No. 15-56420

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

Appeal from the United States District Court for Central California, Los Angeles case number 2:12-cv-06921-GW-JC, Hon. George H. Wu

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF BROADCASTERS IN SUPPORT OF PLAINTIFFS-APPELLANTS

RICK KAPLAN
BENJAMIN F. P. IVINS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N. Street, NW
Washington, DC 20036
(202) 429-5430

JOSEPH R. PALMORE
JAMES R. SIGEL*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 887-6940
JPalmore@mofo.com

PAUL GOLDSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

Counsel for Amicus Curiae National Association of Broadcasters

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus curiae National Association of Broadcasters states that no corporation owns 10% or more of its stock.

Dated: February 3, 2016 s/ Joseph R. Palmore

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

LEGISLATIVE MATERIALS

ADMINISTRATIVE MATERIALS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The National Association of Broadcasters (NAB) is a non-profit, incorporated association of radio and television stations and broadcasting networks. NAB serves and represents the American broadcasting industry, advocating before Congress, the Copyright Office, the Federal Communications Commission (FCC), and the courts on behalf of its members. The majority of NAB's members are local, independent stations.

NAB has a substantial interest in the correct outcome of this case. Without the proper application of copyright and communications laws and regulations governing the public performance of television programming and the retransmission of broadcast signals, broadcasters will be unable to fulfill their statutory obligation to offer free over-the-air television programs that meet the needs and interests of the communities they are licensed to serve. Unauthorized and illegal transmissions pull viewers away from lawful sources, siphoning off from NAB's members revenues essential to recouping the significant costs of acquiring, producing, and distributing local and national programming. Adherence to these laws and regulations is therefore critical to the continued viability of

[1] All parties have consented to the filing of this amicus curiae brief. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amicus curiae or its counsel made a monetary contribution to the preparation or submission of this brief.

broadcast—in particular *local* broadcast—television and to the viewing public such broadcasters are licensed to serve.

INTRODUCTION AND SUMMARY OF ARGUMENT

Congress, in 17 U.S.C. § 111, established a compulsory statutory copyright license for "cable systems," enabling them to retransmit copyrighted broadcast content without having to individually negotiate with rights holders. Congress did not, however, free cable systems from any and all constraints regarding copyrighted content. Far from it.

Instead, Congress struck a careful balance between cable systems and copyright holders—a balance maintained, in large part, through the application of communications law and policy. Under 17 U.S.C. § 111(c)(1), a cable system's secondary transmission of broadcast signals "shall be subject to statutory licensing" if, and only if, "the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." Congress's intent in imposing this condition was plain: it sought to ensure that any cable system availing itself of the Section 111 compulsory license would be subject to FCC regulations that aid in enforcing the exclusivity for the public performance of copyrighted content that would otherwise obtain under the Copyright Act. Accordingly, unless and until the

FCC *authorizes* a secondary transmission, it is not "permissible" within the meaning of Section 111(c)(1) and is thus ineligible for a compulsory license.

The district court's decision disregards this manifest legislative intent and threatens to upset the delicate, but economically essential, balance established by Congress. Appellees (referred to collectively as "FilmOn" in this brief) are not subject to the rules, regulations, and authorizations applicable to cable systems. Indeed, FilmOn is not currently subject to any FCC regulation at all. FilmOn's failure to satisfy the prerequisites of Section 111(c)(1) dooms its claim to the Section 111 compulsory license.

The district court, however, rejected this straightforward reading of Section 111(c)(1). If left undisturbed, its erroneous interpretation will have serious adverse consequences for broadcasters in general, local broadcasters in particular, and those who supply them both with content.

That is because this nation's institution of free and innovative broadcast television is secured by a complex legal framework. Millions of Americans watch broadcast television delivered for free over the air. The Section 111 compulsory license helps to ensure that the millions more who watch cable and satellite television also have access to quality broadcast programming. But such programming is not cost free, and cannot be taken for granted. Thus, the Section 111 compulsory license is counterbalanced by laws and regulations intended to

ensure that local stations continue to serve the communities they are licensed to serve.

Among the most important restrictions applicable to both cable systems and satellite operators are those designed to enforce local broadcasters' bargained-for rights to the exclusive distribution of content within their local markets. Duplicative programming siphons away local audiences and threatens advertising revenues. Without such revenues, local broadcasters are less able to secure and produce the programming they provide to the viewing public. These regulations are thus a crucial component of the business model under which local broadcasters operate. They are critical to the viability of broadcast television itself.

FilmOn currently faces no regulations requiring it to respect the local program exclusivity arrangements between stations and their program suppliers. While it claims to have adopted its *own* voluntary measures designed to protect local exclusivity, there is no assurance that FilmOn will maintain them absent FCC mandate. And the record shows that FilmOn's self-imposed restrictions will be ineffective. Granting an entity like FilmOn a compulsory license to broadcast content could therefore have a devastating impact on local broadcasting. The district court should be reversed.

