

AFTER *AEREO*: APPLYING THE CABLE COMPULSORY LICENSE TO INTERNET RETRANSMISSION SERVICES

Jake Makar*

As Internet technology has advanced, consumers have increasingly opted to view video content on their computer, tablet, and smartphone screens instead of their television screens. In American Broadcasting Cos. v. Aereo, Inc. (“Aereo III”), decided in 2014, the U.S. Supreme Court rejected one of the more creative methods of delivering content via the Internet, closing a legal loophole by ruling that a company could not escape copyright liability by characterizing its retransmission of content as simply providing the consumer with equipment. Although the ruling definitively answered one question that had been subject to debate, the battle over Internet broadcasting has simply moved to another arena. The decision has led Aereo and similar companies to argue that they should be allowed to take advantage of the compulsory licensing scheme available to “cable systems” under Section 111 of the Copyright Act. The result of this new debate could have far-reaching effects on how consumers can access television content and on how the courts will interpret the Copyright Act in the future.

This Note examines the decisions made in the wake of Aereo III that have addressed the application of Section 111 and, in particular, contrasts the reasoning of Fox v. Aereokiller, in which the U.S. District Court for the Central District of California held that Internet rebroadcasting

* J.D. Candidate 2017, Columbia Law School; B.A. 2013, Cornell University. Many thanks to Professor Lance Liebman for his invaluable guidance throughout the writing process and to Professor Clarisa Long for her insightful comments. Additional thanks to the staff and editors of the *Columbia Business Law Review* for their help in preparing this Note for publication.

services are eligible for a compulsory license under Section 111, with the reasoning of courts that have come to the opposite conclusion. This Note argues that both the text of Section 111 and its legislative history demonstrate that Internet rebroadcasting services fall under the statutory definition of “cable system.” It further argues that granting access to the compulsory licensing scheme would accomplish the important policy goal of increasing competition in the marketplace.

I.	Introduction	477
II.	Background	478
	A. Brief History of Copyright and Compulsory Licensing.....	479
	B. The Copyright Act of 1976 and the Rise of Cable Television	481
	C. Aereo and Its “Public Performance” Defense.....	484
III.	Analysis.....	487
	A. A Brief Summary of the Deference Standards ...	487
	B. The Copyright Office Position Rejecting Internet-Based Services’ Eligibility for a Section 111 License	490
	C. The Copyright Office Prevails: <i>WPIX, Inc. v.</i> <i>ivi, Inc.</i> , <i>Aereo IV</i> , and <i>Fox v. FilmOn X</i>	493
	D. The Copyright Office Rebuffed: <i>Fox v.</i> <i>AereoKiller</i>	497
IV.	Recommendation.....	498
	A. Comparing and Contrasting the <i>ivi</i> Position and the <i>AereoKiller</i> Position.....	499
	B. Inclusion of Internet Transmissions Will Accomplish the Goal of Increasing Competition in the Marketplace	506
	C. The Copyright Act Should Be Interpreted Flexibly to Allow for Changing Technology	509
V.	Conclusion.....	511

I. INTRODUCTION

The market for video content is shifting toward the Internet, and everybody knows it. Increasingly, individuals are consuming movies and television programs online through sites such as Netflix and YouTube.¹ The demand for traditional cable television has slowed as more consumers opt to cancel their cable subscriptions and rely solely on the Internet to provide video content.² In the face of such rapid change, a number of companies have emerged that have attempted to take advantage of this new method of content delivery by rebroadcasting television programming directly to consumers via the Internet. Predictably, this behavior has resulted in litigation that has tasked courts with applying the Copyright Act to this technological innovation.

In 2014, the U.S. Supreme Court ruled that an Internet video streaming company, Aereo, was publicly performing copyrighted works under the meaning of the Copyright Act.³ Although the ruling definitively answered a question that had been subject to debate, it left others undecided and, according to some commentators, needlessly created substantial uncertainty within copyright law.⁴ Notably, the Court did not consider whether Aereo should be allowed to take advantage of the compulsory licensing scheme available

¹ See, e.g., Christopher Williams, *Traditional TV Viewing is Over: YouTube Habit is Permanent, Warn Researchers*, TELEGRAPH (Jan. 12, 2016, 3:23 PM), <http://www.telegraph.co.uk/finance/newsbysector/media/technologyandtelecoms/media/12067340/Traditional-TV-viewing-is-over-YouTube-habit-is-permanent-warn-researchers.html>.

² Todd Spangler, *Cord-Cutting Alert: Pay-TV Business Declines for First Time During Q1*, VARIETY (May 11, 2015, 10:46 AM), <http://variety.com/2015/biz/news/cord-cutting-alert-pay-tv-business-declines-for-first-time-in-q1-1201492308/> [<https://perma.cc/9JJ3-C2MW>].

³ *Am. Broad. Cos. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498, 2511 (2014).

⁴ See Mitch Stoltz, *Symposium: Aereo Decision Injects Uncertainty into Copyright*, SCOTUSBLOG (June 27, 2014, 2:18 PM), <http://www.scotusblog.com/2014/06/symposium-aereo-decision-injects-uncertainty-into-copy-right/> [<https://perma.cc/277Z-D9TM>].

through Section 111 of the Copyright Act.⁵ This decision has led Aereo and similar companies to argue that they should be entitled to these compulsory licenses. In large part, the issue revolves around whether Internet retransmission services fall under the Copyright Act's definition of "cable systems," and different courts have come to different conclusions depending on the interpretive methods used. The result of this debate could have far-reaching effects on how consumers can access television content and on how the courts will interpret the Copyright Act in the future.

This Note seeks to resolve this difficulty left unaddressed by the Supreme Court and argues that Internet streaming services should be eligible for the Section 111 license. Part II provides background necessary to conduct the analysis, including the history of the Copyright Act and a discussion of case law relevant to the issue of cable television. Part III analyzes the differences in reasoning motivating the dissimilar results of the Ninth Circuit as compared to the D.C. Circuit and the Second Circuit. Part IV argues that the Ninth Circuit's position is more persuasive and that Section 111 licenses should be available to Internet retransmission services. Finally, Part V briefly concludes.

II. BACKGROUND

In order to properly frame the issue, this Part provides the relevant historical and legal context that bears on whether and how Internet television streaming services should fit within the compulsory licensing scheme of Section 111.

⁵ 17 U.S.C. § 111 (2012).

A. Brief History of Copyright and Compulsory Licensing

Congressional authority to protect intellectual property is derived from the Copyright Clause of the Constitution,⁶ and the Copyright Act of 1976 provides the current statutory framework governing American copyright law.⁷ The underlying purpose of copyright protection is to provide a mechanism to incentivize creators to produce works that the public can enjoy.⁸ Thus, copyright is an attempt to promote the public good by granting a private property right. Courts have recognized that copyright therefore demands the balancing of private interests and public interests.⁹

The first Copyright Act, enacted in 1790, was rather limited in terms of the types of works that were copyrightable and how long the Act offered protection. Subsequent revisions of the Act gradually expanded copyright law to recognize new categories of works in response to technological changes.¹⁰ One particularly significant step was the introduction of a public performance right, included in the 1856 amendment to the 1790

⁶ U.S. CONST. art. I, § 8, cl. 8 (granting Congress the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”).

⁷ Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)).

⁸ See JANE C. GINSBURG & ROBERT A. GORMAN, COPYRIGHT LAW 1 (2012) (“The basic purpose of U.S. copyright is to enrich our society’s wealth of culture and information. The means for doing so is to grant exclusive rights in the exploitation and marketing of a work as an incentive to those who create it.”); Samuel J. Dykstra, Note, *Weighing Down the Cloud: The Public Performance Right and the Internet After Aereo*, 46 LOY. U. CHI. L.J. 989, 996 (2015).

⁹ See GILLIAN DAVIES, COPYRIGHT AND THE PUBLIC INTEREST § 5-022, at 99 (2d ed. 2002); Dykstra, *supra* note 8, at 996.

¹⁰ 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:20 (2016) [hereinafter 1 PATRY ON COPYRIGHT] (stating how amendments following the 1790 Act recognized new rights, matters, and remedies); Dykstra, *supra* note 8, at 996–97.

Copyright Act.¹¹ The recognition of such a right has had a significant effect on the cable television business that continues to this day.

