No. 15-56420

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC., ET AL.

Plaintiff-Appellants,

v.

AEREO KILLER LLC, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
The Honorable George H. Wu
Civ. Nos. 2:12-cv-06921, 2:12-cv-06950 (consolidated)

BRIEF AMICI CURIAE OF
ELECTRONIC FRONTIER FOUNDATION AND PUBLIC KNOWLEDGE
IN SUPPORT OF DEFENDANTS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, each of the amici states that it is not a corporation that issues stock and it has no parent corporation.

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INTEREST OF AMICI CURIAE[1]

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. EFF represents tens of thousands of active donors. For over 25 years, EFF has promoted the sound development of copyright law as a balanced legal regime that fosters creativity and innovation. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. EFF has contributed its expertise to many cases applying copyright law to new technologies, as party counsel, as amicus curiae, and as court-appointed attorneys *ad litem*.

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens' rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas,

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for the amici and their counsel, has authored this brief in whole or in part, or contributed money towards its preparation or submission. All parties have consented to the filing of this brief.

Public Knowledge frequently files amicus briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.[2]

SUMMARY OF ARGUMENT

FilmOn fits the statutory definition of a cable system under the Copyright Act, and qualifies for a statutory license. The district court addressed this question of statutory interpretation correctly, finding among other things that FilmOn "receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals or programs by wires . . . or other communications channels to subscribing members of the public." 17 U.S.C. § 111(f)(3). This Court should affirm.

Public policy also supports affirming the district court's decision. FilmOn will not harm programmers or the pay television industry by allowing people to more easily watch free, over-the-air broadcast television. Instead, by fitting into the existing legal regime for secondary transmissions, it will introduce new competition and give viewers more options.

Multichannel video services like FilmOn are dependent on statutory licenses for the viability of their businesses. Congress determined that transaction costs associated with acquiring licenses individually from innumerable individual

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[2] Amici wish to thank Stanford Law School Juelsgaard Intellectual Property and Innovation certified law students Stephen Liu and Brian Quinn for their substantial assistance in drafting this brief.

content providers and copyright owners are insurmountably high, and decades of experience have confirmed this. The pay TV marketplace is currently structured around the statutory licenses—local broadcasters typically cannot grant negotiated licenses of their programming for retransmission even if they so desire. Given this reality, absent a statutory license, hold-outs among rightsholders would leave services like FilmOn without any way to offer a selection of content that could compete with pay TV services that do benefit from the statutory license. To avoid creating a marketplace where some providers benefit from the statutory licensing scheme and others do not, courts have consistently applied a technologically neutral reading of Section 111, leaving the door open for new or innovative technologies that functionally resemble traditional cable. Only recently have courts begun to stray from this long-established principle of technological neutrality—a dangerous course that this Court need not and should not follow.

Instead, this Court should follow the Supreme Court's wise admonition to avoid extending copyright law to foreclose new and unanticipated technological change. *See Universal City Studios v. Sony Corp.*, 464 U.S. 417, 431 (1984). Rather than attempting to rebalance the various interests raised here based on claimed differences between Internet-based and traditional cable systems, this Court should apply the statute as written: any "facility" for retransmission of broadcast signals that is not in violation of Federal Communications Commission rules is a "cable system" under the Copyright Act and should have access to the Section 111 license. If it so chooses, Congress can clarify or impose conditions on Internet-based cable systems' use of broadcast programming after the fact, as it did for traditional cable and satellite systems.

The district court's approach is consistent with copyright's constitutional purpose. Copyright has never assigned *all* commercially valuable uses of creative works to rightsholders; many have always been reserved to the public. This creates breathing space for technological and business innovation by entrepreneurs who have no affiliation with rightsholders. As history shows, this leads to new markets for creative work, corresponding rewards for authors, and greater access to creative works in the long term.

By contrast, the interpretive approach suggested by appellants and their amici—that only systems using a specific set of capital-intensive technologies currently in use by incumbent pay TV distributors can qualify as "cable systems"—would hinder innovation and harm consumer choice.

This Court should uphold the district court's approach, which better serves copyright's purpose.

ARGUMENT

I. The Courts Have Consistently Applied Technologically Neutral Interpretations of the Copyright Act to Television Distribution Systems.

When considering television distribution systems, courts have consistently applied copyright to television distribution services in a technologically neutral manner, leaving it to Congress to clarify or update the Copyright Act as it saw fit. And the courts have repeatedly declined to apply the Copyright Office's antipathy towards statutory licenses as an interpretive principle.