ARGUMENT

I. BY PERMITTING FILMON TO AVAIL ITSELF OF THE CABLE COMPULSORY LICENSE WHEN IT IS NOT SUBJECT TO THE FCC REGULATIONS APPLICABLE TO CABLE OPERATORS, THE DISTRICT COURT'S DECISION CONTRAVENES THE LETTER AND INTENT OF SECTION 111

A. Broadcasters Provide Crucial Services To Their Local Communities

1. Local broadcasters deliver television programming to millions of Americans

As the Supreme Court has observed, "the importance of local broadcasting outlets can scarcely be exaggerated." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal quotation marks omitted). As of December 31, 2015, there were more than 1,387 full-power commercial television stations licensed by the FCC. Press Release, FCC, Broadcast Station Totals as of December 31, 2015 (Jan. 8, 2016), https://www.fcc.gov/document/broadcast-station-totals-december-31-2015. These stations deliver news, sports, entertainment, and other programming to millions of Americans.

The programming of broadcast television stations takes three principal forms. First, local broadcasters obtain a significant amount of content from the major national networks with which they are affiliated, such as ABC, CBS, NBC, Fox, and Univision. *See* FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 14-16, 30

FCC Rcd. 3,253, 3,322 (2015) ("*Video Competition Report*"). While some broadcast stations are owned and operated by national networks, the majority of local stations are independently owned. *Id.* at 3,321, 3,324. The national networks typically license their programming to local affiliates, granting them the exclusive right to perform these copyrighted works in their broadcast areas. *Id.* at 3,334 & n.671. Such guarantees of exclusivity are critical to local broadcasters, which "rely upon and market this exclusivity to attract commercial advertisers." H.R. Rep. No. 106-79, pt. I, at 13 (1999).

Second, local broadcast stations obtain syndicated programming—including both original programming and reruns of popular network television series—from content providers. *Video Competition Report*, 30 FCC Rcd. at 3,322. Like network programming, syndicated programming is generally licensed to local broadcasters on an exclusive basis within the broadcast area. *Id.* at 3,335-36.

Third, broadcast stations offer locally produced programming. *Id.* at 3,322. Such programming includes local news, weather, emergency alerts, sports, public affairs, and other content of particular interest to the communities the stations are licensed to serve. *Id.*

Local broadcasters provide all of this programming to the general public free of charge. "For many people, free, over-the-air television is their primary source of news, information and emergency alerts—not to mention entertainment." Press

Release, FCC, Ten Days and Counting to DTV Transition (June 2, 2009), http://tinyurl.com/DTV10Days. Indeed, anywhere between 11.4 and 22.4 million American households (accounting for as many as 60 million people) rely exclusively on over-the-air broadcast signals to watch television. *See Video Competition Report*, 30 FCC Rcd. at 3,340. Such reliance on free television is especially prevalent among lower-income families, minorities, and young adults. *See id.*

In addition, millions more watch broadcast television stations as retransmitted by a cable system or satellite carrier to which viewers pay a monthly fee. *See id.* at 3,339-40. Satellite and cable operators are required by statute to obtain local stations' express permission to retransmit their broadcast signals, *see* 47 U.S.C. § 325(b), and they generally pay for such consent, *see Video Competition Report*, 30 FCC Rcd. at 3,333.

Local broadcasters are thus a critical source of programming for the American public, reaching approximately 96% of households. *Id.* at 3,339. Their role in delivering the news is especially significant. According to one survey, "local TV remains a top news source for Americans, with almost three out of four U.S. adults (71%) watching local television news." Katerina Eva Matsa, *Local TV Audiences Bounce Back*, Pew Research Center (Jan. 28, 2014), http://tinyurl.com/PewBounceBack; *see also Local News in a Digital Age*, Pew

Research Center (Mar. 5, 2015), http://www.journalism.org/2015/03/05/local-news-in-a-digital-age (study finding that "nearly nine-in ten residents" in three surveyed cities "follow local news closely," and that the majority rely on local TV for such news). Moreover, local broadcast news has become an increasingly important source of investigative journalism as newspapers and other forms of traditional media face a continuing decline. *See* Barb Palser, *A Promising New Venue: TV stations and their digital outlets may play a more prominent role in investigative reporting*, American Journalism Review (Aug. 27, 2012), http://tinyurl.com/AJRPalser. And local broadcast news also serves a crucial function in emergency situations, such as the January 2016 blizzard that blanketed the northeast. *See* Statement of FCC Chairman Tom Wheeler, *Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System (PS Docket No. 15-94) and Wireless Emergency Alerts (PS Docket No. 15-91)* (Jan. 28, 2016) ("This past weekend's historic winter storm reminded us how much we rely [on] broadcasters and other TV providers to keep us informed during emergencies."). Local stations provide wall-to-wall coverage relied upon by both the viewing public and law enforcement authorities. *See, e.g.*, Advisory, FCC, FCC Provides the Public With Important Tips for Communicating in the Aftermath of Hurricane Sandy (Oct. 31, 2012), http://tinyurl.com/FCCSandy (advising the public to "[t]une

in to your local television or radio stations" for "important news alerts" regarding Hurricane Sandy).

