress needed to regulate the industry to accommodate the changes and expansions.²¹

B. Enactment of the Copyright Act of 1976

Congress responded to the *Teleprompter Corp.* Court’s comment by enacting the 1976 Copyright Act.²² The 1976 Act superseded the Copyright Act of 1909 and became fully effective on January 1, 1978.²³ Two portions of the 1976 Copyright Act are particularly relevant to this note: (1) the Transmit Clause and (2) the Section 111 Compulsory license.

First, the 1976 Act implemented the Transmit Clause, which defines a public performance as “to transmit or otherwise communicate a performance . . . of the [copyrighted] work . . . to the public, by means of any device or process, whether the members of the public capable of receiving the performance . . . receive it in the same place or in separate places and at the same time or at different times.”²⁴

Second, the 1976 Act adopted the Section 111 compulsory license for cable systems.²⁵ The Act defined a cable system as, “a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”²⁶

²⁰ *Id.* at 414.

²¹ *Id.*

²² *Fox TV Stations*, 2015 LEXIS 97305 at *18.

²³ UNITED STATES COPYRIGHT OFFICE: GENERAL GUIDE TO THE COPYRIGHT ACT (Sept. 1977), <http://copyright.gov/reports/guide-to-copyright.pdf>.

²⁴ *Fox TV Stations*, 2015 WL 7761052, at *2.

²⁵ *Fox TV Stations*, 2015 LEXIS 97305 at *18.

²⁶ 17 USCS § 111.

The current litigation regarding online video program distributors concentrates on the interpretations and applications of the Transmit Clause and the Section 111 Compulsory License of the 1976 Copyright Act.²⁷ This is not the first time the courts and Congress have been challenged with the interpretations and applications of these two clauses.²⁸ In the 1980s and 1990s, satellite retransmission posed similar issues for the courts and Congress.²⁹

C. Additional Legislation for New Forms of Broadcast Retransmission

Several years after the enactment of the Copyright Act of 1967, satellite retransmission and the accompanying changes and expansions presented issues for the application of the Copyright Act of 1967.³⁰ In 1988, the United States District Court of the Northern District of Georgia held that a satellite broadcaster was not entitled to the Section 111 compulsory license.³¹ Since that decision, the courts and Congress battled as to whether satellite broadcasters were entitled to Section 111 compulsory licenses for over a decade.³² In 1991, the Copyright Office even promulgated regulations denying satellite broadcasters the right to Section 111 licenses.³³

In 1999, Congress enacted Section 122, which authorized satellite carriers to retransmit local broadcast programming back into a local market.³⁴ Section 122 has been amended five times with the latest amendment issued in 2014.³⁵

Although satellite retransmission is not at issue in this Note, Section 122's enactment is mentioned to illustrate the trajectory of a new form of technology, other than cable, from

²⁷ See generally *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275 (2d Cir. 2012); *Fox TV Stations*, 2015 LEXIS 97305; *Fox TV Stations*, 2015 WL 7761052.

²⁸ *Fox TV Stations*, 2015 LEXIS 97305 at *21-25.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 21.

³² *Id.* at 21-25.

³³ *Fox TV Stations*, 2015 LEXIS 97305 at 22.

³⁴ *Id.* at 21-25.

³⁵ *Id.* at 25.

technological inception to Congressional regulation.

This brief history of the 1976 Copyright Act, including its enactment and application and treatment in the courtroom, sets the foundation for the arguments in this Note.

III. CURRENT SECTION 111 LITIGATION AND THE CIRCUIT SPLITS

Currently, online video program distributors are fighting for entitlement to Section 111 compulsory licenses in response to copyright infringement suits filed against them by various television, film, and productions companies.³⁶ In *WPIX, Inc. v. IVI, Inc.* (more commonly known as the *ivi II* decision), the Second Circuit held that Internet retransmission services were not entitled to Section 111 compulsory licenses.³⁷ In the District of Columbia *FilmOn* decision, Judge Collyer agrees with the Second Circuit.³⁸ In the District of Central California *FilmOn* decision, Judge Wu's interpreted Section 111 as allowing FilmOn to be eligible for compulsory licenses.³⁹ While the Supreme Court decided *Aereo III*, which had to do with an online streaming service, it is not on point and does not reconcile the circuit split.⁴⁰

At issue in *Aereo III* was the Transmit Clause and whether the online streaming services are infringing on the broadcasters' right to public performance.⁴¹ The circuit split at issue in this Note revolves around whether the streaming services in the *ivi* decision, District of Central California District Court *FilmOn* decision, and the District of Columbia District Court *FilmOn* decision should have been entitled to Section 111 compulsory licenses.

A. The Second Circuit's *ivi* Decision

³⁶ See generally *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275 (2d Cir. 2012); *Fox TV Stations*, 2015 LEXIS 97305; *Fox TV Stations*, 2015 WL 7761052.

³⁷ *WPIX, Inc. v. IVI, Inc.*, 691 F.3d 275, 284-85 (2d Cir. 2012).