Even before the Copyright Act of 1976 was passed, and with it Section 111, the Supreme Court took a technologically neutral approach in two landmark decisions. First, in *Fortnightly Corp. v. United Artists Television, Inc.*, the Court held that a community antenna television (CATV) system, consisting of an array of antennas on hilltops that amplified and retransmitted television signals to individual subscribers, did not infringe on the copyright holders' public performance right. 392 U.S. 390, 401 (1968) (contrasting CATV with broadcasters, who *do* "perform the programs that they receive and carry"), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709–10 (1984). Although Fortnightly's CATV system was "powerful and sophisticated," the Court recognized that "the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Id.* at 399. Six years later, in *Teleprompter v. CBS*, the Court extended the *Fortnightly* ruling to CATV retransmission of distant signals, using similar technologically neutral reasoning. 415 U.S. 394, 408–09 (1974) ("The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer").

In 1976, Congress amended the Copyright Act to revise and qualify the Court's holdings in *Fortnightly* and *Teleprompter*. The 1976 Act simultaneously brought CATV retransmissions of broadcast channels within the scope of the copyright holder's exclusive rights and instituted a statutory license allowing CATV systems, colloquially known as cable, to continue retransmitting those channels. *See ABC v. Aereo, Inc.*, 134 S. Ct. 2498, 2505–06 (2014) (recognizing that the changes made by Congress were a regulatory measure, intended to "bring the activities of cable systems within the scope of the Copyright Act").

Determining that transaction costs and the potential for holdout make it infeasible for a pay TV service to negotiate licenses with every rightsholder whose works are broadcast, Congress has *never* required such services to negotiate licenses. Traditional cable, and later, satellite services, have always been able to use a statutory license. Moreover, courts have consistently held that the Section 111 statutory license applies to cable systems, regardless of the specific technologies they use, so long as they meet the definition set forth in that section.

The rise of microwave as a channel for television retransmission is instructive in this regard. In 1982, EMI—a company that relayed off-the-air television signals to CATV systems by converting them into microwave signals—sought an exemption under Section 111(a)(3) for secondary transmissions of broadcast signals. *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982). Doubleday Sports, a broadcast content provider, argued that EMI's selection of channels to relay via microwave signal disqualified EMI from the Section 111 license. The Second Circuit disagreed, refusing to accept that a change in transmission technology could alter the application of Section 111. The court cautioned that "[i]nterpretation of the Act must occur in the real world of telecommunications, not in a vacuum." *Id.* at 132.

The Eighth Circuit followed suit in *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393 (1985). There, Southern Satellite established a direct microwave connection to WTBS, which transmitted content created by Hubbard. *Id.* at 397. Hubbard argued that the signals received by Southern Satellite through this direct connection were not made for reception by the public at large, disqualifying subsequent retransmissions from Section 111's statutory licensing provisions because they were not secondary transmissions, as required by Section 111(c). *Id.* at 400. The court rejected this argument and allowed Southern Satellite to benefit from statutory licensing, because "Congress specifically anticipated the transmission of other than over the air signals when it defined the term 'cable system.'" *Id.* at 401. In so doing, the court noted that in essence, there was a signal going out from WTBS and a signal reaching the public in some form. *Id.* The court emphasized the need avoid an interpretation that "would largely freeze for section 111 purposes both technological development and implementation" or "force both primary and secondary transmitters alike to forego available, economically feasible technology." *Id.* at 400.

In 1994, Congress expressly agreed with this interpretation of Section 111, confirming that systems using microwave as a communications channel are included in the definition of "cable system." Legislative history indicates that this amendment was a clarification, rather than an expansion, of the definition. The Senate Report states that "[t]he proposed legislation amends the definition of the term 'cable system' . . . to *clarify* that the cable compulsory license applies not only to traditional wired cable television systems, but also . . . 'wireless' cable systems." S. Rep. No. 103-407, at 14 (1994) (emphasis added).

Likewise, the House Report on the bill indicated that the Copyright Office, by excluding microwave from classification as a communications channel for Section 111 purposes, had adopted an incorrect and "unnecessarily restrictive interpretation" of the statute. H.R. Rep. No. 99-253, at 17 (1994). "Because the amendment is a *clarification* of existing law," the House Report explains, "the

Copyright Office is expected to apply the amendment to previously-filed statements of account." *Id.* (emphasis added). The express intent of Section 111 was to provide technologically distinct cable systems with access to the same statutory license, subject to uniform terms and conditions.

The story of satellite television confirms this principle. When a Georgia court held that Section 111's definition of "cable system" did not include satellite-based retransmitters, *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc. ("SBN I")*, 694 F. Supp. 1565 (N.D. Ga. 1988), the Eleventh Circuit reversed. *NBC v. Satellite Broadcast Networks, Inc. ("SBN II")*, 940 F.2d 1467 (11th Cir. 1991). The court held that *SBN I* had read the phrase "located in any State" too narrowly in light of the rest of the statute, and that "Congress understood it would be possible for a cable system to exist 'in part' within [one state] and 'in part' elsewhere." *Id.* at 1470. Given that there was no dispute whether SBN's satellite broadcast was a secondary transmission, the court declined to apply geographically limiting interpretations to Section 111. *Id.* at 1468. The court also recognized that satellite companies enabled an even greater cross section of consumers to watch otherwise inaccessible broadcast content:

> [T]here is no good reason why a satellite broadcasting company such as SBN should not be a cable system. . . . [T]o conclude that SBN cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide. . . . In short, there is no good reason to read 'cable system' narrowly to deny SBN its license,

> and to do so will do an injustice to those who live in rural areas. SBN is a cable system.

