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Legal Memorandum

Broadcast Networks Score Significant Victory in Litigation Against Locast; Streaming Service Suspends Operations

The broadcast industry—the Big Four Television Networks, specifically—scored a significant victory over Locast earlier this week in the Networks’ copyright infringement lawsuit against the streaming service. In response to the ruling, handed down Tuesday by a federal judge in the Southern District of New York, Locast announced today that it is suspending operations, effective immediately.

The eight-page Order (a copy of which is attached) resolves the primary, critical legal issue in the case in broadcasters’ favor—and, therefore, it would appear that broadcasters have, for practical purposes, “won” the case at this point. Indeed, Locast’s decision to suspend operations indicates as much, at least for now. That said, the litigation is not over: the Order, leaves for trial the issue of damages the broadcaster plaintiffs have incurred as a result of Locast’s operations. And, of course, Locast may appeal the Order.

Before going further regarding the Order, however, here’s a bit of background about Locast and the Big Four Networks’ lawsuit against the streaming service.

*Background*. Locast, an Aereo-like OTT service, launched in January 2018 in New York City. Since that time, Locast has steadily expanded to multiple markets; as of last count (prior to suspending operations today), it operates in dozens of markets. Locast claims to have surpassed 2.8 million registered users and is available to more than 179 million TV homes covering 55% of the U.S. market.

Backed by a group called Sports Fans Coalition, Locast touts itself as a free service that gathers local television stations in the markets where it operates and streams them constantly over a platform that purportedly prevents viewing outside the applicable DMA. Sports Fans Coalition is led by attorney and law professor David Goodfriend, a former legal advisor to FCC Commissioner Susan Ness; he also served as vice president of law and policy at DISH Network.

Locast set itself up as a non-profit organization: Rather than expressly charge its users a fee, it asks for “donations.” The organization has argued since its creation that it satisfies an exception to the Copyright Act—specifically 17 U.S.C. § 111(a)(5)—that permits non-profits and government agencies to retransmit broadcast signals without a copyright license if (1) they do not benefit financially (i.e., if their transmissions are made without any purpose of commercial advantage), and (2) any fees charged are limited to covering the reasonable costs of operating and maintaining the service.

*The Big Four Networks’ Lawsuit Against Locast*. The Big Four Networks filed suit in late July 2019 in a New York federal court against Mr. Goodfriend and Sports Fans Coalition. The lawsuit argues that Locast engages in a “massive infringement” of the Networks’ exclusive rights under the Copyright Act when it captures over-the-air broadcast signals and makes them available to Locast users via the Internet without a copyright license.

The Networks’ lawsuit challenges Locast’s claim that it operates as a non-profit, arguing that the service stands to generate significant commercial benefits for itself (in the form of valuable consumer data it collects about its users and by reinvesting revenues in continued expansion of the service) as well as for traditional pay-TV distributors. The complaint points out that Locast founder Goodfriend is a former DISH executive who launched the service thanks to a “sizable loan” from a company started by another former DISH executive. In addition, DIRECTV made a well-publicized $500,000 “donation” to Locast in May 2019. Both DISH and DIRECTV make the Locast app available on their set-top boxes, and both stand to benefit significantly from disruption of the retransmission consent regime. The lawsuit also points out that the Copyright Act requires even non-profit booster or translator stations to obtain broadcasters’ consent to retransmission. Locast has not done so.

*This Week’s Order Against Locast*. In the Order released Tuesday, Federal District Court Judge Louis Stanton granted the Networks’ motion for partial summary judgment, striking Locast’s affirmative defense that its service falls within the exemption from copyright infringement liability under 17 U.S.C. § 111(a)(5) on the grounds that it is a non-profit that offers its services without any charge to users “other than assessments necessary to defray the actual and reasonable costs of maintaining and operating” the service.

In the Order, Judge Stanton noted that users who wish to avoid an interruption in Locast’s service must make “donations” to Locast—and that the frequency of interruptions a user experiences correlates to the amount of his or her “donation.” Judge Stanton correctly noted that “[t]he obvious economic fact is that these ‘donations’ are really a scale of fees for uninterrupted service, and it works. At present, Locast is almost fully funded by payments from users.” Judge Stanton also cited the fact that Locast generates income through donations from MVPDs.

The Order finds that the income that Locast brings in does not merely “defray the actual and reasonable costs of maintaining and operating” the service. Instead, Locast uses the income it receives from user donations to expand the service into new markets—a use not covered by the narrow language and intent of Section 111(a)(5). As the Order puts it, “nothing in Section 111 specifies that an expansion of the number of infringing transmissions is exempt from” the Copyright Act. As such, Judge Stanton ruled that Locast’s affirmative defense that it falls within the Section 111(a)(5) exemption applicable to non-profits has been stricken. At the same time, Judge Stanton denied Locast’s motion that it was entitled to summary judgment on the same grounds (i.e., the argument that Locast should have been granted summary judgment because it qualifies for the non-profit exemption to the Copyright Act).

*What’s Next?* It is not entirely clear what will happen next in the lawsuit. As mentioned, the litigation is not yet over. Among other things, the issue of damages incurred by the Networks has not been settled. Locast may well appeal the Order.

But, for now, Locast has informed its users that it will suspend operation of the service. We’ll keep you posted.

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*Tim Nelson, Editor*

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