³⁸ *Fox TV Stations*, 2015 WL 7761052, at *24.

³⁹ *Fox TV Stations*, 2015 LEXIS 97305 at *50.

⁴⁰ *Id.* at 27.

⁴¹ *Id.* at 26-27.

In the *ivi* cases, plaintiffs-appellees, the producers and owners of copyrighted television programming, sued defendants-appellants *ivi, Inc.* and its Chief Executive Officer for streaming plaintiff's copyrighted television programming over the Internet live without their consent.⁴² At issue was whether *ivi* constituted a cable system under Section 111.⁴³ If the Second Circuit were to answer that question in the affirmative, *ivi* had a statutory defense to plaintiff's claims of copyright infringement, and *ivi* was entitled to a compulsory license to continue retransmitting plaintiff's programming.⁴⁴

To decide the issue, the Second Circuit utilized the two-step process outlined in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*⁴⁵ First, the court must consider whether Congress has clearly spoken on the issue of Internet retransmission in Section 111.⁴⁶ If Congress's intent is clear, courts "must give effect to the unambiguously expressed intent of Congress."⁴⁷ Second, if Congress has not specifically addressed the question at bar, the court may "defer to an agency's interpretation of the statute, so long as it is 'reasonable.'"⁴⁸

First, in order to determine whether Congress had directly spoken on the issue of Internet retransmission, the Second Circuit analyzed the congressional intent behind the Section 111 compulsory license.⁴⁹ The court determined that based on the statutory text alone, it is not clear whether a service that retransmits television programming live over the Internet constitutes a cable system under Section 111.⁵⁰ The Second Circuit could not determine whether an Internet retransmission service (1) is or utilizes a "facility," (2) receives and retransmits signals, (3)

⁴² *WPIX*, 691 F.3d at 227.

⁴³ *Id.* at 279.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.* 467 U.S. 837, 842-43 (1984)).

⁴⁷ *WPIX*, 691 F.3d at 279.

⁴⁸ *Id.* at 227 (quoting *Chevron*, 467 U.S. at 843-44).

⁴⁹ *WPIX*, 691 F.3d at 280-84.

⁵⁰ *Id.* at 280.

through wires, cables, microwave, or other communication channels.⁵¹ Thus, the court posited that it was unclear whether the Internet is a facility, as it is “neither a physical nor a tangible entity;” rather it is “a global network of millions of interconnected computers.”⁵²

The court then turned to legislative history and legislative intent.⁵³ As to legislative history, the court emphasized that Congress had codified statutory provisions for cable and satellite but not for the Internet.⁵⁴ Further, the court highlighted that Congress had not included the “Internet” as an acceptable communication channel under Section 111.⁵⁵ But, Congress did add microwave as an acceptable communication channel in 1994⁵⁶

The Second Circuit articulated that the legislative intent “indicates that Congress enacted Section 111 with the intent to address the issue of poor television reception, or, more specifically, to mitigate the difficulties that certain communities and households faced in receiving over-the-air broadcast signals by enabling the expansion of cable systems.”⁵⁷ The Court notes that Congress intended to support localized systems that used cable or optical fibers to transmit signals through a physical, point-to-point connection between a transmission facility and the television sets of individual subscribers.⁵⁸

The Court asserted that Congress did not intend for Section 111 compulsory license to extend to Internet transmissions.⁵⁹ The court again addressed the failure of Congress to expressly include Internet transmission into the language of Section 111.⁶⁰ The court stated that history

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.* at 281-82.

⁵⁴ *WPIX*, 691 F.3d at 281.

⁵⁵ *Id.*

⁵⁶ *Id.* at 282.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *WPIX*, 691 F.3d at 282.

⁶⁰ *Id.*

indicates if Congress intended the Section 111 compulsory license to extend to Internet transmissions, it would have done so expressly through the language of Section 111 as it did for microwave retransmission or by codifying a separate statutory provision as it did for satellite carriers.⁶¹ Instead, Congress's statutory purpose was to address issues of reception and remote access to over-the-air television signals.⁶² Internet retransmission does not fit into that statutory purpose, because Internet retransmission services provide a national, maybe even international, service.⁶³

In determining whether the Congressional interpretation of Section 111 was reasonable, the second step of *Chevron*, the Court discussed the position of the Copyright Office.⁶⁴ According to the Court, Congress had not expressly delegated authority to the Copyright Office to make rules carrying the force of law; "agencies charged with applying a statute . . . may influence courts facing questions the agencies have already answered."⁶⁵ The Copyright Office had continuously concluded that Internet retransmission services are not cable systems and do not qualify for Section 111 compulsory licenses.⁶⁶

For instance, the Copyright Office concluded that satellite carriers were not cable systems under Section 111, because satellite carriers provide nationwide retransmission service and because they are not located in their local service area.⁶⁷ The Court articulated that under this interpretation, Internet retransmission services could not constitute cable systems under Section 111 because they provide nationwide, and arguably global, services.⁶⁸ Further, the Copyright

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *WPIX*, 691 F.3d at 283.

⁶⁵ *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001)).