By 1909, copyright law had become both complicated and opaque, and Congress responded to calls for broad reform by passing the Copyright Act of 1909.¹² The 1909 Act introduced the first compulsory licensing scheme in U.S. copyright law.¹³ Compulsory licensing, which initially applied to the music industry, arose in a context that is also instructive to an analysis of its application to cable television. The Aeolian Company, a producer of piano rolls, inspired congressional concern by attempting to secure exclusive rights from various music publishers to produce the perforated music sheets used in the company's automatic musical machines.¹⁴ If it had reached enough of these agreements, the company would have been able to corner the music market and drive smaller firms out of business. As a result, any public performance of these compositions would have required the purchase of the Aeolian-produced piano roll and the Aeolian-produced musical machine. Fearful of this monopoly power, Congress created a compulsory licensing scheme under which, if a copyright owner agreed to allow a third party to produce the work mechanically, "any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured."¹⁵ Thus, a compulsory license operates as an exception to "the privilege of determining who reaps the profits of [one's property] and what those profits will be," a

¹¹ Act of Aug. 18, 1856, ch. 169, 11 Stat. 138.

¹² See generally 1 PATRY ON COPYRIGHT, *supra* note 10, at § 1:45 (discussing the historical background of 1909 Copyright Act).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075, 1076; see also 1 PATRY ON COPYRIGHT, *supra* note 10, at § 1:45 (discussing how the compulsory licensing provisions of the 1909 Act were in part a response to, and indirectly overturned, *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1908), which held that piano rolls were not copies within the meaning of the Copyright Act).

characteristic that is “[i]mplicit in the ownership of property.”¹⁶ This history would provide a strong basis for the later application to cable television given the substantially similar problems of competition and access.

B. The Copyright Act of 1976 and the Rise of Cable Television

Despite “some notable improvements” to copyright law, the 1909 Act contained “a good deal of incoherence, inconsistency and opaqueness in certain sections,” as it was “ultimately a composite of several tentative bills and proposals embodying different points of view.”¹⁷ As a result, “pressure mounted for the comprehensive revision and modernization of the Copyright Act” around 1950.¹⁸ Not the least of concerns was the rapid advancement of technology, with the development of the motion picture, the phonograph, radio, and television marking the intervening years.¹⁹ The Copyright Act of 1976, an omnibus revision, sought to comprehensively reform American copyright law and account for some of these new technologies.²⁰ Cable television represented an industry that Congress was particularly interested in sorting out following a pair of controversial Supreme Court decisions, *Fortnightly Corp. v. United Artists Television, Inc.* and *Teleprompter Corp. v. Columbia Broadcasting Systems, Inc.*²¹ *Fortnightly* involved

¹⁶ WILLIAM S. STRONG, *THE COPYRIGHT BOOK: A PRACTICAL GUIDE* 211 (6th ed. 2014).

¹⁷ ROBERT A. GORMAN, JANE C. GINSBURG & R. ANTHONY REESE, *COPYRIGHT: CASES AND MATERIALS* 7 (8th ed. 2011).

¹⁸ *Id.*; see also 1 PATRY ON COPYRIGHT, *supra* note 10, at § 1:72 (noting that “[f]ollowing [U.S.] adherence to the [Universal Copyright Convention in 1955] . . . it became apparent that an intensive reexamination of the 1909 Act was long overdue.”).

¹⁹ GORMAN, GINSBURG & REESE, *supra* note 17, at 7.

²⁰ See *id.*; 1 PATRY ON COPYRIGHT, *supra* note 10, at § 1:1.

²¹ *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); see also 1 PATRY ON COPYRIGHT, *supra* note 10, at § 1:80 (describing

Community Antenna Television (“CATV”) systems, which “consist[ed] of antennas [sic] . . . with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers.”²² Applying reasoning that was somewhat distinct from that of previous decisions involving radio,²³ the Court held that CATV simply enhances a viewer’s capacity to receive signals, and therefore does not “perform” the copyrighted works, noting that such systems “did not ‘perform’ the respondent’s copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909.”²⁴ The relevant analysis, according to the majority, was whether the service in question acted as a broadcaster or as a viewer.²⁵ Under this framework, the Court concluded that CATV “falls on the viewer’s side of the line.”²⁶ The Court extended this logic even further in *Teleprompter*, holding that even where a CATV system “imports” signals that would not otherwise be viewable in the market, it does not “perform” under the 1909 Act.²⁷

the effects of the two decisions and noting that “the *Teleprompter* decision spurred on rather than stalled the revision effort”).

²² *Fortnightly Corp.*, 392 U.S. at 392.

²³ Compare *Fortnightly Corp.*, 392 U.S. 400–01 (holding that a CATV system was not publicly performing), with *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191, 201 (1931) (holding that a hotel transmitting a radio broadcast into each room was publicly performing); see also *Fortnightly Corp.*, 392 U.S. at 406 (Fortas, J., dissenting) (arguing that the majority decision is incompatible with the Court’s previous ruling in *Buck*); Dykstra, *supra* note 8, at 1001 (describing the *Fortnightly* decision as “a surprising departure from the Court’s earlier holding about radio retransmissions in *Buck*”).

²⁴ *Fortnightly Corp.*, 392 U.S. at 395, 399.

²⁵ *Id.* at 398 (“Broadcasters perform. Viewers do not perform.”).

²⁶ *Id.* at 399.

²⁷ *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394, 412 (1974).

Fortnightly and *Teleprompter* brought the significance of cable television to the forefront,²⁸ and forced Congress to take revision efforts seriously. The resulting treatment of cable television in the Copyright Act of 1976 was notable in that it overturned the *Fortnightly* and *Teleprompter* decisions and instituted a compulsory licensing scheme similar to the one that had proven effective in the music context.²⁹ The “Transmit Clause” of Section 101 of the 1976 Act provides that transmissions similar to those at issue in *Fortnightly* and *Teleprompter* fall under the definition of public performance.³⁰ As the Supreme Court stated in *American Broadcasting Cos. v. Aereo, Inc.* (“*Aereo III*”), “one of Congress’ primary purposes in amending the Copyright Act in 1976 was to overturn this Court’s determination that [CATV systems] fell outside the Act’s scope.”³¹ Section 111(c), implicitly reinforcing Section 101’s purpose to capture the

²⁸ See TIM WU, *THE MASTER SWITCH* 177 (2010) (describing cable television as a “disruptive innovation . . . and one that would shred the prevailing power structure of television”).

²⁹ GORMAN, GINSBURG & REESE, *supra* note 17, at 8 (calling the “[i]mposition of copyright liability on cable television systems” and the attendant compulsory licensing provisions “key provisions of the 1976 law”).

³⁰ See 17 U.S.C. § 101 (2012) (“To perform or display a work ‘publicly’ means (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.”); see also Sara K. Stadler, *Performance Values*, 83 NOTRE DAME L. REV. 697, 723 (2008) (“Taking the side of the dissenters in *Fortnightly* and *Aiken*, Congress defined ‘performance’ broadly . . .”).

³¹ *Aereo III*, 134 S. Ct. 2498, 2504 (2014); see also H.R. REP. 94-1476, at 87 (1976) (discussing the Supreme Court’s narrow interpretation of “perform” in the 1909 Act which was “completely overturned by [the 1976 Act] and its broad definition of ‘perform’ in section 101”).

activities of cable television systems,³² states in pertinent part:

[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission . . . shall be subject to statutory licensing upon compliance with the requirements of subsection (d) where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.³³

Thus, these provisions effectively place the activity of cable television systems within the ambit of the 1976 Act.³⁴ However, broadcasters' rights are subject to the limitation created by the enactment of Section 111, "authorizing the third party exploitation, but requiring payment as determined by an administrative rate-setting procedure."³⁵

C. Aereo and Its "Public Performance" Defense

As with previous iterations of American copyright law, as technology has continued to advance, the limitations of the Copyright Act—especially with regard to cable television provisions—have been exposed. One of the early signs of the ambiguities that the statutory language would hold was the arrival of "Remote Storage" Digital Video Recorder systems ("RS-DVR"), addressed in *Cartoon Network LP v. CSC*

³² See Dykstra, *supra* note 8, at 1006 (describing Section 111 as "[f]urther evidence of Congress's intent to protect broadcast television from the activities of cable television systems"); see also 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 14:60 (2016) [hereinafter 4 PATRY ON COPYRIGHT] ("The basic concept underpinning Section 111 is that contrary to the Supreme Court's *Fortnightly* and *Teleprompter* decisions, cable operators . . . are engaging in a performance.")

³³ 17 U.S.C. § 111(c) (2012).

³⁴ 4 PATRY ON COPYRIGHT, *supra* note 32, at § 14:73.

³⁵ GORMAN, GINSBURG & REESE, *supra* note 17, at 798.

