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Why FilmOn X's Claim That It Is A Cable System Was Nixed

By Lucy Holmes Plovnick

On March 21, the U.S. Court of Appeals for the Ninth Circuit ruled in *Fox Television Stations, Inc. v. Aerokiller, et al.* that **FilmOn X**, a service providing paying subscribers with access to retransmitted broadcast signals over the internet, did not qualify for the cable statutory license in Section 111 of the Copyright Act.

The Section 111 statutory license allows cable systems to simultaneously retransmit broadcast signals into distant markets, provided that the cable operators submit royalties to the Copyright Office on a semi-annual basis and comply with all applicable FCC regulations.

The Ninth Circuit reversed a ruling by Judge George H. Wu in the Central District of California, which had previously awarded partial summary judgment in FilmOn X's favor. Judge Wu had found that FilmOn X's internet-based retransmission system should be considered a "cable system" under Section 111, and thus was eligible for the cable statutory license.

The Ninth Circuit's ruling overturns Judge Wu's decision.

This Ninth Circuit ruling may have prevented a federal circuit split on the question of whether a service like FilmOn X could qualify for the Section 111 compulsory license.

Courts in the Second Circuit, the Southern District of New York, the District of Columbia, and the Northern District of Illinois had all found that internet-based retransmission services like FilmOn X do not meet the statutory definition of a "cable system" in the Copyright Act. The Ninth Circuit's decision comes only days after FilmOn X made similar arguments in a companion case pending before the D.C. Circuit Court of Appeals, *Fox Television Stations, Inc., et al., v. FilmOn X, LLC, et al*. Oral argument in the D.C. Circuit case was held on March 17, and that court's decision remains pending.

The Ninth Circuit's ruling against FilmOn X ultimately rested on the Copyright Office's interpretation of the statutory definition of a "cable system." Section 111(f)(3) of the Copyright Act defines a "cable system" as "a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the [FCC], and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service." The Copyright

Office has consistently interpreted this statutory language as applying only to traditional, terrestrial cable systems, and has stated repeatedly that Section 111 does not apply to internet-based retransmission services.

Both Fox and FilmOn X argued that statutory definition of a "cable system" in Section 111(f)(3) was clear and unambiguous—but they both took very different positions on how the statutory language should be interpreted by the court. The Ninth Circuit disagreed that the language was unambiguous, finding that they "would not go so far as to conclude that it would be clearly impermissible to say that FilmOn qualifies for a compulsory license under § 111" based on the statutory language alone, and that their ruling did not "foreclose the possibility that the statute could reasonably be read to include Internet-based retransmission services." However, the Ninth Circuit recognized that such a reading of Section 111 was at odds with the Copyright Office's interpretation of the statute. The Ninth Circuit concluded that the Copyright Office's interpretation of the statute was both persuasive and reasonable, and deferred to the agency's interpretation of the Copyright Act. This deference resulted in the Ninth Circuit ruling against FilmOn X.

It is not surprising that FilmOn X has continued to advocate its position in the courts that it should be considered the internet-equivalent of a "cable system," despite its now numerous defeats. As the Ninth Circuit observed, there is a strong incentive for FilmOn X to claim its service qualifies as a cable system so that it can benefit from the Section 111 license. This is because the government-set royalty payments that FilmOn X would have to pay under the statutory license are "de minimus" when compared to cable industry gross receipts and revenues, falling well below market levels. Absent a statutory license, FilmOn X would face the leviathan task of negotiating separate licenses with all of the content owners whose programming it retransmits over its service—which would be cumbersome and drive up costs significantly, limiting its ability to compete with television broadcast stations and more traditional MVPDs.

As new technologies like FilmOn X emerge, courts will continue to face the question of whether existing compulsory licenses like Section 111 should be interpreted broadly to include new delivery systems or narrowly to exclude them. The Copyright Office's narrow interpretation of Section 111, which the Ninth Circuit adopted, is not technology-neutral—it limits the statutory license to traditional, terrestrial cable systems. But this narrow view of the statute is consistent with how Congress has approached statutory licensing in the past.

When Congress enacted Section 111 in 1976 it was trying to balance the "socially useful" role the then-fledgling cable industry served in bringing broadcast signals to remote, under-served areas with the property interests and creative incentives of copyright owners whose content was being exploited. But the Section 111 statutory license was specific to the particular fledgling industry Congress sought to incentivize.

When faced with the emergence of the satellite industry in the late 1980s, the Copyright Office (and the courts) took the position that satellite retransmissions fell outside Section 111 and required a new statutory license. Congress agreed and enacted a separate satellite statutory license, which can be found in Sections 119 and 122 of the Copyright Act. This history suggests that Congress, and not the courts, would ultimately need to consider whether new technologies like internet-based retransmission services should receive a statutory license specific to their industry.

These changing technologies and legal developments are important for all stakeholders to watch as they evolve.

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