Id. at 1470–71.

While the Eleventh Circuit was finalizing this opinion, Congress was already working to address satellite TV services explicitly. A House of Representatives report from 1988 explained that "[t]he legality of satellite delivered broadcast signals to home satellite antenna owners is unsettled. . . . [and] H.R. 2848 resolves the legal issues surrounding provision of broadcast signals to rural America by creating an interim statutory license." H.R. Rep. No. 100-887(II), at 5643–44 (1988). The result was Section 119 of the Copyright Act, which set up a statutory licensing scheme specifically for satellite broadcasters.

Section 119 is best understood as a congressional reversal of the District Court's interpretation of Section 111 in *SBN I*, as it was enacted before the Eleventh Circuit's reversal of that decision. By specifically providing a statutory license for satellite retransmissions of broadcast programming, Congress reaffirmed the premise of the 1976 Act that new, competitive television transmission technologies should have the benefit of such a license.

The Supreme Court's recent decision in *Aereo* bolsters a technologically neutral reading of Section 111. Interpreting the Transmit Clause in the context of an Internet-based television service similar to FilmOn, the Court held that technological difference is not enough to change the fundamental nature of a business as a cable system: "It means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system . . . ." *Aereo*, 134 S. Ct. at 2507. The technologically neutral view that the Court applied to the Transmit Clause in *Aereo* applies with equal force to Section 111. What is important is whether something *acts like* cable, and not whether it mirrors technologies that existed in 1976.

This sensible approach should apply to services that make use of the Internet as part of their retransmission pathways for broadcast television. Unfortunately, some courts have departed from that approach, beginning with *WPIX, Inc. v. ivi, Inc.*, which held that Section 111 does not apply to a "service that streams copyrighted television programming live and over the Internet." 691 F.3d 275, 279 (2d Cir. 2012). By singling out Internet-based services, *ivi* and its progeny broke from long-established precedents that recognized the importance of the statutory license to the development of new television distribution technology. *See also ABC v. Aereo, Inc. ("Aereo IV")*, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); *Fox Television Stations, Inc. v. FilmOn X LLC*, 2015 WL 7761052 (D.D.C. Dec. 2, 2015); *CBS v. FilmOn, Inc.*, 2014 WL 3702568 (S.D.N.Y. July 24, 2014), *aff'd*, 2016 WL 611903 (2d Cir. Feb. 16, 2016).

This Court should correct the course and affirm the district court's traditional interpretation of Section 111. As originally enacted, Section 111 was intended to help nascent competitors in video distribution avoid ruinous transaction costs. That FilmOn and others like it make use of the Internet as part of their signal path should not disqualify them from the same benefits.

II. Through Section 111, Congress Has Limited and Defined the Scope of Exclusivity in the Public Performance Right.

While one of the functions of the Copyright Act is to compensate creators, its "ultimate aim" is "to stimulate artistic creativity for the general public good." *Universal City Studios v. Sony Corp.*, 464 U.S. 417, 432 (1984). "The sole interest of the United States and the primary object in conferring the monopoly," the Supreme Court has explained, "lie in the general benefits derived by the public from the labors of authors." *Id.* (internal quotations and citations omitted). Thus, copyright sets many uses of copyrighted works beyond the rightsholder's control, requiring neither permission nor payment. And what the Act excludes from the rightsholder's legal domain—including by omission—is as important to achieving the Act's goals as what it includes.

For example, a copyright holder's exclusivity over publication does not extend to control over the resale of copies, because such control "would give a right not included in the terms of the statute, and, in [the Court's] view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." *Bobbs-Merrill Co. v. Straus*, 210 U.S. 339, 351 (1908).

This is true even where the result is to deny rightsholders a potential source of income. In fact, copyright law has always allowed third parties to use and profit from the works of others by whatever means Congress has not assigned exclusively to rightsholders. As the Supreme Court has noted, although "[i]t may seem unfair that much of the fruit of the [creators'] labor may be used by others without compensation," this is not an "unforeseen byproduct of a statutory scheme" but rather a fundamental principle. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349–50 (1991) (internal citation omitted).

This principle applies with singular force in this case. The primary signals that are released by content providers over the airwaves are free for any member of the public to receive with a home antenna. Broadcasters have never enjoyed an unfettered right to exclusive control over secondary transmissions of free-to-air TV signals—such exclusivity rights have always been limited by Section 111 and other statutory licenses. The approach taken by the *ivi* court and encouraged by the Appellants here is a judicial expansion of the exclusive right into an area once open to new businesses and innovators.