2. Local broadcasters incur substantial costs in producing and delivering programming

Providing quality programming of particular interest to local communities is expensive. Indeed, local stations incur substantial costs in producing such programming. These costs include hiring reporters and camera crews, purchasing news vans and other equipment, and maintaining production facilities. One survey reported that, on average, local television stations spend more than $4 million per year in their news operating budgets and more than $700,000 in their news capital budgets. *See* Comments of the NAB, *Examination of the Future of Media and Information Needs of Communities in a Digital Age*, FCC GN Docket No. 10-25, at 5-6, 33 (May 7, 2010), *available at* http://tinyurl.com/FutureNewMedia. Commercial-free reporting during emergencies is especially expensive for local stations. *See id.* at 16 (noting that one local station spent $160,000 on a season's worth of hurricane coverage, not counting lost advertising revenue).

These are not local broadcast stations' sole costs. In addition, local stations face substantial capital expenses for their transmission facilities, and they must pay fees to acquire exclusive local rights to network and syndicated programming. *Video Competition Report*, 30 FCC Rcd. at 3,339; *see also* FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video*

Programming, MB Docket No. 12-203, 28 FCC Rcd. 10,496, 10,588 (2013) ("[S]yndication rights for the series *The Big Bang Theory* and *Modern Family* cost stations about $ 2.5 million per episode in barter and cash.").

3. Local broadcasters' revenue, and therefore their ability to provide programming, depends on local market exclusivity

In covering these expenses, local broadcasters "remain highly dependent on advertising revenues." *Video Competition Report*, 30 FCC Rcd. at 3,339; *see* FCC, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, 29 FCC Rcd. 3,351, 3,388 (2014) ("[O]n-air advertising revenues still constitute about 85 percent of broadcasters' revenues."). Because those advertising dollars, in turn, depend on the size of the audience reached, local broadcasters rely substantially on their ability to enforce their bargained-for rights to local exclusivity for network and syndicated programming. *See Video Competition Report*, 30 FCC Rcd. at 3,339; *see also* Comments of the NAB, *The Media Bureau Seeks Comment for Report Required by the STELA Reauthorization Act of 2014*, FCC MB Docket No. 15-43, (May 12, 2015), Attachment A, Norman Hecht Research, Inc., *Designated Market Areas: How They Relate to Viewers and a Vital Local Television Marketplace* (May 2015) at 3-4, *available at* http://apps.fcc.gov/ecfs/document/view?id=60001047113 (observing that because "[l]ocal advertisers are interested in having their advertising messages reach consumers who can purchase their products and services locally," and national

advertisers buy time on local stations "to reach specific targets," "advertisers need to know who they are reaching"). If viewers are able to watch the same network and syndicated programming through imported out-of-market broadcast signals, local broadcasters will find their audiences diminished, and advertisers will have less incentive to pay to reach potential local customers.

Local broadcasters would not, moreover, be the only ones harmed. When local stations' advertising revenues are decreased, they are less able to compensate content providers for their programming. Faced with such diminished returns, content providers will be more likely to migrate to pay television—potentially depriving millions of free over-the-air programming. *See* Comments of the NAB, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, Appendix B, at 32 (June 26, 2014), *available at* http://apps.fcc.gov/ecfs/document/view?id=7521348820. And because "news output is strongly and positively correlated with station revenues," diminished advertising revenue will mean reduced levels of local news for viewers. Jeffrey Eisenach & Kevin Caves, *The Effects of Regulation on Economies of Scale and Scope in TV Broadcasting* at 4 (June 2011), attached to Reply Comments of the NAB, FCC MB Docket No. 10-71 (June 27, 2011).

Accordingly, Congress and the FCC have provided mechanisms by which local stations can enforce the local program exclusivity they have obtained against

cable and satellite operators. *Video Competition Report*, 30 FCC Rcd. at 3,277; *see, e.g.*, 17 U.S.C. § 119(a)(3); 47 U.S.C. § 339(b); 47 C.F.R. §§ 76.92, 76.101, 76.122. In the context of cable systems, some of the most important of these regulations are known as the network non-duplication and syndicated exclusivity rules. Pursuant to these rules, a local broadcast station may, for example, "request the blackout of duplicated programming in the local station's zone of protection when carried on another station imported" by a cable operator. *Video Competition Report*, 30 FCC Rcd. at 3,277. As the FCC has explained, "the main purpose and effect" of these rules "is to allow the local affiliates to protect their revenues in order to make them better able to fulfill their responsibilities as licensees of the Commission." FCC, *Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, Gen. Docket No. 87-24, 2 FCC Rcd. 2,393, 2,400 (1987). Local broadcasters' ability to perform their critical role in delivering news and other content to millions of Americans depends in large part on the existence and enforcement of these protections. *See* FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* at ¶ 50 (Sept. 8, 2005) (finding it contrary to the public interest to interfere with contractual exclusivity arrangements that

broadcasters "entered into for the very purpose of securing programming content that meets the needs and interests of their communities").