⁶⁶ *WPIX*, 691 F.3d at 283.

⁶⁷ *Id.* at 284.

⁶⁸ *Id.*

Office had consistently recognized that Section 111's reference to "other communication channels" should not be read broadly to include "future unknown services," such as satellite, multipoint distribution, and satellite master antenna television transmissions.⁶⁹

Thus, the Second Circuit concluded that the Copyright Office's position is reasonable and persuasive.⁷⁰ As a result, the Court held that *ivi* was not entitled to a Section 111 compulsory license.⁷¹

B. Judge Wu's District of Central California District Court FilmOn decision.

In July of 2015, the United States District Court for the Central District of California, which falls within the Ninth Circuit, decided *FilmOn*.⁷² In the case, plaintiffs, the producers and owners of copyrighted television programming, moved for a summary judgment against defendants, FilmOn X LLC and its owner, claiming defendants are not entitled to a Section 111 compulsory license.⁷³ The Court held that FilmOn is entitled to a Section 111 compulsory license, once compliance with the statutory requirements is achieved.⁷⁴ In reaching this decision, the Court analyzed the Second Circuit's *ivi* opinion.⁷⁵ Judge Wu posited that the Second Circuit employed an overly narrow reading of the Copyright Act.⁷⁶ Further, the Court determined it was unnecessary to turn to legislative history or the administrative interpretation as in *ivi*.⁷⁷

To be able to make a decision on how the Copyright Act may or may not govern the technology utilized by FilmOn, one must first obtain an understanding of the technology behind the website streaming services. Judge Wu explains that FilmOn uses two different systems to

⁶⁹ *Id.* (quoting 57 Fed. Reg. 3284, 3293-96).

⁷⁰ *WPIX*, 691 F.3d at 284.

⁷¹ *See Id.* at 284-85.

⁷² *See generally Fox TV Stations*, 2015 LEXIS 97305.

⁷³ *Fox TV Stations*, 2015 LEXIS 97305 at *2.

⁷⁴ *Id.* at 50.

⁷⁵ *Id.* at 35-43.

⁷⁶ *Id.* at 36.

⁷⁷ *Id.* at 40.

receive and retransmit broadcast programming: a “trailer system” and a “Lanner system.”⁷⁸ The trailer system uses small antennas on the roof of a trailer.⁷⁹ The Lanner system involves one master antenna on the roof of a commercial data center.⁸⁰ This master antenna routes the signals to an antenna box where the signals are amplified and captured by small antennas.⁸¹ When a user accesses the FilmOn website, the user’s computer requests a list of available programming, and the FilmOn server responds with the list.⁸² When the user chooses a channel, the request is directed to and managed by the local facility in the user’s surrounding area.⁸³

With an understanding of FilmOn’s technology, Judge Wu began his analysis by first examining the definition of a cable system from the 1976 Copyright Act.⁸⁴ The definition reads as follows: “A facility located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.”⁸⁵ Judge Wu asserts that the Internet is not the facility urged by Defendants.⁸⁶ Therefore, the Internet cannot be a facility for the purposes of the Section 111 analysis.⁸⁷

Without the Defendant’s facilities, the Internet does not receive Plaintiff’s broadcast signal. Rather, antennas located within buildings within states receive the signals.⁸⁸ The signals

⁷⁸ *Fox TV Stations*, 2015 LEXIS 97305 at *7.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Fox TV Stations*, 2015 LEXIS 97305 at *7.

⁸⁴ *Fox TV Stations*, 2015 LEXIS 97305 at *36-37.

⁸⁵ *Id.* 37.

⁸⁶ *Id.* at 39-40.

⁸⁷ *Id.*

⁸⁸ *Id.*

are then retransmitted out of those facilities on “wires, cables, microwave, or other communications channels.”⁸⁹ “The facility that Defendants have control over and operate consists of the ‘complicated electrical instrumentalities’ used for retransmission, which precede ‘the Internet’ in the Defendants’ retransmission scheme.”⁹⁰ Thus, Judge Wu held that the Second Circuit *ivi* decision was not persuasive and that FilmOn would be entitled to a Section 111 compulsory license, once the online video program distributors complied with all of the statutory provisions listed in Section 111.⁹¹

C. Judge Collyer’s District of Columbia District Court FilmOn decision.

In November 2015, the United States District Court for the District of Columbia, decided *FilmOn*, as well.⁹² Just as in the District of Central California’s *FilmOn* case, plaintiffs are a group of broadcaster and televisions networks, and defendant is FilmOn X LLC.⁹³ Plaintiffs seek the Court to adopt the reasoning in *ivi II* and *Areo*, while Film On X argues that the Court should adopt Judge Wu’s reasoning.⁹⁴

Again, to be able to make a decision on how the Copyright Act may or may not govern the technology utilized by FilmOn, one must first obtain an understanding of the technology behind the website streaming services. Judge Collyer explains that FilmOn assigns an individual user to the content streams from one of thousands of very small antennas that FilmOn operates in major metropolitan areas.⁹⁵ This service allows viewers to watch television programming on any computer or digital device.⁹⁶

⁸⁹ *Fox TV Stations*, 2015 LEXIS 97305 at *39-40.