III. Maintaining Internet-Based Cable Systems' Ability to Use Section 111 Will Promote Competition and Innovation.

New technologies for viewing and distributing media have often been challenged by copyright infringement claims, including the player piano, the videocassette recorder, and the portable MP3 music player. However, the Supreme Court has explicitly avoided causing harm to markets for new technologies that themselves have the potential to expand markets for creative work. Instead, it has directed reviewing courts to employ a circumscribed approach when applying copyright law to new technology, and has been careful to craft rules that respect Congress's prerogatives without "discourag[ing] the emergence or use of different kinds of technologies." *Aereo*, 134 S. Ct. at 2502. The district court's ruling hews to the Supreme Court's approach, and would (i) lower transaction costs and introduce competition, (ii) encourage investments in new technology, and (iii) benefit consumers of television programming.

A. Copyright issues that arise out of technological advances and innovation are best addressed by a fully-informed legislative body.

Advances in technology have often rendered provisions of the Copyright Act ambiguous. In these circumstances, "the Copyright Act must be construed in light of [its] basic purpose." *Sony*, 464 U.S. at 432 (internal citation omitted). In this case, as in many others, the interpretation most faithful to copyright's purpose is that which allows new businesses, unaffiliated with major copyright holders, to add value for the consumers of creative materials. This is especially true in circumstances where, as here, rightsholders have already been compensated for the distribution of their works, as through advertising sales.

The *Sony* case illustrates the wisdom of this approach. Before the late 1970s, most television viewers did not have the ability to record programs for later viewing, a practice known as time-shifting. The broadcasting business developed in a world where linear viewing of entire programs at the time of broadcast was the only way to view television. The 1976 Copyright Act was drafted against this backdrop, and never expressly addresses time-shifting.

Then innovators brought a disruptive new product to market. Home videocassette recorders ("VCRs") revolutionized the consumption of television in a way that neither Congress nor industry expected. In *Sony*, incumbent broadcasters characterized the VCR as a dangerous and economically harmful technology, a label they now apply to FilmOn. In 1982, the president of the Motion Picture Association of America ("MPAA") famously compared the VCR to a serial killer, predicting that "[t]he investment of hundreds of millions of dollars each year to produce quality programs to theaters and television will surely decline." *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 97th

Cong. 13 (1982) (testimony of Jack Valenti, President, MPAA), *available at* http://cryptome.org/hrcw-hear.htm.

The Court rejected the broadcasters' invitation to expand the statutory monopoly to preclude personal time-shifting. *Sony*, 464 U.S. at 456. In doing so, the Court also rejected the dissent's proposed approach to difficult cases of statutory interpretation: that an independent application of "traditional copyright principles" gravitates towards a finding of liability, and thus towards rightsholder control over distribution technology. *Id.* at 500 (Blackmun, J., dissenting).

Just two years after *Sony*, videocassettes became the motion picture industry's largest source of revenue. Aljean Harmetz, *Hollywood Braces for Directors' Strike*, N.Y. Times (Apr. 11, 1987). Television incumbents—who had previously been hostile to the VCR—benefitted from surging demand in this new market for creative work. The unforeseen success of the VCR demonstrates the wisdom of permissively interpreting copyright law to sustain new innovation. New markets develop in unanticipated directions, and innovators deserve a chance to compete, even if the economic benefits cannot be proven at first glance. *See Sony*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.").

This principle also applies to retransmissions of broadcast television that use the Internet as a component of the signal pathway. Neither Congress nor the television industry foresaw the availability of low-cost video Internet streaming when they crafted the Section 111 license. But like the VCR, retransmission technology that utilizes the Internet may offer unanticipated benefits for incumbents, new entrants, and consumers.[3] If Congress wishes to establish a special set of rules for Internet-based retransmission of broadcast television, it certainly can do so. In the meantime, this Court should not restrict the availability of Section 111 to the specific, capital-intensive technology used by incumbent video distributors, some of whom are plaintiff-appellants in this case.

[3] The then-president of the MPAA, speaking at a time when traditional cable was still an upstart technology that challenged incumbents, testified that

> [c]able should continue to be granted a compulsory license to retransmit local programs required to be carried under FCC regulations. Cable should not be required to pay any copyright fee to copyright owners for using such programs. This policy is in accord with the concept of localism and better serves the public interest . . . .

Hearings on H.R. 1805, H.R. 2007, H.R. 2108, H.R. 3528, H.R. 3530, H.R. 3560, H.R. 3940, H.R. 5870, and H.R. 5949, Copyright/cable Television, Part 1 Before the Subcomm. on Courts, Civil Liberties & the Admin. of Justice of the H. Comm. on the Judiciary, 98th Cong. 68 (1982) (statement of Jack Valenti, President, MPAA).