B. Congress Has Established A Balanced Scheme Designed To Preserve Local Broadcasting

In enacting the Copyright Act of 1976, Congress was well aware of the importance of local broadcasting and thus took care to safeguard the enforcement of broadcasters' local market exclusivity rights. It accomplished this goal by conditioning the compulsory license regime it established in Section 111 on compliance with communications law provisions designed to enable local broadcasters to enforce rights secured in the program marketplace. Where no such provisions apply, the Section 111 compulsory license is unavailable.

1. Congress enacted the 1976 Act against the backdrop of FCC regulation of the cable industry

Understanding the operation of the Section 111 compulsory license provision requires an understanding of the background against which Congress legislated. Before the 1976 Copyright Act, cable operators could, pursuant to the Supreme Court's decisions in *Fornightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), and *Teleprompter Corp. v. Columbia Broadcasting System, Inc.*, 415 U.S. 394 (1974), retransmit copyrighted broadcast content without incurring any copyright liability. Congress rejected these holdings by enacting the 1976 Act's Transmit Clause. *See Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct.

2498, 2505-06 (2014). The Transmit Clause grants a copyright owner the exclusive right to "transmit or otherwise communicate a performance or display of the [copyrighted] work . . . to the public, by means of *any* device or process." 17 U.S.C. § 101 (emphasis added).

Congress was concerned, however, that requiring cable operators to negotiate with each copyright holder owning rights to a given broadcast would carry substantial transaction costs. Congress therefore established a compulsory license that would allow such operators to forgo individualized negotiations. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am.*, 836 F.2d 599, 602 (D.C. Cir. 1988). Under Section 111, a "cable system" is entitled to a license to the secondary transmission "of a performance or display of a work embodied in a primary transmission made by a broadcast station" so long as the cable system satisfies certain conditions. 17 U.S.C. § 111(c)(1). Among these conditions is that "the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." *Id.*

As this statutory language indicates, Congress did not intend the compulsory license to give cable systems automatic and unfettered access to broadcast content. Rather, it enacted Section 111 with the understanding that the FCC had imposed,

and would continue to impose, broadcast-related regulations on cable systems, and it incorporated these regulations into the statute.

Specifically, in 1965 the Commission concluded that it could not "regard a [cable] system's duplication of local programing via the signals of distant stations as a fair method of competition." FCC, *Amendment of Subpart L, Part 11, to Adopt Rules and Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, 38 F.C.C. 683, 705 (1965). It therefore adopted the first iteration of the network non-duplication rule. *Id.* at 743. Subsequently, in 1972, the Commission adopted a more comprehensive set of regulations for cable systems. These regulations included the first syndicated exclusivity rule, which provided protection for non-network broadcasts by television stations in the nation's 100 largest markets. FCC, *Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, 36 F.C.C.2d 143, 169-70 (1972).

Congress was well aware of these regulatory provisions at the time it adopted the 1976 Act. Indeed, the House Judiciary Committee's report expressly observed that "any statutory scheme that imposes copyright liability on cable television systems must take account of the intricate and complicated rules and regulations adopted by the Federal Communications Commission to govern the

cable television industry." H.R. Rep. No. 94-1476, at 89 (1976). Thus, as the Copyright Office has concluded, "Section 111 of the Copyright Act unmistakably reflects interplay between copyright and communications policies, and Congress legislated in 1976 based upon the existing cable industry, which had been framed by the regulatory policies of the FCC." Copyright Office, *Cable Compulsory License*, 56 Fed. Reg. 31,580-01, 31,593 (1991).

2. The text and legislative history demonstrate that Congress intended Section 111(c)(1) to require that the FCC authorize any transmission qualifying for the compulsory license

In Section 111(c)(1), Congress expressly conditioned the compulsory license regime on submission to FCC regulation. Only if a secondary transmission "is permissible under the rules, regulations, or authorizations of the Federal Communications Commission" is it subject to compulsory licensing. 17 U.S.C. § 111(c)(1). "Permissible," in this context, does not merely mean "not prohibited by." Instead, it refers to the FCC's *affirmative authorization* of a given secondary transmission. Without such affirmative authorization, no compulsory license is available.

This understanding of Section 111(c)(1) follows from the ordinary meaning of "permissible" as requiring express consent and not mere passive allowance. *See* Webster's Third New International Dictionary (unabridged) (1976) (defining "permissible'" as "that may be permitted" and "permitted" as "consent[ed] to

expressly or formally."). That "permissible" carries this intended meaning in Section 111(c)(1) is demonstrated by its express linkage to FCC "*authorizations*," a term that itself connotes affirmative consent, not merely the absence of a prohibition. *See NCAA v. Governor of New Jersey*, 730 F.3d 208, 232 (3d Cir. 2013) ("We do not see how having no law in place governing sports wagering is the same as authorizing it by law. . . . [T]he lack of an affirmative prohibition of an activity does not mean it is affirmatively authorized by law.") (emphases omitted). If the FCC has not regulated a secondary transmission, and thereby granted it "authorization[]," the transmission is not yet "permissible" within the meaning of Section 111(c)(1).