*Holdings, Inc. (“Cablevision”).*³⁶ RS-DVRs are systems that are similar to standalone DVRs in that they are used to digitally record television broadcasts. However, there is one important difference that rendered RS-DVRs a much more difficult problem: the RS-DVR allows customers to store recorded programming on central hard drives at a “remote” location.³⁷ Customers were then able to “receive playback of those programs through their home television sets, using only a remote control and a standard cable box equipped with the RS-DVR software.”³⁸ In *Cablevision*, the broadcasters alleged that this activity directly infringed on their copyrights by engaging in public performances of their protected works.³⁹ Concluding that “the transmit clause directs us to examine who precisely is ‘capable of receiving’ a particular transmission of a performance,”⁴⁰ the Court held that “[b]ecause each RS–DVR playback transmission is made to a single subscriber using a single unique copy produced by that subscriber . . . such transmissions are not performances ‘to the public,’ and therefore do not infringe any exclusive right of public performance.”⁴¹ As the Internet grew more ubiquitous, certain companies—notably, Aereo—attempted

³⁶ *Cartoon Network LP v. CSC Holdings*, 536 F.3d 121, 123 (2d Cir. 2008).

³⁷ *Id.* at 124.

³⁸ *Id.*

³⁹ *Id.* at 123. Plaintiffs also argued that their copyrights were infringed by the initial act of copying the work. *Id.* at 124–26. However, the court determined that the copies were made by individuals, rather than the cable company. *Id.* at 133.

⁴⁰ *Id.* at 135.

⁴¹ *Id.* at 139; *see also* *WNET, Thirteen v. Aereo, Inc. (Aereo II)*, 712 F.3d 676, 689 (2d Cir. 2013) *rev’d sub nom.* *Am. Broad. Cos. v. Aereo, Inc. (Aereo III)*, 134 S. Ct. 2498 (2014) (discussing the *Cablevision* court’s interpretation of the Transmit Clause); 4 PATRY ON COPYRIGHT, *supra* note 32, at § 14:28 (discussing the interpretation of the 1976 Act’s public performance right).

to take advantage of the *Cablevision* court's interpretation of the Transmit Clause.⁴²

Recognizing an opportunity in the *Cablevision* court's interpretation of the ambiguous language of the Transmit Clause, Aereo organized its business specifically to avoid paying for any licenses. Central to Aereo's system was a warehouse that stored thousands of small antennae, each capable of receiving over-the-air television broadcast signals.⁴³ Upon a user's selection of a program on the company's website, Aereo's servers selected one of the antennae, dedicated it to that user, and tuned in to the signal carrying the program.⁴⁴ Importantly, only a single subscriber could use any one antenna at any given time.⁴⁵ The system then saved a copy of the program as a separate file for each user and transmitted that file to the user over the Internet.⁴⁶ Aereo argued that the U.S. Court of Appeals for the Second Circuit's interpretation of the Transmit Clause in *Cablevision* was correct and that, under that interpretation, Aereo's transmissions were not "public performances" under Section 101.⁴⁷ The Second Circuit, applying *Cablevision*, had held that Aereo's transmissions were not public performances under Section 101.⁴⁸ The Supreme Court disagreed.⁴⁹ The majority opinion noted that the history surrounding the Copyright Act of 1976 evinces the congressional intent to overturn the Court's rulings in

⁴² See Dykstra, *supra* note 8, at 1007 (describing RS-DVR as "A Prelude to Aereo").

⁴³ *Aereo III*, 134 S. Ct. at 2503.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Brief for Respondent at 17, *Aereo III*, 134 S. Ct. 2498 (2014) (No. 13-461) (arguing that "the Second Circuit correctly interpreted the Transmit Clause" and because "Aereo's equipment facilitates only 'one-to-one' transmissions . . . [t]hose transmissions do not constitute 'public performances'").

⁴⁸ *Aereo II*, 712 F.3d 676, 695 (2d Cir. 2013).

⁴⁹ *Aereo III*, 134 S. Ct. at 2503.

Fortnightly and *Teleprompter*.⁵⁰ Comparing the activities of Aereo to those of the CATV systems targeted by the 1976 Act, the Court held that Aereo’s service was a public performance under Section 101.⁵¹ However, the Court was careful to limit its *Aereo III* opinion to the facts at bar and explicitly declined to set forth a generally applicable rule.⁵² As a result, it left as an open question whether its “looks-like-cable” reasoning would have the same force in the Section 111 context and necessitate allowing Internet streaming services to take advantage of that section’s compulsory licensing scheme.

III. ANALYSIS

A. A Brief Summary of the Deference Standards

The primary focus of this Note is Section 111 itself—the text and legislative history. However, because “the Copyright Office—the federal agency charged with overseeing [Section] 111—has spoken on the issue of whether [Section] 111’s compulsory licenses extend to Internet retransmissions,” it is clear that any court considering this question must consider the level of deference that should be accorded to the Copyright Office’s position.⁵³ As a result, this Part will provide a summary of the two possible standards of deference a court may apply—*Chevron, U.S.A., Inc. v.*

⁵⁰ *Id.* at 2504–06.

⁵¹ *Id.* at 2506 (“Aereo’s activities are substantially similar to those of the CATV companies that Congress amended the Act to reach.”); *see also id.* at 2515 (Scalia, J., dissenting) (“The Court’s conclusion that Aereo performs boils down to the following syllogism: (1) Congress amended the Act to overrule our decisions holding that cable systems do not perform when they retransmit over-the-air broadcasts; (2) Aereo looks a lot like a cable system; therefore (3) Aereo performs.”).

⁵² *Id.* at 2511 (“We cannot now answer more precisely how the Transmit Clause or other provisions of the Copyright Act will apply to technologies not before us.”); *see also* 4 PATRY ON COPYRIGHT, *supra* note 32, at § 14:28.

⁵³ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 279 (2d Cir. 2012).

Natural Resources Defense Council, Inc. or Skidmore v. Swift & Co.—and briefly analyze the arguments on either side.

Under *Chevron*, courts must conduct a two-part analysis whenever confronted with an administrative agency's construction of a statute:

First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.⁵⁴

In subsequent cases, the Supreme Court clarified the *Chevron* standard, holding, “[i]nterpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”⁵⁵ In these cases, courts should instead apply the lower deference standard articulated in *Skidmore v. Swift & Co.*, under which the weight a court should give to an administrative agency's judgment “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”⁵⁶ In order to determine which of these two standards is appropriate in a given case, the court must apply a two-step inquiry, first asking whether “Congress delegated authority to the agency generally to make rules carrying the force of law” and second

⁵⁴ *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

⁵⁵ *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).

⁵⁶ *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

asking whether “the agency interpretation . . . was promulgated in exercise of that authority.”⁵⁷

The cases that have addressed the application of Section 111 to Internet retransmission services reveal disagreement with respect to the appropriate standard of deference.⁵⁸ The lack of a “formal regulation governing internet-based retransmission services” raises doubts about the validity of the argument that *Chevron* deference should apply.⁵⁹ As the *FilmOn* court mentions, although the plaintiffs can point to some formal regulations that “establish that [Section] 111 is ‘clearly directed at localized transmission services,’” those regulations “only considered the eligibility of satellite carriers, multipoint distribution service, and multichannel multipoint distribution service to operate under the § 111 compulsory license. Therefore, the regulations did not specifically address the question of whether an Internet-based retransmission service qualifies as a cable system.”⁶⁰ Because the Copyright Office’s position “is not based on a formal regulation but on a series of statements, policy documents, and congressional testimonies over the years,”⁶¹ it seems clear that these cases demand *Skidmore* deference rather than *Chevron*. Although the exact contours of

⁵⁷ *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

⁵⁸ *Compare ivi*, 691 F.3d at 284 (citing *Mead* in deferring to the Copyright Office’s position under *Chevron*), with *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052, at *17, *19 (D.D.C. Dec. 2, 2015) (deferring to the Copyright Office’s position under *Skidmore*, after noting that the *ivi* court “did not discuss why it found the Copyright Office’s interpretation entitled to *Chevron* deference as opposed to a lesser type of deference”), and *Fox Television Stations, Inc. v. AereoKiller LLC*, 115 F. Supp. 3d 1152, 1168–69 (C.D. Cal. 2015) (deeming the *ivi* decision “not persuasive” while declining to defer to the Copyright Office’s position under *Chevron*). The broadcasting companies continue to argue that *Chevron* deference should apply. See generally Brief of Appellants at 45–60, *Fox Television Stations, Inc. v. AereoKiller LLC*, No. 15-56420 (9th Cir. Jan. 27, 2016).

⁵⁹ *FilmOn*, 2015 WL 7761052, at *17.

⁶⁰ *Id.* at *17 n.19.

⁶¹ *Id.* at *18.