B. *Despite major technological development, the price of pay TV services has increased.*

Technological development has transformed the way in which Americans consume media, but incumbent TV providers have largely failed to adapt. A 2014 study found that more than 8 percent of pay TV subscribers cut the cord completely and abandoned their service, and more than 45 percent reported "shaving" down the level of their service. Sarah Perez, *New Study Shows A Rise in Cord Cutting*, TechCrunch (June 23, 2015), http://techcrunch.com/2015/06/23/new-study-shows-a-rise-in-cord-cutting-8-2-percent-ditched-pay-tv-in-2014-up-1-3-yoy/. Over 71 percent of those surveyed reported that increasing fees for pay TV contributed to the decision, and 33 percent cited dissatisfaction with channel options as a factor. *Id.*

The pricing data from recent years validates these consumers' concerns: The Government Accountability Office ("GAO") reports that "[f]rom 2005 through 2011, cable rates rose more than 33.5 percent for both basic and expanded service tiers" and increased over twice as fast as "inflation [as] captured in the Consumer Price index." U.S. Gov't Accountability Office, GAO-13-576, *Video Marketplace: Competition Is Evolving, and Government Reporting Should Be Reevaluated* 16 (2013). Given this high (and rising) price, it is unsurprising that the thirteen largest U.S. cable providers lost an estimated 463,000 subscribers in the first six months of 2015. Barb Darrow & Stacy Jones, *Cable Consumers Keep Cutting the Cord.*

Can Anyone Blame Them?, Fortune (Aug. 18, 2015), http://fortune.com/2015/08/18/cable-consumers-keep-cutting-the-cord/. Pay TV providers' ability to raise the price of service while losing substantial numbers of customers is telling: in this market, customers often find themselves locked in to existing business arrangements and technology,[4] and are unable to benefit from technological innovation and competition that could bring down prices.

C. Broadcasters benefit from the status quo, and lack incentives to expand access to free, over-the-air programming.

For a variety of technological and economic reasons, incumbent broadcasters are not serving the needs of consumers who want access to their programming. Consumers who use antennas to receive over-the-air programming must be within the broadcast range of the station to receive programming; those who are insufficiently close to the station experience "black screens and a message reading 'No signal.'" Kalamazoo Gazette Staff, *Digital Divide: New All-or-Nothing TV Signals Leave Many with Dark Screens*, Mich. Live (Sept. 27, 2009),

[4] *See, e.g.*, Press Release, Thomas Wheeler, Chairman, Federal Communications Commission (Jan. 27, 2016), https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf ("Ninety-nine percent of pay-TV subscribers are chained to their set-top boxes because cable and satellite operators have locked up the market. Lack of competition has meant few choices and high prices for consumers—on average, $231 in rental fees annually for the average American household. Altogether, U.S. consumers spend $20 billion a year to lease these devices. Since 1994, according to a recent analysis, the cost of cable set-top boxes has risen 185 percent while the cost of computers, televisions and mobile phones has dropped by 90 percent.").

http://www.mlive.com/business/west-michigan/index.ssf/2009/09/digital_divide_new_all-or-noth.html. Broadcasters *could* build networks of repeaters to expand free access to their programming and reach consumers in "digital dead zones." But broadcasters' reliance on retransmission consent payments from cable and satellite operators gives them a disincentive to expand free over-the-air access.

In fact, broadcasters—whose traditional source of revenue is advertising—derive an increasing amount of revenue from retransmission consent fees negotiated with cable and satellite operators under Federal Communications Commission rules.[5] As these fees grow, widespread pay TV subscribership, rather than free over-the-air (OTA) broadcasting, becomes more lucrative for broadcasters. As long as an overwhelming percentage of households subscribe to pay TV services,[6] broadcasters can engage in rent seeking behavior: they capture large retransmission fees from cable providers and maintain advertising share

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[5] Industry research firm SNL Kagan reports that cable companies paid broadcast television stations $6.3 billion in retransmission fees in 2015, and will pay $10.3 billion per year by 2021. Daniel Frankel, *SNL Kagan Raises Retrans Fee Forecast to $9.8B by 2020; Mediacom's CEO Complains to FCC*, Fierce Cable (July 7, 2015), http://www.fiercecable.com/story/snl-kagan-raises-retrans-fee-forecast-98b-2020-mediacoms-ceo-complains-fcc/2015-07-07.

[6] According to a recent survey, 83 percent of U.S. households subscribe to some kind of pay TV service, a category that comprises cable and satellite television offerings. *See* Leichtman Research Group, Inc., Press Release, *83% of U.S. Households Subscribe to a Pay-TV Service* (Sept. 3, 2015), http://www.leichtmanresearch.com/press/090315release.html.

without making a commensurate effort to expand infrastructure to provide free over-the-air television. Accordingly, many broadcasters are incented to suppress new competitors like FilmOn, which *does* expand access to OTA television by efficiently using existing infrastructure.