⁹⁰ *Id.* at 40.

⁹¹ *Id.* at 50.

⁹² *See generally Fox TV Stations*, 2015 WL 7761052.

⁹³ *Fox TV Stations*, 2015 WL 7761052, at *1.

⁹⁴ *Id.* at *4.

⁹⁵ *Id.* at *1.

⁹⁶ *Id.*

Judge Collyer sees this technology differently than Judge Wu.⁹⁷ Judge Collyer admits FilmOn has physical facilities (the dime-sized antennas) that capture the broadcast signals. However, she asserts that FilmOn ultimately relies on the Internet to deliver the video content to the subscriber.⁹⁸ The detrimental distinction for FilmOn, according to Judge Collyer, lies in the secondary transmission of the video content.⁹⁹ Cable systems consist of a central antenna, which receives the television signals, and a network of cables through which the signals are transmitted to the receiving subscribers.¹⁰⁰ Internet retransmission services have physical facilities that receive the broadcast signals but retransmit them to Internet service providers, rather than “directly” to the subscriber’s digital device.¹⁰¹

Judge Collyer posits that the retransmission distinction causes Internet-based retransmission systems to fail to fit the Section 111(f)(3) definition of facility.¹⁰² According to Judge Collyer, the definition reads as follows: “a physical ‘facility’ must receive the broadcast signals *and* make the secondary transmissions to paying subscribers.”¹⁰³ Judge Collyer emphasizes that because FilmOn’s Internet-based retransmission system does not retransmit signals “directly” to the subscriber nor does it deliver video content “exclusively” through wires, cables, and microwave links, it does not qualify as a cable system.¹⁰⁴ As such, Judge Collyer denies FilmOn’s eligibility for a Section 111 compulsory license.¹⁰⁵

⁹⁷ See *Fox TV Stations*, 2015 WL 7761052, at *13.

⁹⁸ *Fox TV Stations*, 2015 WL 7761052, at *13.

⁹⁹ See *Fox TV Stations*, 2015 WL 7761052, at *13.

¹⁰⁰ *Fox TV Stations*, 2015 WL 7761052, at *13.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Fox TV Stations*, 2015 WL 7761052, at *24.

D. Judge Wu Got it Right.

As with all splits on authority in the legal world, one must prevail. Judge Wu got it right: online video program distributors should be entitled to Section 111 compulsory licenses, if they so chose and follow the necessary requirements listed in the statute.¹⁰⁶

Because the retransmission occurs from the antennas located within states to the wires, cables, microwave, or other communications channels, Internet retransmission process precisely matches the definition of a cable system in the Copyright Act of 1976.¹⁰⁷ Thus, it is unnecessary to turn to legislative history or the administrative interpretation as in *ivi*.¹⁰⁸

Even if it were necessary, the Second Circuit's *Chevron* analysis is not all that persuasive.¹⁰⁹ The Second Circuit asserts that the legislative history and the legislative intent demonstrate that Congress did not intend for the Section 111 license to extend to the Internet.¹¹⁰ According to the Second Circuit, history indicates that if Congress desired such a result, Congress would have expressly added language to the text of Section 111 as it did for microwave retransmission or by codifying a separate statutory provision as it did for satellite carriers in Section 122.¹¹¹

However, Congress did not enact the Copyright Act until 1976 after *Fortnightly* and *Telecompter* were decided in front of the Supreme Court.¹¹² A case about whether online video program distributors should be entitled to Section 111 license has not yet gone in front of the Supreme Court.¹¹³

¹⁰⁶ *Fox TV Stations*, 2015 LEXIS 97305 at *50.

¹⁰⁷ *See Fox TV Stations*, 2015 LEXIS 97305 at 39-40.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 43.

¹¹⁰ *WPIX*, 691 F.3d at 282.

¹¹¹ *Id.*

¹¹² *Fox TV Stations*, 2015 LEXIS 97305 at *17-19.

¹¹³ *See WPIX*, 691 F.3d at 275, *Fox TV Stations*, 2015 LEXIS 97305 at *1 (showing both cases have yet to reach the Supreme Court).

As for a comparison with satellite retransmission, litigation started in 1988.¹¹⁴ In 1991, the Copyright Office promulgated regulations denying satellite broadcasters the right to Section 111 licenses.¹¹⁵ In 1999, Congress enacted Section 122, which authorizes satellite carriers to retransmit local broadcast programming back into a local market.¹¹⁶ The issue of whether online video program distributors are entitled to Section 111 compulsory licenses has only been in litigation since 2011.¹¹⁷

Based on the trajectories for cable and satellite, it is still too early for Congress to enact legislation.¹¹⁸ Therefore, just because Congress has not yet enacted legislation for the Internet to be entitled to Section 111 compulsory license, does not mean Congress did not intend for the Internet to be so entitled.¹¹⁹

Judge Collyer hinges her District of Columbia District Court *FilmOn* decision on the retransmission aspect articulated in the definition of a cable system in Section 111.¹²⁰ She appears to take a very strict reading of the definition and asserts that because FilmOn does not retransmit signals directly to the subscriber, FilmOn is not a cable system and therefore, cannot be entitled to a Section 111 compulsory license.¹²¹ What Judge Collyer fails to mention is that the Section 111 definition of cable system does not include the word “directly.”¹²² Additionally, Judge Collyer asserts that the Internet does not deliver video content “exclusively” through wires, cables, and microwave links but relies on several types of distribution media, including

¹¹⁴ *Fox TV Stations*, 2015 LEXIS 97305 at *21.