Skidmore are somewhat unclear, “[i]t is easy enough to recognize the consensus view that *Skidmore* gives judges more discretion than *Chevron*’s command of mandatory deference.”⁶² As Part IV argues, the plain meaning of Section 111, the legislative history surrounding the statute, and policies underlying the compulsory licensing scheme do not comport with the Copyright Office’s position, and therefore that interpretation does not deserve deference under *Skidmore*.

B. The Copyright Office Position Rejecting Internet-Based Services’ Eligibility for a Section 111 License

In the view of the Copyright Office, the Section 111 compulsory license should not be extended to Internet retransmission services, both as a policy matter and as a matter of statutory interpretation.⁶³ The Copyright Office has emphatically declared that the extension of the compulsory licensing scheme to Internet retransmission systems “is not warranted, and . . . not comparable to retransmissions via cable and satellite.”⁶⁴ As noted in the *AereoKiller* decision, discussed in Part III.C *infra*, the Office’s “restrictive view concerning Section 111 [is] no surprise” The Copyright Office has long been a critic of

⁶² Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1250 (2007).

⁶³ See U.S. COPYRIGHT OFFICE, A REVIEW OF THE COPYRIGHT LICENSING REGIMES COVERING RETRANSMISSION OF BROADCAST SIGNALS 91–99 (1997); *Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts & Intellectual Prop. of the H. Comm. on the Judiciary*, 106th Cong. (2000) [hereinafter *Peters Statement*] (statement of Marybeth Peters, Register of Copyrights), <http://copyright.gov/docs/regstat61500.html> [<https://perma.cc/8R7L-KQV3>]; see also Letter from Jacqueline C. Charlesworth, General Counsel and Associate Register of Copyrights, U.S. Copyright Office, to Matthew Calabro, Director of Financial Planning & Analysis and Revenue, Aereo, Inc. (July 16, 2014) [hereinafter *Charlesworth Letter*].

⁶⁴ *Peters Statement*, *supra* note 63.

compulsory licensing for broadcast retransmissions.”⁶⁵ Indeed, the Copyright Office was arguing for the elimination of the compulsory cable license as early as 1981.⁶⁶

The Copyright Office has consistently taken the position that the language of Section 111 does not extend to Internet transmissions.⁶⁷ As stated by the Register of Copyrights, “if there is to be a compulsory license covering such retransmissions, it will have to come from newly enacted legislation and not existing law.”⁶⁸ The Copyright Office has stated that this conclusion remains unchanged in the wake of the Supreme Court’s *Aereo III* decision.⁶⁹ This interpretation of the text is based on Section 111(f)’s references to “headends” and “contiguous communities,” which “proves that the compulsory license applies only to localized retransmission services regulated as cable systems by the [Federal Communication Commission (“FCC”)].”⁷⁰ Similarly, the Office has also pointed to the Section 111(c) requirement that the retransmission is “permissible under the rules, regulations, or authorizations of the Federal Communications Commission” as demonstrating a close link

⁶⁵ Fox Television Stations, Inc. v. AereoKiller, 115 F. Supp. 3d 1152, 1164 (C.D. Cal. 2015) (quoting *Peters Statement*, supra note 63); see also U.S. COPYRIGHT OFFICE, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT, SECTION 109 REPORT, at vi-vii (2008) [hereinafter SHVERA REPORT] (expressing the Copyright Office’s opinion that “[i]t is now time to phase out Section 111 and Section 119”); Annemarie Bridy, *Aereo: From Working Around Copyright to Thinking Inside the (Cable) Box*, 2015 MICH. ST. L. REV. 465, 477 (2015) (“It is thus not surprising that the Office, whenever it has been called upon to do so, has construed the scope of § 111 in a vanishingly narrow way.”).

⁶⁶ *Peters Statement*, supra note 63; see also SHVERA REPORT, supra note 65, at 78.

⁶⁷ *Peters Statement*, supra note 63 (“[T]he section 111 license does not and should not apply to Internet transmissions.”) (quoting Letter from Marybeth Peters, Register of Copyrights, to the Honorable Howard Coble (Nov. 10, 1999)).

⁶⁸ *Peters Statement*, supra note 63.

⁶⁹ *Charlesworth Letter*, supra note 63.

⁷⁰ Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. 3284, 3290–92 (Jan. 29, 1992) (to be codified at 37 C.F.R. pt. 201).

between FCC regulation and the availability of the Section 111 compulsory license.⁷¹ The Copyright Office has interpreted these references to FCC regulation “to mean that the retransmitter must be affirmatively regulated by those rules.”⁷² As the Copyright Office has acknowledged, this second argument is explicitly dependent upon FCC regulation.⁷³ As a result, its validity is complicated to some extent by the FCC’s consideration of a rule that would qualify Internet retransmission services as multichannel video programming distributors (“MVPDs”) under communications law.⁷⁴

From a policy perspective, the Copyright Office bases its position against making the Section 111 compulsory license available to Internet retransmission services on what it perceives as “a fundamental difference between Internet retransmissions and retransmissions via cable and satellite.”⁷⁵ That is, “[b]oth cable and satellite provide a means of delivering broadcast signals that copyright owners cannot practicably do themselves.”⁷⁶ Thus, in the Copyright Office’s view, because the copyright owners face no significant obstacles to making their content available over

⁷¹ 17 U.S.C. § 111(c) (2012); Cable Compulsory License; Definition of Cable System, 57 Fed. Reg. at 3292 (“[I]t is apparent that the operation of section 111 is hinged on the FCC rules regulating the cable industry.”).

⁷² Bridy, *supra* note 65, at 475. *But see* WPIX, Inc. v. ivi, Inc., 765 F. Supp. 2d 594, 616 n.33 (S.D.N.Y. 2011), *aff’d*, 691 F.3d 275 (2d Cir. 2012) (“The Copyright Office’s tentative endorsement of the AT & T U-Verse system, which does not appear to be subject to the Communications Act, implies that the Office does not believe that in order to qualify as a cable system under Section 111, an entity *must* be governed by the FCC.”).

⁷³ *See Charlesworth Letter, supra* note 63.

⁷⁴ Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services, 80 Fed. Reg. 2078, 2080 (proposed Dec. 19, 2014) (to be codified at 47 C.F.R. pt. 76) (“tentatively” concluding “that the statutory definition of MVPD includes certain Internet-based distributors of video programming”); *see also* Fox Television Stations, Inc. v. AereoKiller, 115 F. Supp. 3d 1152, 1169–70 (C.D. Cal. 2015).

⁷⁵ *Peters Statement, supra* note 63.

⁷⁶ *Id.*

the Internet, it would be inappropriate to implement a coercive compulsory license and Congress should instead allow the free market to work.⁷⁷ In addition, the Copyright Office has argued that introducing copyrighted works to the Internet is a dangerous proposition given the ease with which bad actors could copy and reproduce that content.⁷⁸ In light of the explosion of available online content today, the continued relevance of this second concern is somewhat dubious.

C. The Copyright Office Prevails: *WPIX, Inc. v. ivi, Inc., Aereo IV*, and *Fox v. FilmOn X*

In 2012, the Second Circuit considered *WPIX, Inc. v. ivi, Inc.*, a case that presented the court with the issue of whether the cable system compulsory licensing scheme of Section 111 is available to an Internet streaming company.⁷⁹ A coalition of producers and owners of television programming brought a copyright infringement suit against *ivi*, an Internet-based company that was re-broadcasting television programming via Internet stream.⁸⁰ The court, undertaking a *Chevron* analysis, determined that the compulsory licenses of Section 111 did not extend to Internet retransmission services.⁸¹ Although the statutory text was, in the opinion of the court, ambiguous, the legislative history clearly demonstrated that Congress did not intend to include

⁷⁷ SHVERA REPORT, *supra* note 65, at 188.

⁷⁸ *Id.* at 181 (citing “serious questions about signal security” as a reason for excluding Internet retransmissions from the scope of § 111); *see also Peters Statement, supra* note 63 (“[I]t is all too easy for recipients of such transmissions to find ways to circumvent those measures and download perfect digital copies, which then could be disseminated without limit online. The resulting harm to copyright owners in a global market could be irreparable.”); Bridy, *supra* note 65, at 476 (“One impetus for the failed amendment was the Office’s perception—post-Napster—that the Internet is just not a safe place for copyrighted content.”).

⁷⁹ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275 (2d Cir. 2012).

⁸⁰ *Id.* at 277.

⁸¹ *Id.* at 279–82.