Other broadcasters that rely primarily on advertising revenue benefit from FilmOn's expansion of the reach of broadcast signals using Internet streaming, without the regulatory overhead and expensive infrastructure of a traditional cable system. "[M]any small and independent broadcasters (SIBs) depend heavily on such user-friendly viewing technologies to reach their audience." Brief of Small and Independent Broadcasters as Amici Curiae Supporting Respondent at 5, *ABC v. Aereo, Inc.*, 134 S. Ct. 2498 (2014) (No. 13-461).

D. Pay TV providers are similarly unwilling or unable to expand access to broadcast-only packages.

Pay TV providers also fail to adequately serve consumers who primarily want access to local broadcast television. Cable and satellite television providers "deliver content through cable cords, telephone wires, or via satellites and home satellite dishes," all of which require significant expenditures to build and maintain. Adam Levine-Weinberg, *Why Your Cable Bill Is So Darn Expensive*, Motley Fool (Apr. 12, 2015, 11:03 AM), http://www.fool.com/investing/general/2015/04/12/why-your-cable-bill-is-so-darn-expensive.aspx. In order to remain profitable, pay TV providers need to "spread these fixed costs over as broad a revenue base as possible," and must bundle the sale of access to popular channels with little-watched ones. *See id.* Bundling may not be a matter of choice: pay TV providers may want to provide à la carte offerings of the most popular channels, but find themselves unable to do so because the prices charged by broadcasters for "standalone options may be so high that the only economically sound option is to accept the[ir] bundled offer." Notice of Proposed Rulemaking in the Matter of Implementation of Section 103 of the STELA Reauthorization Act of 2014, Totality of the Circumstances Test, 80 Fed. Reg. 59706, 59711 (proposed Oct. 2, 2015) (to be codified at 47 C.F.R. pt. 76).

In addition to infrastructure costs and channel lock-in, pay TV distributors must also negotiate with broadcasters to retransmit their programming. *See* 47 C.F.R. § 76.64 (2015). Such retransmission fees are "expected to hit $9.3 billion" by 2020, costs which pay TV providers are passing on to consumers. Christopher Zara, *How High Can Cable Bills Go? TV Broadcasters Blasted Over Soaring Retransmission Fees*, Int'l Bus. Times (June 29, 2015), http://www.ibtimes.com/how-high-can-cable-bills-go-tv-broadcasters-blasted-over-soaring-retransmission-fees-1988662.

Finally, the pay TV industry has also become increasingly concentrated, and viewers in rural areas—those most likely to live in digital dead zones—may not have any measure of choice when it comes to selecting their cable provider or choosing the best plan. For many consumers, purchasing a bundled Internet and cable television package is cost effective, and combined providers like Comcast and Time Warner Cable dominate particular regional markets. Jonelle Marte, *Ten Things Cable-TV Companies Won't Say* (Dec. 2, 2012), http://on.wsj.com/XgPEfD ("[A] 2011 survey by the Federal Communications Commission showed that 61.5% of customers still only had one main choice of cable provider."). As a result, pay TV providers may be positioned to offer only those packages which maximize revenue, rather than catering to consumers who are only interested in basic broadcast programming.

Ultimately, consumers are left with few choices. Many are beyond the reach of over-the-air signals "because of the curvature of the earth and other topographical factors." *Teleprompter*, 415 U.S. at 400. Other consumers may be priced out of cable packages that are not tailored to their economic situation. These individuals living in "digital dead zones" face a choice between increasingly expensive pay TV or no TV at all.

E. The District Court's interpretation of Section 111 levels the playing field for incumbents and new entrants.

In response to the growing cost of pay TV, many consumers have turned back to free over-the-air broadcast television programming. According to Nielsen data, the number of "broadcast only" households rose from 10.9 million in the second quarter of 2013 to 12.8 million in the third quarter of 2015, the latest data available. *See* Nielsen, *The Total Audience Report: Q3 2015* at 22 (2015); Nielsen, *The Cross-Platform Report: September 2013* at 14 (2013). A number of innovative companies like Channel Master are taking advantage of this trend by offering products that combine "state-of-the-art digital antennas with [] digital video recorders." Mike Farrell, *Threat from the Skies: Pay TV's Newest Rival Is an Old Foe*, Multichannel News (Apr. 13, 2014, 8:00 AM), http://www.multichannel.com/news/technology/threat-skies/389682. Paired with an HD antenna, Channel Master's DVR+ product permits consumers to watch, record, pause, and rewind over-the-air broadcasts with "no contracts and no monthly fees." Channel Master, www.channelmaster.com/antenna_DVR_s/336.htm (last visited Feb. 5, 2016).

Despite its appeal, the new technologies have significant limitations: they require a cumbersome antenna, and cannot function effectively in areas where the broadcast signal is weak or non-existent. As a result, these new tools have not alleviated the lack of consumer choice in television providers, and have failed to introduce meaningful competition in rural areas or digital dead zones.