¹¹⁵ *Id.* at 22.

¹¹⁶ *Id.* at 25.

¹¹⁷ *See WPIX*, 691 F.3d at 275 (showing that the case was decided in the Southern District of New York in 2011).

¹¹⁸ *See supra* notes 13-30.

¹¹⁹ *Id.*

¹²⁰ *Fox TV Stations*, 2015 WL 7761052, at *13.

¹²¹ *Id.*

¹²² 17 U.S.C. § 111(f)(3). In relevant part the statutory definition reads as follows, “and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.” *Id.* The word “directly” is not present.

satellite, cellular networks, and Wi-Fi.¹²³ The Section 111 definition of cable system also does not use the word “exclusively.”¹²⁴ Thus, Judge Collyer decision is structured as a strict reading of the Section 111 definition of cable system, yet her reasoning adds words that are absent from the definition.

Further, while the Supreme Court’s decision in *Aereo* was not on-point as to the specific issue of the multichannel video programming distributors’ entitlement to Section 111 compulsory licenses, the Supreme Court did make statements that are “about as close a statement directly in [ivi’s] favor as could be made.”¹²⁵ The Supreme Court posited, “*Aereo* bore an ‘overwhelming likeness to the cable companies targeted by the 1976 amendments.’”¹²⁶ In full, the Supreme Court stated,

[I]n *Fortnightly* the television signals, in a sense, lurked behind the screen, ready to emerge when the subscriber turned the knob. Here the signals pursue their ordinary course of travel through the universe until today’s ‘turn of the knob’ – a click on a website – activates machinery that intercepts and reroutes them to *Aereo*’s subscribers over the Internet. But this difference means nothing to the subscriber. It means nothing to the broadcaster. We do not see how the single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system into “a copy shop that provides its patrons with a library card.”¹²⁷

Further the Court’s *Aereo* decision’s reasoning “continues the trajectory started in *Fortnightly* and seen again in the satellite decisions: courts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and re-transmitters in the wake of technological innovation.”¹²⁸

¹²³ *Fox TV Stations*, 2015 WL 7761052, at *13.

¹²⁴ 17 U.S.C. § 111(f)(3). In relevant part the statutory definition reads as follows, “and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.” *Id.* The word “exclusively” is not present.

¹²⁵ *Fox TV Stations*, 2015 LEXIS 97305 at *27.

¹²⁶ *Id.* at 26.

¹²⁷ *Id.* at 26-27 (quoting *ABC, Inc. v. Aereo, Inc.*, 134 S. Ct. 2498, 2507 (2014)).

¹²⁸ *Id.* at 27.

Thus, Judge Wu got it right: online video program distributors should be entitled to Section 111 compulsory licenses. While the courtroom battles over Section 111 compulsory licenses have ensued, the Federal Communication Commission is attempting to solve the copyright infringement tension between online video program distributors and television, film, and productions companies through proposed regulation.

PART IV: FEDERAL COMMUNICATIONS COMMISSION REGULATIONS

A. Federal Communications Commission's Notice of Proposed Rulemaking

On December 19, 2014, the FCC released a notice of proposed rule making (NPRM).¹²⁹ The NPRM tentatively concludes that online video program distributors providing linear streams of programming shall be defined as multichannel video programming distributors (MVPDs) under the Communications Act.¹³⁰ In the notice of proposed rule making, the FCC stated, “We propose the term MVPD to mean distributors of multiple linear video programming streams, including Internet-based services.”¹³¹ The FCC views this definition as a modernized interpretation of the term MVPD by including online video streamers, regardless of the technology used to distribute the programming.¹³²

The FCC identifies several business models that have emerged from online video distribution.¹³³ Subscription Linear, which makes available continuous, linear streams of video programming on a subscription basis, includes SkyAngel and Aereo.¹³⁴ Subscription On-Demand, which makes available on-demand content on a subscription basis, includes Amazon

¹²⁹ Polashuk, *supra* note 1.

¹³⁰ *Id.*

¹³¹ Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2079 (proposed Dec. 17, 2014).

¹³² *Id.* at 2078.

¹³³ *Id.* at 2080.

