



Virginia Association of Broadcasters Legal Review



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Legal Memorandum

D.C. FEDERAL COURT DEALS A BLOW TO FILMON X'S COPYRIGHT CAMPAIGN

Following the U.S. Supreme Court's *Aereo* decision in 2014, the battle between broadcasters and internet streaming services shifted to focus on whether "online video distributors" or "OVDs" such as FilmOn X are entitled to the compulsory copyright license made available to cable systems by 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.

In July 2015, a federal district court in California ruled that FilmOn X is potentially entitled to the compulsory license, finding that the language of Section 111 does not draw distinctions between traditional cable services and OVDs. Broadcasters have appealed that decision to the Ninth Circuit.

FilmOn X's hope for a similar victory on the east coast were dashed on November 12, 2015, when a D.C. federal district court judge ruled that FilmOn X infringed broadcasters' exclusive public performance rights under the Copyright Act. The court's opinion explaining its reasoning remains under seal, but a two-page order issued the same day makes clear that FilmOn X was unable to persuade the court that the cable compulsory license is equally available to Internet streaming services.

Conflicting decisions from federal courts in different circuits often results, ultimately, in a decision by the U.S. Supreme Court. Thus, if the two FilmOn X district court decisions result in conflicting decisions from the D.C. Circuit Court of Appeal and the Ninth Circuit Court of Appeal,

it could set the stage for the Supreme Court to clarify what it meant when it described now-defunct streaming service Aereo as “a system that is for all practical purposes a traditional cable system.”

Meanwhile, the FCC is considering whether Internet-based video distributors should be treated as “multichannel video programming distributors” or “MVPDs” alongside traditional pay-TV service providers—a decision that could subject OVDs to the must-carry and retransmission consent rules and might prompt the Copyright Office to revisit the question whether OVDs are entitled to the Section 111 license. To date, the Copyright Office has taken the position that Internet-based retransmission services do not qualify for the statutory license but has acknowledged that the FCC’s “MVPD” rulemaking could impact its analysis.

This is surely not the final word on this important subject, and we will continue to keep you apprised of significant developments.

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

Stephen Hartzell, Editor

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