Internet transmissions in the Section 111 compulsory licensing scheme.⁸²

The court first examined the language of Sections 111(c)(1) and 111(f)(3).⁸³ The heart of *ivi*'s challenge came down to whether it could be considered a "cable system" as defined in 111(f)(3). According to the court, this determination could not be made from the statutory text alone because its language is unclear as to "whether such a service (1) is or utilizes a 'facility' (2) that receives and retransmits signals (3) through wires, cables, microwave, or other communication channels."⁸⁴ Perhaps realizing that the second and third points seem to be rather easily met by *ivi*'s streaming service, the court chose to focus on the term "facility," stating that it is unclear whether an Internet service can qualify as a "facility" under Section 111 because "the Internet . . . is neither a physical nor a tangible entity."⁸⁵ Additionally, the court implied that the lack of centralization of the Internet weighed against a finding that it could be considered a facility.⁸⁶ Concluding its analysis,

⁸² *Id.*

⁸³ *See id.* at 279–80. Section 111(c)(1) is reproduced and discussed *supra* in Part II.B and Section 111(f)(3) 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 Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service.

17 U.S.C. § 111(f)(3) (2012).

⁸⁴ *ivi*, 691 F.3d at 280.

⁸⁵ *Id.*

⁸⁶ *Id.* (asserting that "the growth of 'cloud-based systems,' or virtual platforms where content resides remotely on a distant server, further highlights the uncertainty as to whether an Internet retransmission service is or utilizes a facility that receives and retransmits television signals").

the court stated, “Congress’s intent is not apparent from the statutory text.”⁸⁷

The *ivi* court found the primary support for its ruling in the legislative history of the Copyright Act. In particular, the court viewed the addition of the satellite compulsory licensing scheme codified in Section 119 as evidence that Congress did not intend new technologies to be interpreted as qualifying as a cable system under Section 111.⁸⁸ Further, the court gave weight to congressional history, stating that because compulsory licensing is a “derogation of the exclusive property rights granted by the Copyright Act to copyright holders,” Congress “needs to act as narrowly as possible to minimize the effects of the government’s intrusion on the broader market”⁸⁹ Similarly, while “Congress expressly included ‘microwave’ as an acceptable communications channel for retransmissions,” it “has not codified a statutory provision for Internet retransmissions, nor has it included the ‘Internet’ as an acceptable communication channel under § 111.”⁹⁰ This history demonstrated, according to the court, that Congress did not intend Section 111 to extend to Internet transmissions.⁹¹ In addition, the court accorded *Chevron* deference to the Copyright Office’s position that Internet retransmission services are not cable systems under Section 111.⁹²

The U.S. District Court for the Southern District of New York discussed the *ivi* decision in *Aereo IV*, after the U.S. Supreme Court remanded the case.⁹³ The *ivi* decision became relevant at that stage because the defendant attempted to shift its stance from arguing that it was not required to pay

⁸⁷ *Id.*

⁸⁸ *Id.* at 281.

⁸⁹ *Id.* at 281–82 (quoting S. REP. NO. 106-42, at 10 (1999)).

⁹⁰ *Id.* at 282 & n.8 (noting references to “contiguous communities” in 17 U.S.C. § 111).

⁹¹ *Id.* at 282–83.

⁹² *Id.* at 283–84.

⁹³ *Am. Broad. Cos. v. Aereo, Inc. (Aereo IV)*, No. 12-CV-1540, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014).

copyright holders anything at all to arguing that it was entitled to a compulsory license under Section 111.⁹⁴ Aereo argued that the language of the Supreme Court’s decision comparing its service to a cable system called into question the holding of *ivi* and necessitated a conclusion that it was entitled to a license under Section 111.⁹⁵ The District Court disagreed, stating that “while all cable systems may perform publicly, not all entities that perform publicly are necessarily cable systems, and nothing in the Supreme Court’s opinion indicates otherwise.”⁹⁶ Ultimately, the District Court concluded that Aereo’s new tactic amounted to little more than a desperate attempt to “turn lemons into lemonade” after its loss at the Supreme Court.⁹⁷

The Second Circuit’s reasoning was adopted by the U.S. District Court for the District of Columbia in *Fox v. FilmOn X*, a case involving the same litigants as *Fox v. AereoKiller*, discussed in Part III.C. As in *AereoKiller* and *Aereo IV*, the defendant argued for a “technology-agnostic” approach, drawing on language in the Supreme Court’s *Aereo III* decision.⁹⁸ In rejecting this argument, the U.S. District Court for the District of Columbia noted that the Supreme Court’s *Aereo III* analysis was limited to the Transmit Clause and that therefore “any analogy to cable companies should be interpreted in that particular context.”⁹⁹ The *FilmOn* court ultimately came to the same conclusion as the Second Circuit, deciding that “the plain language of § 111(f)(3)

⁹⁴ *Id.* at *1–2.

⁹⁵ *Id.* at *3 (“Aereo now seeks to capitalize on the Supreme Court’s comparison of it to a CATV system to argue that it is in fact a cable system that should be entitled to a compulsory license under § 111.”).

⁹⁶ *Id.* at *4.

⁹⁷ *Id.* at *3.

⁹⁸ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052, at *10 (D.D.C. Dec. 2, 2015) (citing *Aereo III*) (“To support this proposition, Defendants rely on the fact that the Supreme Court highlighted the ‘overwhelming likeness’ between Aereo’s service and that of CATV systems and dismissed technological differences on the basis that they were ‘invisible to subscriber and broadcaster alike.’”).

⁹⁹ *Id.* at *10.

contradicts Defendants’ position that Internet-based retransmitters are entitled to a compulsory license,” and deferring to the Copyright Office’s view that FilmOn X is not a cable system under Section 111.¹⁰⁰

D. The Copyright Office Rebuffed: *Fox v. AereoKiller*

The U.S. District Court for the Central District of California faced the same question in *Fox v. AereoKiller* but reached the opposite conclusion, finding that Internet retransmission services are “cable systems” under Section 111 and therefore are entitled to compulsory licensing.¹⁰¹ The procedural posture of the case was similar to that of *Aereo IV*—FilmOn X had previously raised a defense based on the same public performance theory that was rejected by the Supreme Court in *Aereo III* and switched to a Section 111 theory in *AereoKiller*.¹⁰² More importantly, the technology

¹⁰⁰ *Id.* at *16 (“The Court’s interpretation becomes even more forceful when the text is read as part of the overall statutory scheme.”). Notably, the *FilmOn* court applied a different level of deference to the Copyright Office’s interpretation of Section 111. This difference ultimately did not have an effect on the outcome, because the *FilmOn* court, like the *Aereo IV* court, ultimately concluded that deference to the Copyright Office position is appropriate. *See id.* at *21.

¹⁰¹ *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1154 (C.D. Cal. 2015). The defendant company has since changed its name from “AereoKiller” to “FilmOn X.” Thus, to avoid confusion, the company will be referred to in this Note as “FilmOn X” while the case will be referred to as “AereoKiller.” Bryan Koenig, *Streaming Co. Says It’s Entitled to Compulsory Cable License*, LAW360 (June 19, 2015, 7:50 PM), <http://www.law360.com/articles/670236/streaming-co-says-it-s-entitled-to-compulsory-cable-license> [<https://perma.cc/7FXV-NQJ4>].

¹⁰² *See Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1140–41 (C.D. Cal. 2012) (noting that the defendants argued that their service was “technologically analogous to the service which the Southern District of New York found to be non-infringing in” *Am. Broad. Cos. v. Aereo, Inc. (Aereo I)*, 874 F. Supp. 2d 373 (S.D.N.Y. 2012)); *see also AereoKiller*, 115 F. Supp. 3d, at 1154–56 (discussing the procedural background of the case).

utilized by FilmOn X was substantially similar to the technology at issue in *Aereo III*.¹⁰³

After tracing the history of Section 111 from the *Fortnightly* and *Teleprompter* decisions through to the addition of similar provisions aimed at satellite services,¹⁰⁴ the court considered the *ivi* court's approach and the Copyright Office's approach.¹⁰⁵ The court disagreed with the *ivi* court's reasoning, holding that "17 U.S.C. § 111(f)(3) simply does not draw the distinction" between traditional cable and Internet retransmission services.¹⁰⁶ Because it found no ambiguity in the language of the statute, the court found it "unnecessary to turn to the legislative history or the administrative interpretation."¹⁰⁷ It is also worth noting that the *AereoKiller* court—unlike the *Aereo IV* court—found the language in the Supreme Court's *Aereo* decision to be relevant, since that language seems to necessitate the conclusion that Internet-based transmission services are included in Section 111's definition of "cable systems."¹⁰⁸

IV. RECOMMENDATION

Future courts that are faced with the question of whether an Internet retransmission service qualifies as a cable company under Section 111 of the Copyright Act should follow the *AereoKiller* court and give those services access to the cable compulsory license.¹⁰⁹ The plain text of Section 111,

¹⁰³ *AereoKiller*, 115 F. Supp. 3d, at 1156–58 (describing FilmOn X's system, which, like Aereo's, utilized miniature antennae to allow users to access over-the-air content).