¹³⁴ *Id.*

Prime Instant Video and Netflix.¹³⁵ Transactional On-Demand, which makes available on-demand content to consumers on a per-episode or per-season/movie basis, includes Amazon Instant Video and iTunes.¹³⁶ Ad-based Linear and On-Demand, which offers linear and/or on-demand video programming on a free, ad-supported basis, includes FilmOn and Hulu.¹³⁷ Transactional Linear, which offers non-continuous linear programming on a transactional basis, includes pay-per-view UFC.¹³⁸

The FCC tentatively concludes that only Subscription Linear video services are to be considered MVPDs.¹³⁹ This definition expansion would bring Subscription Linear video services under the regulatory framework of the Communications Act.¹⁴⁰ To understand the significance of this result, it is necessary to delve into a very brief history of the Communications Act.

The Communications Act of 1934 created the Federal Communications Commission.¹⁴¹ Congress then amended the Communications Act of 1934 with the Telecommunications Act of 1996.¹⁴² The Act's main purpose was to open up the communications industry to competition.¹⁴³ More significant to this Note, the Act also subjects "multichannel video programming distributors" (MVPD) to almost exclusive federal regulatory control.¹⁴⁴

Hence, as MVPDs Subscription Linear video services would be subject to privileges and obligations of the Communications Act.¹⁴⁵ The privileges include nondiscriminatory access to

¹³⁵ *Id.*

¹³⁶ Polashuk, *supra* note 1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Polashuk, *supra* note 1.

¹⁴¹ 47 U.S.C. § 151 (1934).

¹⁴² Andrew D. Ketter, *Comment: The Narrow Choice of Broadband Providers for Consumers: Competition and Local Regulation*, 2002 WIS. L. REV. 211, 221 (2002).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Polashuk, *supra* note 1.

certain programming and the assurance that broadcasters will negotiate in good faith for the retransmission of content.¹⁴⁶ The obligations included complying with requirements for nondiscriminatory program carriage and parallel obligation for good faith negotiations for broadcast retransmission consent, as well as competitive availability of navigation devices, equal opportunities, closed captioning, video description, access to emergency information, signal leakage, inside writing, and commercial loudness restrictions.¹⁴⁷

This proposed change to the MVPD definition fails to modernize federal regulations to successfully meet the advancement of today's online video streaming technology. Instead, the change merely creates a new category of online video distributors under the Communications Act, which is not recognized under the Copyright Act.¹⁴⁸ The new definition does not offer MVDPs eligibility for a Section 111 compulsory license.¹⁴⁹ Online video program distributors would still need to negotiate with individual content owners and obtain licenses from broadcast stations.¹⁵⁰ Thus, the FCC's proposed change does not address the currently litigated issue of whether online video program distributors should be eligible for Section 111 compulsory licenses.¹⁵¹

Without offering the Subscription Linear video services the benefit of statutory licenses, the benefits provided to the online video program distributors under the proposed change are illusory.¹⁵² MVPD is a term that comes from the 1992 Cable Act, and it's meaning is clunky and outdated.¹⁵³ Due to the remarkable success of the online distribution industry, the burden should

¹⁴⁶ 80 Fed. Reg. at 2085.

¹⁴⁷ *Id.* at 2085-87.

¹⁴⁸ Polashuk, *supra* 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Fox TV Stations*, 2015 LEXIS 97305 at *2, *WPIX*, 691 F.3d at 279.

¹⁵² Ajit Pai, *Commission Pai Remarks Before the Churchill Club*, FEDERAL COMMUNICATIONS COMMISSIONS (Sept. 17, 2014), <https://www.fcc.gov/document/commissioner-pai-remarks-churchill-club>.

¹⁵³ *Id.*

be on those who favor new regulations to prove the problems with the industry and explain why a change is necessary.¹⁵⁴

B. Judge Wu's Decision Solves the Problem

While the FCC proposed change is unnecessary and unhelpful, Judge Wu's decision in *FilmOn* will allow online video program distributors to remain free from stifling regulations while protecting such providers from being destroyed by copyright infringement suits.¹⁵⁵ If an online video program distributor so chooses, it can comply with the statutory requirements of Section 111 and be eligible for a compulsory license.¹⁵⁶ No matter how amazing and revolutionary new online video program distribution technology may be, without access to content, it cannot reach an audience.¹⁵⁷

Additionally, compulsory licenses for online video program distributors offer several benefits to all parties involved. First, parity for the compulsory licensing for online video program distributors gives clarity and predictability for copyright owners and new businesses operating in the television market.¹⁵⁸ Creators and investors do not have to be wary as to whether a new venture will violate copyright law.¹⁵⁹ As long as the statutory requirements of Section 111 are met, the distributor would be entitled to the compulsory license.¹⁶⁰ If Aereo had this option, it probably would not have resulted to declaring bankruptcy in November of 2014 nor would it

¹⁵⁴ *Id.*

¹⁵⁵ See *Fox TV Stations*, 2015 LEXIS 97305 at *2; Kate Cox, *FCC Proposes Treating Online TV Like Cable TC; Amazon Objects If It'll Stop Your From Binge-Watching 'The Wire,'* CONSUMERIST (Sept. 14, 2015), <http://consumerist.com/2015/04/06/fcc-proposes-treating-online-tv-like-cable-tv-amazon-objects-if-itll-stop-you-from-binge-watching-the-wire/>.