The legislative history confirms this reading of Section 111(c)(1). As the House Report explained, the "compulsory copyright license" is limited to "the retransmission of those over-the-air broadcast signals that a cable system is *authorized* to carry pursuant to the rules and regulations of the FCC." H.R. Rep. No. 94-1476, at 89 (emphasis added). And in describing the scope of Section 111(d)(1), which at that time required each cable system to report "the name and location of the primary transmitter or primary transmitters whose signals are regularly carried by the cable system," Pub. L. 94-553, 90 Stat. 2541, 2553 (1976), the House Report defined "[s]ignals 'regularly carried' by the system" as "those signals which the Federal Communications Commission has *specifically*

authorized the cable system to carry, and which are actually carried by the system on a regular basis." H.R. Rep. No. 94-1476, at 95 (emphasis added). These passages demonstrate that Congress considered a secondary transmission to be "permissible," and thus potentially eligible for a compulsory license, only if the FCC had affirmatively authorized it.

3. Section 111(c)(1) is a crucial part of the balance Congress struck between the need for expeditious program licensing and the interests of copyright owners

More broadly, Section 111(c)(1)'s requirement that there be *some* FCC regulation of the transmission in question reflects Congress's intent to balance its facilitation of copyright licensing for cable systems against the harm to copyright owners caused by this derogation of their exclusive rights. As with any compulsory license provision, Section 111 represents an accommodation of two competing interests: providing the public with access to the work in question, and ensuring that the copyright owner's returns from its investment are not unduly diminished. *See* Goldstein on Copyright, § 2.9.2 (3d ed. 2015). "Balancing two societal benefits, Congress enacted § 111 to enable cable systems to continue providing greater geographical access to television programming while offering some protection to broadcasters to incentivize the continued creation of broadcast television programming." *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 281 (2d Cir. 2012); *accord* Copyright Office, *Satellite Home Viewer Extension and*

Reauthorization Act Section 109 Report 106 (June 2008) ("SHVERA § 109 Report") ("Section 111 is the result of a carefully balanced legislative compromise.").

This balance is especially important with respect to Section 111's application to local broadcasters. Establishing a compulsory license for cable systems without providing *any* regulatory counterweight would have presented a particular threat to local broadcasters because it would have undermined their bargained-for right to exclusivity. "If there were not a section 111 . . . statutory license, copyright owners of broadcast programming would be able to exercise the exclusive rights of copyright ownership granted to them under section 106 of the Copyright Act." Copyright Office, *Satellite Home Viewer Extension and Reauthorization § 110 Report* 42 (Feb. 2006) ("Section 110 Report"). Thus, absent compulsory licenses, a local broadcaster could bring a copyright action against a cable system seeking to prevent it from importing content to which the broadcaster holds exclusive local rights: the cable system's public performance of that work in a local broadcaster's exclusive distribution area would represent a violation of its exclusive license. *See* 17 U.S.C. § 106 (granting owners of copyright in "motion pictures and other audiovisual works" the "exclusive right[] . . . to perform the copyrighted work publicly"); *see also, e.g., id.* § 501(c) (recognizing a "television broadcast station holding a copyright or other license to transmit" a work as a

"legal or beneficial owner" of the copyright "if such [a] secondary transmission occurs within the local service area of the television station"); *id.* § 501(e) (similar). If, however, Section 111 gives a cable system a compulsory license to perform the work in question, such protections are unavailable. Compulsory licenses therefore leave local broadcasters vulnerable to the importation of signals that could undermine their entire business model. *See supra*, pp. 10-13.

Congress sought to ameliorate these adverse effects through the ongoing application of FCC regulations enforcing local market exclusivity. Indeed, the House Report cautioned the FCC that the 1976 Act should not serve "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 89. The Report continued: "Specifically, we would urge the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation or increased use of imported distant signals." *Id.*

As these statements make clear, Congress did not intend the Section 111 license to operate in a regulatory vacuum, or to authorize cable systems to retransmit copyrighted broadcast content wherever and however they saw fit. Instead, Section 111—and subsection (c)(1) in particular—presupposes the existence of FCC regulation that would continue to preserve local broadcasters' exclusivity rights even in the absence of an available copyright remedy. Congress

recognized that a compulsory license regime must be coupled with cable regulations such as exclusivity rules, and it "legislated with an understanding that the cable systems it was granting a compulsory license to would also be subject to the regulations of the FCC." *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 616 (S.D.N.Y. 2011).

