Virginia Association of Broadcasters
Legal Review

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Legal Memorandum

NINTH CIRCUIT REJECTS FILMON X'S BID FOR THE COMPULSORY COPYRIGHT LICENSE

In 2014, the U.S. Supreme Court ruled that Internet streaming service Aereo infringed copyright holders' exclusive rights when it captured programs broadcast over the air and retransmitted them to paying subscribers without the consent of the copyright holders—that is, Aereo had made unauthorized "public performances" of copyrighted works. Following that decision, the battle between broadcasters and internet streaming services shifted: Online video distributors or "OVDs" claimed to be "cable systems" covered by the compulsory copyright license provided in Section 111 of the Copyright Act. Section 111 allows cable systems to distribute broadcasters' copyrighted content without negotiating individual copyright licenses with every network and local station.

One OVD, FilmOn X (formerly known as Aereokiller), scored a temporary victory on the copyright front in July 2015: A California federal district court ruled that FilmOn X is potentially entitled to the compulsory license, reasoning that the language of Section 111 does not distinguish between traditional cable services and OVDs. Broadcasters appealed.

In a decision issued Tuesday, March 21, 2017, the Ninth Circuit Court of Appeals reversed the district court, agreeing with broadcasters that Internet streamers like FilmOn X are not "cable systems" eligible for the compulsory license. The court considered the detailed definition of "cable system" in the Copyright Act, which neither definitively includes nor conclusively excludes services that transmit via the Internet. Given that potential ambiguity, the Ninth Circuit deferred to the consistent and longstanding position of the U.S. Copyright Office that the Section 111 license is unavailable to inherently nationwide (as opposed to localized) Internet-based retransmission services. The appeals court further reasoned that the purpose of the Copyright Act could be jeopardized by extending the compulsory license to Internet streamers: Unlike traditional cable systems, online services like FilmOn X have no geographic boundaries and therefore pose

"a more serious threat to the value and integrity of copyrighted works" and magnify the risks of piracy and other copyright violations.

As the Ninth Circuit's decision notes, the weight of authority is in agreement: Six other federal courts have concluded that Internet-based retransmission services do not count as "cable systems." Only the California district court had decided that the compulsory copyright license could be available to OVDs, and that outlier decision has now been reversed.

Nevertheless, a similar issue is pending before the District of Columbia Circuit Court of Appeals following a November 2015 decision of a D.C. federal district court that the cable compulsory license is unavailable to Internet streaming services. If the decision of the D.C. Circuit, which held oral argument just last week, ultimately conflicts with the Ninth Circuit's, that conflict could set the stage for the U.S. Supreme Court to clarify what it meant when it described (now-defunct) Aereo as "a system that is for all practical purposes a traditional cable system."

If you have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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