¹⁵⁶ See *Fox TV Stations*, 2015 LEXIS 97305 at *50.

¹⁵⁷ Dan Garon, *NOTE: Poison ivi: Compulsory Licensing and the Future of Internet Television*, 39 IOWA J. CORP. L. 173, 188 (2013).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Fox TV Stations*, 2015 LEXIS 97305 at *51.

have been forced to auction off its assets, primarily to TiVo, in February of 2015.¹⁶¹ Second, parity for online video program distributors will benefit consumers by furthering free choice and promoting more efficient time shifting.¹⁶² Third, parity will benefit broadcasters.¹⁶³ Broadcasters have any interest in ensuring their longevity, and part of that longevity is remaining relevant to as many viewers as possible, especially to younger audiences.¹⁶⁴ Younger audiences tend to access multimedia content via computers or tablets, rather than from traditional television.¹⁶⁵

This solution and balance seems to be attractive to online video program distributors. In fact, FilmOn has recently modified its service in an attempt to bring itself in compliance with Section 111 requirements.¹⁶⁶ FilmOn has indicated that users will only be able to watch programs if they purchase local channel subscription packages.¹⁶⁷ Such packages will be limited to the television channels available in a designated market area.¹⁶⁸ Additionally, FilmOn has developed a “geolocation system” that only allows access to broadcast programming if the viewer’s digital device is located within the original broadcaster’s market area at the time of the retransmission.¹⁶⁹ Further, FilmOn has made past royalty payments and filed Statements of Account with the Copyright Office for, roughly, the past two years.¹⁷⁰ The Copyright Office accepted FilmOn’s documents on a “provisional basis,” since the question of whether online

¹⁶¹ Kate Cox, *FCC Proposes Treating Online TV Like Cable TC; Amazon Objects If It’ll Stop Your From Binge-Watching ‘The Wire,’* CONSUMERIST (Sept. 14, 2014), <http://consumerist.com/2015/04/06/fcc-proposes-treating-online-tv-like-cable-tv-amazon-objects-if-itll-stop-you-from-binge-watching-the-wire/>.

¹⁶² Garon, *supra* note 157, at 196.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Fox TV Stations*, 2015 WL 7761052, at *5.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Fox TV Stations*, 2015 WL 7761052, at *5.

video program distributors are eligible for Section 111 compulsory licenses had been raised before the courts.¹⁷¹

Thus, parity for compulsory licenses for online video program distributors is an efficient and beneficial means to provide copyright infringement protection for online video program distributors who desire it.

C. The Video Market Place Does Not Need Regulations . . . Yet.

The FCC's proposed changes are simply premature.¹⁷² Currently, the online video program distributor industry is thriving.¹⁷³ Further, the Internet is redefining video.¹⁷⁴ It is "reshaping the video market place in ways we are just beginning to see."¹⁷⁵

The FCC buttresses its alleged need to reinterpret the statutory definition of MVDP under one core premise: "that the continued evolution in Internet delivery of video programming service requires regulatory intervention to provide 'nascent, Internet-based' video programming service providers with competitive access to video programming."¹⁷⁶ However, market forces have already stimulated and will continue to stimulate broadcasters, cable networks, and other video programming to make content available to innovative, Internet-delivered, distribution platforms.¹⁷⁷ Not only is content being made available online through existing models, but the

¹⁷¹ *Id.*

¹⁷² Paul, Weiss, Rifkind, Wharton & Garrison LLP, *Parties present different viewpoints on classification of online video providers*, LEXOLOGY (Sept. 16, 2014) <http://www.lexology.com/library/detail.aspx?g=1690a97f-9ca4-4297-910f-805ef566fa5f>.

¹⁷³ See Jeremy Malcom and Mitch Stoltz, *FCC Broadcasting Rules Won't Help Internet Thrive*, ELECTRONIC FRONTIER FOUNDATION (Sept. 16, 2015), <https://www.eff.org/deeplinks/2015/03/fcc-broadcasting-rules-wont-help-internet-video-thrive>.

¹⁷⁴ Troy Dreier, *NAB 2015: Should the FCC Regulate OTT Video Providers Like MVPDs?* Streaming Media Magazine (Sept. 18, 2015), <http://www.streamingmedia.com/Articles/Editorial/Featured-Articles/NAB-2015-Should-the-FCC-Regulate-OTT-Video-Providers-Like-MVPDs-103288.aspx>.

¹⁷⁵ Malcom, *supra* note 173. (quoting Ajit Pai).

¹⁷⁶ Comments of the Walt Disney Co., 21st Century Fox, Inc., & CBS Corp. at 1, In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, FCC 14-210 (rel. Dec. 19, 2014).