¹⁰⁴ *Id.* at 1159–62.

¹⁰⁵ *Id.* at 1163–69.

¹⁰⁶ *Id.* at 1168.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1163 (noting that although the *Aereo III* decision was not controlling because it did not address the Section 111 question, it is "about as close a statement directly in Defendants' favor as could be made").

¹⁰⁹ The *AereoKiller* court did not explicitly discuss the *Skidmore* standard of deference as noted in Part III.A, *supra*, and instead rested its decision on the plain meaning of the statute. However, it should be noted

the legislative history of the Act, and the Supreme Court's *Aereo III* decision all point towards compulsory license eligibility for Internet retransmission services. Moreover, this position would accomplish the significant policy goal of increasing competition in the marketplace and would represent a method of interpretation that best promotes the purposes of the Copyright Act.

A. Comparing and Contrasting the *ivi* Position and the *AereoKiller* Position

The crux of the disagreement between the Second Circuit in *ivi* and the U.S. District Court for the Central District of California in *AereoKiller* is the plain language of the statute.¹¹⁰ To the Second Circuit, there is substantial ambiguity in Section 111, which required it to conduct part two of its *Chevron* analysis to reach the ultimate result of deference to the Copyright Office. In contrast, the *AereoKiller* court found that the statute leaves ample room for the operation of Internet retransmission services.¹¹¹

Notably, it is strange that the *ivi* court characterized the Internet writ large as the possible facility that would place these services under the Section 111 definition of “cable system.” While there is little doubt that the Internet itself is not a “facility” under Section 111, it is certainly possible that the definition is met by individual servers, web addresses and so on. Indeed, under other U.S. law, the Internet is defined as: “collectively the myriad of computer and telecommunications *facilities*, including equipment and

that in addition to the plain meaning of the text, the legislative history and the overarching goals of Section 111 provide additional support for rejecting the Copyright Office's position.

¹¹⁰ For the purposes of this comparison, this Part considers the “*ivi* position” to include the D.C. District Court's opinion in *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052 (D.D.C. Dec. 2, 2015).

¹¹¹ *AereoKiller*, 115 F. Supp. 3d, at 1167 (“[I]t is difficult to recognize the ambiguity the Second Circuit saw in the statute, at least as applied to the facts of this case.”).

operating software, which comprise the interconnected world-wide network of networks that employ the Transmission Control Protocol/Internet Protocol, or any predecessor successor protocols to such protocol, to communicate information of all kinds by wire or radio.”¹¹² This definition suggests that the Internet should be viewed as a network of various facilities. As the *AereoKiller* court observed, although the Second Circuit was correct insofar as “[t]he ‘Internet’ . . . can’t be a ‘facility’ for purposes of the § 111 analysis because without Defendants’ facilities, the Internet does not receive Plaintiffs’ public broadcast signal,” its analysis is flawed because the Internet “is not the ‘facility’ urged by Defendants here.”¹¹³ In short, the *ivi* court’s analysis of the “facilities” question was simply inapposite.

The *FilmOn* court—citing *ivi* for support—argued that the “facility” requirement is not met by Internet retransmission services because “§ 111(f)(3) requires that a physical ‘facility’ must receive the broadcast signals *and* make the secondary transmissions to paying subscribers,” and therefore “any system that fails to encompass the distribution medium and does not retransmit the signals directly to the subscriber does not qualify as a ‘cable system.’”¹¹⁴ Because Internet retransmission services necessarily must first transmit the signal to an Internet service provider (“ISP”), the court argued, a subscriber “receives the retransmission, not from the ‘facility,’ but from interconnected computers through cyberspace.”¹¹⁵ The court cited references to “headends” in Section 111(f)(3) to support this emphasis on complete control over the distribution medium.¹¹⁶

¹¹² 15 U.S.C. § 6555 (2012) (emphasis added).

¹¹³ *AereoKiller*, 115 F. Supp. 3d, at 1167.

¹¹⁴ *FilmOn*, 2015 WL 7761052, at *13.

¹¹⁵ *Id.*

¹¹⁶ *Id.* This reading may be the result of discomfort with the differences between the Section 111(f)(3) definition of “cable systems” and the definition contained in the Communications Act. Compare 17 U.S.C. § 111(f)(3) (2012), with 47 U.S.C. § 522(7) (2012) (“[T]he term ‘cable

The textual support for this argument isn't particularly strong—as the *AereoKiller* court noted, the sentence in Section 111(f)(3) that references headends “merely provides how commonly-owned cable systems should be treated for purposes of royalty computation and does not impose additional requirements onto the definition of ‘cable system.’”¹¹⁷ It is most naturally read as an exception that helps to clarify the definition contained in the first sentence. Since the Internet retransmission services at issue are not covered by the second sentence, there is no reason to treat the “headends” language as removing such services from the Section 111 definition of “cable systems.” Perhaps more pointedly, even assuming that the language in the second sentence should have some bearing on the definition contained in the first sentence,¹¹⁸ “[n]othing about the usage of ‘headend’ in the statute indicates that [Internet retransmission services do] not employ one.”¹¹⁹ Moreover, the statute explicitly names “microwave” as an acceptable means of making secondary transmissions.¹²⁰ Since microwave signals are transmitted over the air, a cable system cannot be said to “encompass the distribution medium” through which those signals are transmitted. It is therefore difficult

system’ means a facility, consisting of a set of *closed transmission paths* and associated signal generation, reception, and control equipment that is designed to provide cable service”) (emphasis added). However, the Copyright Office does not argue that the definitions are coextensive. See SHVERA REPORT, *supra* note 65, at 199 (finding that Internet-Protocol (“IP”) based services are eligible for the Section 111 license, despite those services failing to meet the statutory definition of cable system under the Communications Act).

¹¹⁷ *FilmOn*, 2015 WL 7761052, at *12 n.16; see also *AereoKiller*, 115 F. Supp. 3d at 1168 (“The second sentence [of Section 111(f)(3)] merely provides that certain commonly owned cable systems will be treated as a single system for purposes of computing a royalty.”).

¹¹⁸ *FilmOn*, 2015 WL 7761052 at *12 n.16 (“This does not mean that this sentence should be ignored when deciding what qualifies as a cable system.”).

¹¹⁹ *AereoKiller*, 115 F. Supp. 3d at 1168.

¹²⁰ 17 U.S.C. § 111(f)(3) (2012).

to read the statute as demanding complete control over the distribution medium.

The *ivi* court's arguments relying upon the legislative history are no more convincing. First, although Congress did add a separate compulsory licensing scheme for satellite systems under Section 119, the court's account of that section's legislative history is incomplete. When that section was first added to the Copyright Act as part of the Satellite Home Viewer Act of 1988, Congress noted that one of the factors that prompted the introduction of a separate statutory scheme for satellite were "concerns about scrambling"—the process by which satellite carriers made their signals inaccessible except to those for whom the signal was intended.¹²¹ Specifically, satellite carriers were worried that "[b]y scrambling their signals . . . they may lose their 'passive carrier' exemption from liability for copyright infringement under section 111(a)(3) of the Copyright Act."¹²² Notably, Congress explicitly "express[ed] no view about the merits of the positions advanced by [entities asserting that they might qualify as a 'cable system' under section 111 in then-undecided cases]."¹²³ This suggests that Section 119 should not be read to preclude Internet streaming services from access to a Section 111 license.

The *ivi* court's mistreatment of this issue may be the result of confusion. The opinion references an Eleventh Circuit case decided in 1991, *Satellite Broad Networks* ("SBN"), which held that satellite carriers are "cable systems" under Section 111.¹²⁴ The *ivi* court asserts that this decision prompted a congressional response in 1998 of "codifying a separate statutory license for satellite carriers under § 119 of the Copyright Act."¹²⁵ But as noted above and

¹²¹ H.R. REP. NO. 100-887, pt. 1, at 12 (1988).

¹²² *Id.*

¹²³ *Id.* at 14.

¹²⁴ *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 281 (2d Cir. 2012) (citing *Nat'l Broad. Co. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1471 (11th Cir. 1991)).