In the years since, Congress has repeatedly reaffirmed the importance of the balance Section 111(c)(1) struck between local broadcasters and secondary transmitters. For example, in the Satellite Home Viewer Act of 1988 ("SHVA"), Congress established a statutory copyright license to cover certain satellite retransmissions of television programming. SHVA, Pub. L. No. 100-667, § 202, 102 Stat. 3935, 3949 (1988) (codified as amended at 17 U.S.C. § 119). Critically, however, Congress restricted satellite carriers' distribution of distant network signals to "unserved households," meaning a household unable to receive an adequate broadcast signal over the air. *Id.* at 3950. By ensuring protection for local broadcasters' exclusivity rights notwithstanding the compulsory license, this limitation "serve[d] as a surrogate for the FCC network nonduplication rules applicable to the cable industry." *Section 110 Report*, at 8; *see also id.* at iii ("The unserved household is an important term of the statutory license because it enables broadcasters to maintain market exclusivity and reap the economic benefits that flow from that control, and it promotes localism by providing access to local

voices, weather, news and advertising."). In this manner, Congress could continue to, as the House Report put it, "preserv[e] the exclusivity that is an integral part of today's network-affiliate relationship." H.R. Rep. No. 100-887, pt. II, at 20 (1988).

In since reauthorizing and modifying the compulsory license scheme for satellite operators, Congress has retained and in some cases expanded these essential protections for local broadcasting. *See, e.g.*, Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-534 (1999) (codified as amended at 47 U.S.C. § 339(b)(1)(A)) (requiring the FCC to impose its network non-duplication and syndicated exclusivity rules on the retransmission of certain broadcast signals); Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, 118 Stat. 2809, 3393, 3397-3400 (2004) (codified as amended at 17 U.S.C. § 119(a)(3)) (prohibiting a satellite carrier from delivering a distant network signal to new subscribers if the satellite carrier is already making available local-into-local service). As the House Report to the STELA Reauthorization Act of 2014, Pub. L. No. 113-200, 128 Stat. 2059 (2014), unequivocally stated, the broadcast "localism regime by which television networks and stations serve individual communities with news, weather, and information" is "based on the exclusive territorial rights granted to local affiliate

stations by programming networks, which are reinforced by regulatory requirements established by the FCC." H.R. Rep. No. 113-518, at 5 (2014).

Section 111(c)(1)'s limitation of cable system compulsory licenses to the retransmission of broadcast signals "permissible under the rules, regulations, or authorizations of the Federal Communications Commission" serves the same purpose as these statutory provisions applicable to satellite operators. Rather than precisely delineate the scope of these protections in the statute itself (as it did in the provisions applicable to satellites), Congress incorporated into the operation of the cable compulsory license the FCC's continuing oversight and regulation.

In sum, "[t]he statutory licenses for the retransmission of local and distant broadcast signals, which have worked in tandem with the FCC's rules for the last [40] years, have been part of a larger communications policy that has supported and protected the broadcast television business model." Copyright Office, *Satellite Television Extension and Localism Act § 302 Report* 49 (Aug. 2011). When a secondary transmission lies outside the scope of this complex communications policy regime because it has not been authorized by the FCC, the Section 111 compulsory license is unavailable. A contrary conclusion would disturb the careful balance established by Congress.

4. Because the FCC has not affirmatively authorized FilmOn's retransmissions, they are not "permissible" under Section 111(c)(1), and thus not eligible for the compulsory license

FilmOn is not, and does not purport to be, subject to any existing FCC regulation. The FCC has not authorized FilmOn's retransmission of broadcast signals. Nor has the FCC imposed on FilmOn the various regulations applicable to cable systems, including the network nonduplication and syndicated exclusivity rules. *See* 47 C.F.R. §§ 76.92, 76.101.[2]

The district court's contrary conclusion rests on a misunderstanding of the scope of Section 111(c)(1). Casually dismissing the Appellants' argument that FilmOn failed to satisfy this statutory requirement, the district court declared that the Appellants had "point[ed] to no ways in which [FilmOn was] in violation of FCC regulations." ER19. In this respect, the district court's decision resembles that of the Eleventh Circuit in *NBC v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467 (11th Cir. 1991), which, with little analysis, reached a similar conclusion. *See id.* at 1471.

As demonstrated above, however, such a narrow reading of Section 111(c)(1) is inconsistent with its text and purpose. *See supra*, pp. 16-23.

[2] While the FCC is currently considering regulations that might apply to internet retransmissions of broadcast content, it has not yet acted on this proposal. *See* FCC, Notice of Proposed Rulemaking, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, FCC MB Docket No. 14-261, at 51 (2014).

Congress's intent in enacting this provision was to ensure that Section 111 licensees were regulated by the FCC. Congress thus used the word "permissible" to mean *authorized*. The district court failed to consider any of the statutory context or historical materials that demonstrate this congressional purpose of counterbalancing FCC regulation against the compulsory licenses established in Section 111. Indeed, the district court's interpretation effectively renders Section 111(c)(1) pointless: it is not clear why Congress would have gone to the trouble of carving out from the compulsory license regime secondary transmissions that are *already prohibited* by FCC regulations.