In contrast, FilmOn and other Internet-based providers *do* compete with pay TV providers, because they can provide television services to consumers without regard to the strength of the broadcast signal in a particular area. Consumers in both rural and urban environments can access the programming of cloud-based providers if they have access to an Internet connection, or if they purchase mobile data plans that permit video streaming. And unlike traditional pay TV providers, FilmOn and similar cloud-based providers benefit from lower costs: they don't bear the cost of maintaining an extensive cable or satellite infrastructure, and they aren't compelled to sell large bundles of popular and unpopular channels at higher prices.

Accordingly, an increasing number of television consumers are gravitating towards these cost effective, flexible products, and advertisers are following. *See* Perez, *supra*. Revenue from digital video advertising totaled $7.77 billion in 2015, and revenue from all digital advertising is expected to eclipse that of traditional television advertising this year. *See US Digital Ad Spending Will Approach $60 Billion This Year, with Retailers Leading the Way*, eMarketer (May 19, 2015), http://www.emarketer.com/Article/US-Digital-Ad-Spending-Will-Approach-60-Billion-This-Year-with-Retailers-Leading-Way/1012497; Nathalie Tadena, *Digital Ad Spending in U.S. to Surpass Television Spending in 2016*, Wall St. J. (Oct. 15, 2015, 3:29 PM), http://on.wsj.com/1LPSkET.

Acknowledging this transformation, the District Court declined Appellants' invitation to assume the role of technological arbiter. The court correctly concluded that a permissive interpretation of Section 111 encourages vigorous competition, and rejected Appellants' attempt to block their competitors' use of "available, economically feasible technology." *Fox Television Stations, Inc. v.*

AereoKiller, No. 2:12-CV-6950, 2015 WL 4477797, at *15 (C.D. Cal. 2015) (internal citation omitted).

F. Adopting the Plaintiffs' cramped interpretation of Section 111 would hinder competition and innovation in the delivery of over-the-top broadcast video content.

Adopting the Plaintiffs' "technology-specific" reading of Section 111 would enable broadcasters and pay TV outlets, which already enjoy all of the benefits and leverage of incumbency, to extend their dominance of the television market to the new market for Internet-based (also called "over-the-top") streaming video. Some broadcasters and pay TV providers have already used their privileged position vis a vis rightsholders to stream broadcast television over the Internet.

Comcast, which is a plaintiff in this case through its subsidiary Universal, has introduced "Stream TV" in certain markets. *See* Hiawatha Bray, *Comcast Targets Digital Natives with Stream, but Will They Care?*, BetaBoston (July 17, 2015), http://www.betaboston.com/news/2015/07/16/comcast-targets-digital-natives-with-stream-but-will-they-care/. For an extra $15 per month, Stream permits existing Comcast Internet customers to watch and record live broadcasts from major networks on their desktop and mobile devices. *See id.* Comcast argues that this new service is a "cable system" under the Communications Act—granting itself regulatory privileges it seeks to deny new entrants here. *See* Opposition of Comcast Corporation, *Applications of Comcast Corporation*, *General Electric*

Company and NBC Universal, Inc. for Consent to Assign Licenses or Transfer Control of Licensees Protecting and Promoting the Open Internet, FCC MB Docket No. 10-56 (Mar. 14, 2016), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001533897 ("Stream TV is a Title VI cable service delivered over a private, managed closed transmission path to customers' homes, not over the Internet.").

Broadcasters and incumbent pay TV services hope to use copyright law to "freez[e] existing economic arrangements," *Teleprompter*, 415 U.S. at 413 n.15, and cap the number of entrants into the market for streaming broadcasts over the Internet, much as they have done in the market for traditional television broadcasts. Keeping FilmOn and other potential competitors from using the Section 111 safe harbor is part of that strategy. Not only is this approach anticompetitive, but it would foreclose the possibility of transformative innovation and investment that benefits both incumbents and new entrants.

G. A technologically neutral Section 111 can benefit incumbents, new entrants, content creators, and consumers.

Many new technologies have proven valuable despite having purportedly unnecessary features, inefficiencies, or bizarre technical designs. Cable television was derided as a sham innovation during its first decades: cable pioneers' method of running wires to individual houses "didn't fit the mission" of the existing television juggernauts, and its proponents were characterized as "small-town wheeler-dealers." Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* 180–81 (2010). Plaintiffs' characterization of FilmOn as an illegitimate Internet video service mirrors early criticisms of cable television, and underscores the import of this case for innovation in the video distribution market.

Moreover, in their eagerness to exclude FilmOn and similar services from the Section 111 statutory licensing scheme, Plaintiffs may be overcommitting to retransmission fees and overlooking these new entrants' potential as partners. According to 2014 data, local broadcast station revenue from advertising ($19.7 billion) still dwarfs revenue accrued from retransmission fees ($5 billion)[7], and advertisers are poised to invest even more in digital ads. Pay TV providers may be able to use FilmOn and similar services to expand advertising coverage to previously unreachable consumer segmentsn.