¹²⁵ *Id.*

in the court's own opinion, Section 119 was added in 1988 in the Satellite Home Viewer Act.¹²⁶ Equally strange is the court's claim that the Eleventh Circuit decision was superseded by Section 119, as recognized in a later decision, *Satellite Broadcasting & Communications Ass'n of America v. Oman*.¹²⁷ *Oman* reversed *SBN* based on deference to the Copyright Office, not based on Section 119.¹²⁸

It seems likely that the *ivi* court had instead intended to reference the U.S. District Court for the Northern District of Georgia decision that was on appeal in *SBN*, decided in 1988.¹²⁹ Indeed, as the *AereoKiller* court noted, it was this decision that prompted congressional action.¹³⁰ This distinction is immensely important; although the Eleventh Circuit eventually decided that a satellite system should be considered a Section 111 "cable system," that decision overturned the District Court's opposite holding. This fundamentally undermines the *ivi* court's argument on this point—congressional action was incited not by a perceived need to *distinguish* satellite from cable, but from a worry

¹²⁶ Satellite Home Viewer Act of 1988, Pub. L. No. 100-667, 102 Stat. 3949 (1988).

¹²⁷ *ivi*, 691 F.3d at 281. See generally *Satellite Broad. & Commc'ns Ass'n of Am. v. Oman*, 17 F.3d 344 (11th Cir. 1994).

¹²⁸ *Oman*, 17 F.3d at 346, 348. In fact, in footnote 2 of the *Oman* opinion, the court noted that "Section 119 . . . offers little guidance in interpreting § 111 because the accompanying House Report stated:

[N]othing in this Act is intended to reflect any view as to the proper interpretation of section 111 of this title prior to enactment of this Act, or after this Act ceases to be effective In particular, nothing in this Act is intended to reflect any view concerning whether . . . an entity that retransmits television broadcast signals by satellite to private homes could qualify as a "cable system" under section 111(f).

(citing H.R. REP. NO. 100-887, pt. 1, at 27 (1988)).

¹²⁹ See *Pac. & S. Co. v. Satellite Broad. Networks, Inc.*, 694 F. Supp. 1565, 1570, 1572, 1575 (N.D. Ga. 1988).

¹³⁰ *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1161 (C.D. Cal. 2015).

that the courts would not interpret Section 111(f) to include satellite. In order to ensure that satellite would be afforded the same protection, Congress created a new statutory exemption. Although, as the *FilmOn* court notes, “[i]nstead of amending the definition of a cable system, Congress enacted the Satellite Home Viewer Act in 1988 [which created Section 119],” the purpose of this action was to offer protections to satellite that would place it on even footing with cable; it was not intended to affect the Section 111 definition of a cable system.¹³¹ Such a reading runs directly counter to congressional direction that “nothing in [the Satellite Home Viewer Act] is intended to reflect any view concerning whether . . . an entity that retransmits television broadcast signals by satellite to private homes could qualify as a ‘cable system’ under section 111(f).”¹³² This history hardly can be considered evidence that Section 119 should be interpreted to prevent Internet retransmission services from having access to Section 111.

Moreover, although the *ivi* court suggests that the sole purpose of the Section 111 license is to “address issues of reception and remote access to over-the-air television signals,”¹³³ Congress has also expressed that the compulsory licensing scheme is aimed at the “promotion of competition in the marketplace for delivery of multichannel video programming” which “is an effective policy to reduce costs to consumers.”¹³⁴ Clearly placing Internet retransmission services on an even footing with cable and satellite would inject competition into the marketplace and encourage the development of new services to the benefit of consumers.¹³⁵

¹³¹ Fox Television Stations, Inc. v. FilmOn X LLC, No. 13-758 (RMC), 2015 WL 7761052, at *13 (D.D.C. Dec. 2, 2015).

¹³² H.R. REP. NO. 100-887 pt. 1, at 27 (1988).

¹³³ WPIX, Inc. v. *ivi*, Inc., 691 F.3d 275, 282 (2d Cir. 2012).

¹³⁴ S. REP. NO. 106-42, at 10 (1999).

¹³⁵ This has been recognized by the FCC in considering a policy of including Internet retransmission services in its definition of MVPDs. See Promoting Innovation and Competition in the Provision of Multichannel

A final point of contention between the two positions is the correct way to interpret Congress' addition of "microwave" to Section 111(f)'s list of acceptable communications channels. The Second Circuit found this to be evidence that Internet transmissions are not covered by Section 111, since Congress did not also expressly add Internet transmissions.¹³⁶ The *AereoKiller* court disagreed, pointing out that despite its discussion of the addition of "microwave," the Court "did not purport to find any ambiguity in the phrase 'or other communications channels'"¹³⁷ The legislative history of this addition was not discussed by the *ivi* court, and the *AereoKiller* court noted that in fact, the addition was an acknowledgement of prior court rulings recognizing microwave transmissions as falling under Section 111(f).¹³⁸ In addition, it is telling that Section 111(f) was revised "because of an unnecessarily restrictive interpretation by the Copyright Office of the phrase 'or other communications channels' in the same definition."¹³⁹ Rather than a truly substantive revision, Congress viewed the addition of "microwave" as "a clarification of existing law."¹⁴⁰

As the *AereoKiller* court effectively argues, "it is difficult to recognize the ambiguity the Second Circuit saw in the statute."¹⁴¹ The FilmOn X system seems to clearly utilize a facility that receives and transmits signals to subscribing members of the public through "wires, cables, microwave, or other communications channels."¹⁴² Neither the Second

Video Programming Distribution Services, 80 Fed. Reg. 2078 (proposed Jan. 15, 2015) (to be codified at 47 C.F.R. pt. 76).

¹³⁶ *ivi*, 691 F.3d at 282.

¹³⁷ Fox Television Stations, Inc. v. AereoKiller, 115 F. Supp. 3d 1152, 1167 (C.D. Cal. 2015).

¹³⁸ See Hubbard Broad., Inc. v. S. Satellite Sys., Inc., 777 F.2d 393, 401 (8th Cir. 1985); see also *AereoKiller*, 115 F. Supp. 3d at 1162 n.11.

¹³⁹ H.R. REP. NO. 103-703, at 17 (1994).

¹⁴⁰ *Id.*

¹⁴¹ *AereoKiller*, 115 F. Supp. 3d at 1167.

¹⁴² 17 U.S.C. § 111(f)(3) (2012).

Circuit’s textual analysis of the meaning of “facilities” nor its consideration of the legislative history is particularly convincing. More broadly, the *ivi* decision, as well as its subsequent application in *Aereo IV*, seems to employ logic that runs directly counter to the Supreme Court’s *Aereo III* decision. The Supreme Court explicitly relied upon the comparison between Aereo’s service and a traditional cable company in finding that Aereo was publically performing. Meanwhile, the *ivi* court’s reasoning, deferring to the views of the Copyright Office, would “contest this rationale, arguing that the technological differences between a cable company and Defendants’ Internet rebroadcasting system are exceedingly meaningful to the broadcaster.”¹⁴³ Although the *FilmOn* court attempted to address this point by confining the *Aereo III* approach to the Transmit Clause,¹⁴⁴ it is both counterintuitive and awkward to say that Internet retransmission services are the same as cable companies for the purposes of the Transmit Clause, but are distinct from cable companies for the purposes of Section 111.

Given that the plain text of the statute, the legislative history, and the language of the *Aereo III* decision all support the inclusion of Internet retransmission services under the definition of “cable systems” in Section 111, the *AereoKiller* position is persuasive.

B. Inclusion of Internet Transmissions Will Accomplish the Goal of Increasing Competition in the Marketplace

The above analysis makes clear that the statutory language is broad enough to encompass Internet retransmission services. Moreover, there are strong economic

¹⁴³ *AereoKiller*, 115 F. Supp. 3d, at 1163.

¹⁴⁴ *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052, at *10 (D.D.C. Dec. 2, 2015) (stating that *Aereo III* reflected the fact that “technological differences could be disregarded when interpreting the Transmit Clause, but not necessarily when analyzing a different provision of the Copyright Act”).

reasons for such an interpretation. As discussed above, one of the aims of the compulsory licensing schemes included in the Copyright Act is the “promotion of competition” in order to “reduce costs to consumers.”¹⁴⁵ This goal is only realized to a limited extent in the current copyright regime because traditional cable companies enjoy local monopolies. The introduction of satellite television was an unequivocal success in this respect, resulting in billions of dollars in consumer gains.¹⁴⁶ Internet-based services would undoubtedly provide a similar benefit to consumers.