In seeking some measure of support for its interpretation, the district court cited *ivi*, 765 F. Supp. 2d 594, and declared that "even the Copyright Office has taken the position that transmissions need not be affirmatively authorized by the FCC to qualify for § 111 purposes." ER19. That is incorrect. Rather, as the *ivi* district court explained, the Copyright Office has suggested that AT&T's U-Verse system—which has not been designated a cable system by the FCC—may nonetheless satisfy all of the elements of Section 111(f)'s definition of a "cable system." 765 F. Supp. 2d at 616 n.33; *see* SHVERA § 109 Report at 199 (stating that this system met "each of the elements of the cable system definition").

But whether an operator is a Section 111(f) "cable system" and whether it is entitled to a Section 111 compulsory license are two different questions: a "cable

system" may utilize the compulsory license only if it *also* satisfies the conditions set forth in Sections 111(c) and 111(d). Those conditions, of course, include the requirement that the secondary transmission be "permissible under the rules, regulations, or authorizations" of the FCC. 17 U.S.C. § 111(c)(1); *see* Copyright Office, *Cable Compulsory License*, 56 Fed. Reg. at 31,582 (characterizing arguments regarding Section 111(c)(1) as going "beyond a discussion of the definition of cable system"). The Copyright Office did not definitively determine whether the U-Verse system satisfied these conditions and could thus avail itself of the Section 111 license. *See* SHVERA § 109 Report at 200; *see also* Copyright Office, *Cable Compulsory License*, 57 Fed. Reg. 3,284-01, 3,291 (1992) (declining to "endorse[]" the conclusion that satellite operators satisfied Section 111(c)(1) even if not then regulated by the FCC). It thus did not, as the district court apparently believed, conclude that an entity is entitled to a compulsory license even if not currently subject to any FCC regulations at all.

II. ALLOWING FILMON TO AVAIL ITSELF OF THE COMPULSORY LICENSE WOULD CAUSE LOCAL BROADCASTERS, AND ULTIMATELY THE PUBLIC THEY SERVE, SERIOUS HARM

The district court's decision to allow FilmOn to utilize the Section 111 compulsory license even though it has not secured the FCC authorization required by Section 111(c)(1) represents a serious threat to local broadcasters and the

viewers they are licensed to serve. An examination of circumstances in which the FCC's exclusivity rules do not apply reveals that the harm would be substantial.

One example comes from Florida, where Stations WFTS-TV, in Tampa, and WWSB(TV), in Sarasota, are both affiliated with the ABC television network and serve an overlapping geographic area. Approximately 47% of television households in the Tampa-St. Petersburg area receive both stations, whether over the air or via satellite or cable. *See* Comments of the NAB, *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, at 42-43 (June 26, 2014). According to Station WFTS, its ratings for ABC network programming would have been 16.5% higher in the fourth quarter of 2013 if WFTS had full exclusivity for that programming. *Id.* at 43. That ratings difference would translate into 36% more advertising revenue—or approximately $6,410,000 annually. *Id.* For its part, WWSB reaches a smaller proportion of viewers in the area, and possesses local exclusivity only to the extent that Comcast does not retransmit WFTS on its Sarasota systems. *Id.* at 43-44. WWSB projects that, were it the exclusive ABC affiliate in its broadcast area, its ratings during network programming would be 600% higher. *Id.* at 44. That would produce a revenue increase of approximately 275%—or nearly $18 million on an annualized basis. *Id.* For point of reference, an actual revenue loss of that magnitude would be more than $5 million greater than the amount necessary to pay for the entire

operating and news budgets of the average broadcast station in the 25 largest national markets. *Id.* at 43-44.

The potential harm flowing from the unregulated retransmission of broadcast content would not be limited to local stations' financial viability, as a recent example from Utica, New York, demonstrates. There, because of a retransmission consent dispute, the cable operator began importing a Pennsylvania broadcast station into the Utica area. The mayor of Utica soon expressed unease about local viewer confusion—citing, for example, a call he had received regarding emergency reports of flooding in distant Wilkes-Barre, Pennsylvania. *Id.* at 34. The situation in Utica contrasts sharply with that in Joplin, Missouri, where in 2011 local coverage of tornados may well have saved lives. *See* Joint Comments of Barrington Broadcasting Group, LLC et al., *Amendment of the Commission's Rules Related to Retransmission Consent*, FCC MB Docket No. 10-71, at 8 (May 27, 2011). "If a Joplin resident watching television on the evening of Sunday, May 22, 2011, had been watching '60 Minutes' on a distant CBS affiliate imported into the Joplin market, he or she would not have received emergency coverage delivered by the local CBS affiliate about the proximity of the tornadoes." *Id.*

FilmOn purports to provide some protections against such harmful consequences, stating that it utilizes "geolocation" services designed to limit users to content originally broadcast in their area. *See* ER8. FilmOn claims, for

example, to target retransmissions to individuals whose billing address is within the broadcast area, to deny access to devices located outside the area, and to restrict users from employing proxy servers to view broadcast content from distant stations. *See* ER8. It also claims to rely on an encryption token intended to ensure that these users are not themselves able to retransmit the broadcast content. *See* ER8.