Rightsholders and consumers also stand to benefit from increased investment and innovation in Internet streaming of broadcast programming. Netflix, an ascendant streaming video provider, plans to spend $5 billion this year on licensed and original programming, and Amazon and Hulu plan to spend comparable amounts. *See* Adam Levy, *YouTube Could Force Netflix and Amazon to Spend More*, The Motley Fool (Dec. 14, 2015, 1:20 PM), http://www.fool.com/

[7] Pew Research Center, *State of the News Media 2015* 6 (2015), http://www.journalism.org/files/2015/04/FINAL-STATE-OF-THE-NEWS-MEDIA1.pdf.

investing/general/2015/12/14/youtube-could-force-netflix-and-amazon-to-spend-mo.aspx. YouTube, another prominent streaming provider, has paid out $1 billion to over 8,000 rights holders (including network broadcasters) who participate in its Content ID program. *Statistics*, YouTube, https://www.youtube.com/yt/press/statistics.html (last visited Feb. 12, 2016).

Consumers have embraced these options: nearly half of U.S. households purchase access to one of these streaming services. Mark Walsh, *Cord-Cutting Fears Spark Big Selloff at Disney, Fox, CBS; Cramer Likes Netflix*, The Street (Aug. 6, 2015), http://www.thestreet.com/story/13246127/1/cord-cutting-fears-spark-massive-sell-off-at-disney-fox-and-cbs.html. Despite the popularity and promise of these new platforms, "the biggest gaps in streaming—local TV stations and live sports—will remain largely unchanged" if this Court adopts Plaintiffs' technologically restrictive interpretation of Section 111. Rob Pegoraro, *The Time to Cut the Cord and Switch to Streaming TV Is Now*, Yahoo Tech (Jan. 19, 2015), http://www.yahoo.com/tech/the-time-to-cut-the-cord-and-switch-to-streaming-002529064.html. Despite all the advantages of over-the-top content, services like Netflix and Hulu are a complement, and not a substitute, for the exclusive content available from broadcasters. Like FilmOn, they cannot pragmatically offer local broadcast programming without a statutory license. A technologically neutral interpretation of Section 111, however, would enable such providers to compete in the market to deliver that broadcast content and address the current gaps in streaming.

IV. Where Market-Altering Decisions of Communication Policy Are Concerned, Interpretations of Section 111 Should Not Preempt or Preclude Rulemaking by the Federal Communications Commission.

The Section 111 license applies "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1).

The law requires that multichannel video programming distributors ("MVPDs") obtain "the express authority of the originating station" before retransmitting the signal of commercial broadcasting stations, 47 U.S.C. § 325(a); 47 C.F.R. § 76.64 (2015), and that broadcasters and MVPDs "negotiate in good faith" for retransmission. 47 U.S.C. § 325(b)(3)(C)(ii); 47 C.F.R. § 76.65 (2015). Because Internet-based systems like FilmOn's are not currently considered MVPDs by the FCC, FilmOn's actions do not violate any specific rules regarding retransmission consent and are therefore "permissible." FilmOn thus qualifies for the statutory license.

The FCC has proposed bringing Internet-based systems into the retransmission consent regime by revisiting its definition of MVPD. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming*

Distribution Services, 80 Fed. Reg. 2078 (Jan. 15, 2015). While Congress has cautioned "the Federal Communications Commission, and others who make determinations concerning communications policy, not to rely upon any action of this Committee [regarding copyright policy] as a basis for any significant changes in the delicate balance of regulation in areas where the Congress has not resolved the issue," H.R. Rep. No. 94-1476, at 5703–04 (1976), courts should avoid construing ambiguous statutes in ways that undermine the FCC's power to regulate communications in the public interest. *See* 47 U.S.C. § 151 (establishing the FCC "[f]or the purpose of regulating interstate commerce in communication"). While MVPD status has implications beyond retransmission consent, a finding that systems such as FilmOn cannot qualify for the copyright licenses where traditional MVPDs do could limit the FCC's ability to promote a competitive video marketplace by solidifying an incumbent advantage against new entrants. This would be contrary to the public policy goal of "increasing competition and diversity" in the video marketplace. 47 U.S.C. § 548. A technology-neutral interpretation of Section 111 accords with Congressional intent and public policy, and leaves communications policy matters within the discretion of the FCC. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592–95 (1983).

CONCLUSION

"[Where] Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Sony*, 464 U.S. at 431. This Court should apply that wise approach in this case and decline the broadcasters' invitation to expand copyright law to unanticipated contexts in anticompetitive ways. This Court should affirm the lower court's decision, leaving any substantive changes up to Congress.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

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

1. This Brief Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 6992 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Windows 2016, the word processing system used to prepare the brief, in 14 point Times New Roman font.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 4, 2016.

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CERTIFICATE OF SERVICE

I certify that I caused the foregoing **BRIEF AMICI CURIAE OF ELECTRONIC FRONTIER FOUNDATION AND PUBLIC KNOWLEDGE IN SUPPORT OF DEFENDANTS-APPELLEES** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 4, 2016. All participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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