Furthermore, interpreting Section 111 to allow compulsory licensing would force cable companies to compete more broadly. In the current television landscape, cable companies often do not compete directly because individual companies are dominant in certain regions.¹⁴⁷ Making the Section 111 license available to Internet services could force traditional cable companies to begin offering their own version of online broadcasts and thereby compete against each other nationally. Even without this change in how Section 111 is applied, cable companies have faced some pressure to compete with online content providers.¹⁴⁸ Nevertheless, traditional cable continues to enjoy a substantial competitive advantage over these services in that it can offer live programming; certain events such as sports contests or awards shows decline precipitously in value the

¹⁴⁵ S. REP. NO. 106-42, at 10 (1999).

¹⁴⁶ See generally Austan Goolsbee & Amil Petrin, *The Consumer Gains from Direct Broadcast Satellites and the Competition with Cable TV*, 72 *ECONOMETRICA* 351 (2004) (arguing that the introduction of satellite resulted in aggregate gains of \$2.5 billion for satellite subscribers and \$3 billion for cable subscribers).

¹⁴⁷ See Note, *Enabling Television Competition in a Converged Market*, 126 *HARV. L. REV.* 2083, 2090–92 (2013) (discussing the phenomenon of “clustering” in television markets).

¹⁴⁸ Alex Sherman, *Why the Cable Companies You Hate May be Forced to Compete Online*, *BLOOMBERG* (Apr. 1, 2015, 1:44 PM), <http://www.bloomberg.com/news/articles/2015-04-01/why-the-cable-companies-you-hate-may-be-forced-to-compete-online> [<https://perma.cc/Q5Y6-WURW>].

more they are “time shifted.”¹⁴⁹ As a result, these services cannot be said to be true competitors of traditional cable. Giving Internet retransmission services access to the Section 111 license would eliminate this advantage by placing Internet retransmission services on even footing with cable providers.¹⁵⁰ If traditional cable and Internet retransmission services had equal access to the Section 111 compulsory license, consumers would be presented with a legitimate alternative to cable and satellite that includes the ability to view live programming broadcast over-the-air.

Finally, providing access to Section 111 could be the first step on a path of disintermediation of the delivery of video content. As others have noted, online delivery of content may ultimately pressure content providers themselves to make content available online.¹⁵¹ Indeed this type of behavior is already beginning to take place, as many networks have responded to the threat of services such as Hulu and Netflix

¹⁴⁹ The issue of competition is certainly complicated by the fact that many traditional cable companies also control Internet access. See Robert B. Reich, *The Rigging of the American Market*, BALTIMORE SUN (Nov. 4, 2015, 6:00 AM), <http://www.baltimoresun.com/news/opinion/bal-the-rigging-of-the-american-market-20151103-story.html> [<http://perma.cc/7QPB-5ATK>] (noting that eighty percent of Americans have no choice in Internet service provider). However, that discussion is beyond the scope of this Note.

¹⁵⁰ Of course, this advantage will not disappear immediately, especially given that, during the *Aereo* litigation, major sports leagues asserted that they would move all games to cable if the service was deemed legal. *NFL, MLB Back Broadcasters in Fight vs Aereo*, CNBC (Nov. 18, 2013, 3:57 PM), <http://www.cnbc.com/2013/11/18/nfl-mlb-back-broadcasters-in-fight-vs-aereo.html> [<http://perma.cc/4AK4-X8NE>]. Such a strategy does not seem as though it would be sustainable given that the preeminent cable sports channel, ESPN, is facing reduced revenues as a result of declining cable subscriptions. Matt Bonesteel, *Survey Paints Gloomy Picture for ESPN*, CHI. TRIB. (Jan. 14, 2016, 11:01 AM), <http://www.chicagotribune.com/sports/breaking/ct-espn-disney-cable-tv-20160114-story.html> [<https://perma.cc/7CPP-BRGE>].

¹⁵¹ See Bradley Ryba, Comment, *Aerevolution: Why We Should, Briefly, Embrace Unlicensed Online Streaming of Retransmitted Broadcast Television Content*, 13 J. MARSHALL REV. INTELL. PROP. L. 577, 595 (2014) (describing this as “[t]he networks’ most sensible solution”).

by making certain content available online after airing.¹⁵² Though it is difficult to foresee how the online marketplace for content will evolve, it is possible that users will ultimately be able to shop for the shows that they are most interested in and to build a personal bundle of programming. Allowing consumers to choose programming in this way would allow for a more efficient allocation of resources and would add to the substantial economic benefits realizable through increased competition in the marketplace.

C. The Copyright Act Should Be Interpreted Flexibly to Allow for Changing Technology

As the *Aereo IV*, *AereoKiller*, and *FilmOn* courts indicated, these cases directly confront whether the Copyright Act should be “technology-agnostic,” and thus they provide an opportunity to examine how the Copyright Act should apply moving forward.¹⁵³ Copyright is “a creature of technology.”¹⁵⁴ Therefore, the Act should be interpreted flexibly to allow for technological change, especially in a period of such rapid innovation. The application of the *ivi* rationale in cases such as *Aereo IV* and *AereoKiller* would lead to a copyright regime that does little to balance private property rights with the public benefit of access to copyrighted works, and that instead “hardwires a lack of balance between rights and exceptions—giving a broad,

¹⁵² David Pogue, *Networks Start to Offer TV on the Web*, N.Y. TIMES (Oct. 18, 2007), <http://www.nytimes.com/2007/10/18/technology/circuits/18pogue.html?pagewanted=all&r=0>.

¹⁵³ See *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-758 (RMC), 2015 WL 7761052, at *10 (D.D.C. Dec. 2, 2015) (“The Court does not agree that the Supreme Court adopted a technology-agnostic interpretation of the Transmit Clause, let alone the Copyright Act as a whole.”); *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1163 (C.D. Cal. 2015) (“[C]ourts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation.”).

¹⁵⁴ Brad Sherman & Leanne Wiseman, *Copyright: When Old Technologies Were New, in* COPYRIGHT AND THE CHALLENGE OF THE NEW 1 (Brad Sherman & Leanne Wiseman eds., 2012).

technology-neutral scope to the former and a narrow, technology-specific scope to the latter.”¹⁵⁵ Such an imbalance would stunt innovation and harm consumers.¹⁵⁶

Moreover, given the pace of technological change, a technology-agnostic approach would have significant practical advantages. As the defendants argued in *AereoKiller*, “it would be improper and unwise to force Congress to amend the Act every time a new broadcast retransmission technology was adopted by Section 111 retransmitters.”¹⁵⁷ This point is especially salient in light of the broad language of Section 111 and the legislative history of the Act, discussed more fully in Part IV.A *supra*. Courts should therefore follow the *AereoKiller* court’s lead and “reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation.”¹⁵⁸ Holding otherwise “would largely freeze for section 111 purposes both technological development and implementation,” and “force both primary and secondary transmitters alike to forego available, economically feasible technology.”¹⁵⁹ Adopting a technology-agnostic interpretation would ensure efficient operation of the statute and avoid these sorts of market distortions.

¹⁵⁵ Bridy, *supra* note 65, at 473–74.

¹⁵⁶ Geoffrey Palachuk, *Aereo: Bringing the NFL to a “Cloud” Near You: How Evolving Technology Demands Rapid Reevaluation of Legislative Protections in Light of Streaming Television Broadcasts*, 50 GONZ. L. REV. 117, 142 (2015) (asking “why protect the Broadcasters over the innovators?”).

¹⁵⁷ Defendants’ Memorandum of Points and Authorities in Support of Summary Adjudication of Defendants’ Counterclaim for Declaratory Relief and Defendants’ Section 111 Affirmative Defense at 14, *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152 (C.D. Cal. 2015) (No. CV 12–6921–GW (JCx)).

¹⁵⁸ *AereoKiller*, 115 F. Supp. 3d at 1163 (arguing that courts have consistently taken this stance).

¹⁵⁹ *AereoKiller*, 115 F. Supp. 3d at 1171 (quoting *Hubbard Broad., Inc. v. S. Satellite Sys., Inc.*, 777 F.2d 393, 400 (8th Cir. 1985)).

V. CONCLUSION

This Note argues that Internet retransmission services easily fit the statutory definition of “cable system” and should have access to the cable compulsory license. The plain language of Section 111, its legislative history, and the Supreme Court’s reasoning in the *Aereo III* decision all point towards a conclusion that the *AereoKiller* court was correct, and the *ivi* case was wrongly decided. Moreover, there are strong policy reasons weighing in favor of placing Internet retransmission services on even footing with cable and satellite. The Copyright Act should not be a static piece of legislation that is unresponsive to the changing realities of how content is delivered. The exact means of delivery should not have an effect on the operation of Section 111 so long as it is substantially similar to the very systems the Section was written to cover. Reading Section 111 to cover Internet retransmission services helps to advance the goals of copyright by more effectively balancing the rights of copyright owners with benefits for consumers.