At the moment, however, these constraints on FilmOn's retransmissions are entirely self-imposed. No FCC or other regulation *requires* FilmOn to maintain such local exclusivity. There is little reason to think that FilmOn will continue to subject itself voluntarily to such restrictions absent regulation.

Moreover, there *is* good reason to doubt the effectiveness of FilmOn's claimed attempts at preserving local exclusivity. As one of Appellants' experts demonstrated below, FilmOn appears not to have actually implemented its billing-address check, and in any event such a restriction may be easily evaded. *See* ER8. Similarly, FilmOn's claimed limitations on the locations of devices accessing its transmissions are highly inaccurate and may be circumvented. *See* ER8. Likewise, its purported restrictions on proxy servers have yet to be implemented, and would still fail to prevent many users from accessing broadcast content from across the country. *See* ER8-9. And finally, FilmOn's encryption system has proven to be vulnerable to security breaches. *See* ER9; *see also ABC, Inc. v.*

Aereo, Inc., No. 12-cv-1540, 2014 U.S. Dist. LEXIS 150555, at *22-23 (S.D.N.Y. Oct. 23, 2014) (noting with respect to a similar internet retransmitter that "the technological safeguards designed to ensure that subscribers cannot access broadcasts outside of their home [designated market area] are easily overridden").

These many flaws are significant. Indeed, even the district court noted that "it appears that while [FilmOn] ha[s] attempted to develop a more robust geolocation and content protection system, that system: (1) has not been fully developed, (2) makes approximations and compromises that result in access being granted outside of the designated market area, (3) is not immune to manipulation, and (4) has not always been accurately described by [FilmOn] to the Court." ER9. The court dismissed these concerns with the observation that "precise system performance may be an appropriate subject for regulation by, *e.g.*, the FCC, should it choose to affirmatively authorize systems like [FilmOn's]." ER9 n.7. But the need to ensure that such protections are adequate is precisely why compulsory licensing under Section 111 is predicated on FCC authorization in the first place.

This need is all the more apparent given the harm that may result from the breach of measures designed to limit the availability of copyrighted material on the internet. Cable and satellite systems may be breached—an unauthorized household may, via wire or similar measures, secure access to transmissions to which they are not entitled. But because such breaches occur in a locally-confined cable system,

the resultant harm is geographically limited. *Cf.* Copyright Office, *Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705-02, 18,707 (1997) (concluding that the Section 111 license covers only "inherently localized transmission media of limited availability"). Someone with an unauthorized cable hookup, for example, is unlikely to be able to retransmit stolen transmissions worldwide.

The same cannot be said of the internet, "a worldwide system with the capability of transmitting, or retransmitting, copyrighted works to hundreds of millions of viewers within seconds." Statement of Marybeth Peters, Register of Copyrights, Before the House Subcommittee on Courts and Intellectual Property, 106th Congress, 2d Sess. (June 15, 2000). A single breach of FilmOn's geolocation and encryption systems could result in the unauthorized dissemination of broadcast content to untold numbers of viewers across the country or around the world. *See* SHVERA § 109 Report at 193 (noting that if an internet retransmission system is "cracked," "content leakage will ensue and massive unauthorized redistribution will occur"); *ivi*, 765 F. Supp. 2d at 614 n.28 (emphasizing the differing concerns of "piracy" involved with an internet retransmitter as compared to a system that "does not use the Internet and owns and controls the wires that run into its customers' houses"). FilmOn may someday be able to develop measures that ultimately resolve these concerns—especially if it is subject to regulation

requiring as much. But, as the Copyright Office has concluded, "unless we can be confident of their reliability and security, enactment of a compulsory license for local signals would place broadcast programming in jeopardy." Statement of Marybeth Peters, Register of Copyrights, Before the House Subcommittee on Courts and Intellectual Property.

CONCLUSION

For the foregoing reasons, the district court's decision should be reversed.

Dated: February 3, 2016

Respectfully submitted,

s/ Joseph R. Palmore

RICK KAPLAN
BENJAMIN F. P. IVINS
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N. St., NW
Washington, DC 20036
(202) 429-5430

JOSEPH R. PALMORE
JAMES R. SIGEL*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 887-6940
JPalmore@mofo.com

PAUL GOLDSTEIN
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, CA 94105

** Application to the District of Columbia Bar pending. Practice supervised by principals of firm admitted to District of Columbia Bar.*

Counsel for Amicus Curiae National Association of Broadcasters

CERTIFICATE OF SERVICE

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

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: February 3, 2015 s/ Joseph R. Palmore

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it is 6,947 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type-style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2010 in 14-point Times New Roman font.

Dated: February 3, 2016 s/ Joseph R. Palmore

dc-816472