¹⁷⁷ *Id.* at 2.

market is also creating new, robust business models, all while being largely free from governmental intervention.¹⁷⁸

The NPRM will jeopardize the diversity of programming that audiences enjoy today over a variety of platforms.¹⁷⁹ The current market environment has fostered significant investment in online distribution of video and allowed market participants to experiment with both with new technologies and new business models to support them.¹⁸⁰ Imposing one-size-fits-all regulations is ill suited to the Internet, and could destroy its diversity.¹⁸¹ What may work for one entrepreneur may not work for others, and freedom to experiment is critical in the early years of development and innovation.¹⁸²

It is undisputed that the industry has grown and continues to bring consumers even more benefits.¹⁸³ For instance, the number of services lawfully providing access to movies and television shows online grew from essentially zero in 1997 to more than 110 in 2014.¹⁸⁴ Additionally, the number of times audiences used those services to lawfully access movies and television shows online grew from 20 million and 2.8 billion, respectively, in 2005 to 5.7 billion and 56.9 billion in 2013.¹⁸⁵ These figures are expected to grow to 10.3 billion and 91.6 billion by 2018.¹⁸⁶

In addition to the expansive growth of access and consumption demonstrated by the raw data, the online video industry has achieved impressive successes, involving agreements and

¹⁷⁸ *Id.*

¹⁷⁹ Comments of the Motion Pictures Ass'n. Of Amer., at 1, In the Matter of Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, MB Docket No. 14-261, FCC 14-210 (rel. Dec. 19, 2014).

¹⁸⁰ *Id.* at 7.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Malcom, *supra* note 164 (quoting Amazon).

¹⁸⁴ *Supra* note 179, at 1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

content, just over the summer of 2015 alone.¹⁸⁷ For example, Hulu entered into a partnership with Showtime, reached an agreement for additional seasons on *Southpark*, and began streaming every episode of *Seinfeld*.¹⁸⁸ Netflix announced the 2015 release dates for its first original feature films.¹⁸⁹ Amazon negotiated a deal for PBS's *Masterpiece* franchise.¹⁹⁰ Verizon agreed with Scripps to carry HGTV, Food Network, and Travel Channel.¹⁹¹ Comcast began offering Stream.¹⁹² Showtime and Lifetime launched new video streaming services.¹⁹³ Increasingly frequently, privately negotiated deals that benefit online providers, content creators, and consumers, are being struck all without government intervention.¹⁹⁴

This expansion and experimentation in the marketplace should be allowed to continue without the suppression of regulation.¹⁹⁵

D. Call to Congress

Among the most important ingredients in the success of the video marketplace is respect for two fundamentally American values: free speech and intellectual property.¹⁹⁶ Under the First Amendment, the speaker and the audience act in the marketplace of ideas and determine what is said and heard, not the government.¹⁹⁷ The Copyright Clause respects the right of creators to determine how to disseminate their works.¹⁹⁸ Recognition of that respect increases production and distribution of content for public benefit.¹⁹⁹ The ability of content producers and distributors

¹⁸⁷ *Id.*

¹⁸⁸ Pai, *supra* note 152.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Pai, *supra* note 152.

¹⁹⁴ *Id.*

¹⁹⁵ *Supra* note 179, at 8.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

to decide what programming to create, license, and disseminate is what makes the online marketplace so dynamic.²⁰⁰ That ability also allows companies to manage the economic risks of competition and unpredictability in the online video marketplace.²⁰¹ Management of that balance enables producers and distributors to continue investing and innovating to deliver high-quality content to consumers.²⁰² The FCC's NPRM will disrupt all of this.²⁰³

Ultimately, it is up to Congress to say what the law will be.²⁰⁴ The elimination of the compulsory license is inevitable.²⁰⁵ When Congress does decide to eliminate the compulsory license, it can enact legislation for the online video program distributors as it did for cable retransmissions with Section 111 and for satellite retransmissions with Section 122. For the time being, it is a logical and necessary solution to allow online video program distributors entitlement to Section 111 compulsory licenses.

PART V: CONCLUSION

Whether multichannel video programming distributors are entitled Section 111 compulsory license hinges on how one interprets the role the Internet plays in the retransmission of content, as described by Section 111(f)(3). This Note put for the position that Judge Wu's United States District Court for the Central District of California *FilmOn* interpretation and decision should be upheld on its appeal, and if necessary, be upheld on an appeal to the Supreme Court. Further, this Note asserted that the FCC's proposed notice of rulemaking to expand the definition of MVPDs to include Subscription Linear online video providers is unnecessary and unhelpful. Instead, the online video program distribution industry can use Judge Wu's decision

²⁰⁰ *Supra* note 179, at 9.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Fox TV Stations*, 2015 LEXIS 97305 at *50.

²⁰⁵ Garon, *supra* note 157, at 194.

for eligibility of Section 111 compulsory license if such a provider wishes to protect itself from copyright infringement action. In fact, this solution and balance is attractive to online video program distributors, as made evident by FilmOn's recent compliance with Section 111 requirements. It is up to the industry to continue to self-regulate and keep certain theories of regulation in the halls of academia and out of the marketplace. And, when the time is right, it will be up to Congress to create a statute concerning online video program distributors. Currently, the industry must be allowed to continue to grow and flourish. When Congress does enact legislation for online video providers, Congress must assure the law is flexible enough to move and change with the ever-evolving industry.