No. 15-56420

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC., *et al.*,

Plaintiffs-Appellants,

v.

AEREO KILLER LLC, *et al.*,

Defendants-Appellees.

On Appeal from the
United States District Court for the Central District of California
The Honorable George H. Wu
Civ Nos. 2:12-cv-06921, 2:12-cv-06950 (consolidated)

BRIEF OF *AMICI CURIAE* THE COMPETITIVE ENTERPRISE INSTITUTE AND THE INTERNATIONAL CENTER FOR LAW AND ECONOMICS IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations and Administrative Decisions

Legislative Materials

Other Authorities

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CEI and ICLE have been heavily involved in the issue of broadcast television retransmission. For example, as *amici curiae* in *American Broadcasting Cos. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), we urged the Supreme Court to hold that Aereo publicly performed copyrighted works within the meaning of the Copyright Act.

All parties to this case consented to the filing of this brief. This brief was not authored in whole or in part by a counsel to a party in this case. Neither a party nor a party's counsel contributed money that was intended to fund the preparation or submission of this brief. No person, other than *amici*, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION

Although the immediate question presented in this case is whether Internet-based retransmission services are eligible for the compulsory license made available by Section 111 of the Copyright Act, this statute does not exist in a vacuum. Rather, Congress has established a comprehensive statutory regime governing the retransmission of broadcast television through several laws that span *two* titles of the United States Code. In particular, Section 111's compulsory license is available only to a "cable system"—a type of broadcast retransmission service that is also subject to, and defined by, a host of statutory requirements enacted by Congress in the 1992 Cable Act. When the Copyright Act is read in conjunction with the Cable Act, as it must be, along with other provisions of the Communications Act and a long line of judicial decisions, the unmistakable conclusion is that Defendants' service cannot be a "cable system" within the meaning of the Copyright Act.

Of greatest importance to Congress's legislative framework governing retransmission is the requirement that any entity retransmitting broadcast television—regardless of the technical means—

first obtain consent from the owner or primary transmitter of the television programming. By interpreting the Copyright Act's compulsory license to make it available to Internet-based retransmission services, the lower court undercuts that legislative framework. Although cable systems (and satellite carriers) are eligible for a compulsory copyright license for which they do not need explicit permission from television program owners, under the Communications Act they must still generally obtain a *broadcast station's* consent before retransmitting its signal. To obtain this consent, cable companies must generally pay an agreed upon amount to broadcasters on top of statutory copyright royalties. For all other entities that wish to retransmit broadcast television, no compulsory copyright license is available; they must bargain for the right to publicly perform television shows with the shows' owners.

Defendants seek to sidestep both of these obligations by concocting a supposed loophole in federal law—engaging in a sort of regulatory arbitrage between the Communications Act and the Copyright Act. Thus, Defendants claim that they are both eligible for the compulsory copyright license available to cable systems, and also that their service is

technically configured to escape the reach of the Communications Act's provision empowering broadcast stations to decide whether to consent to a cable system's retransmission of their signals. Not surprisingly, and as the text and purpose of the Copyright Act and the Communications Act reveal, Congress never authorized this ploy.

ARGUMENT

I. CONGRESS DELIBERATELY CRAFTED A STATUTORY REGIME TO BAR THE UNAUTHORIZED RETRANSMISSION OF BROADCAST TELEVISION PROGRAMMING

A. The Copyright Act of 1976: Congress creates a compulsory license for television retransmissions by cable systems

Congress wrote Section 111 into law when it overhauled U.S. copyright law with the Copyright Act of 1976, Pub. L. No. 94–553, 90 Stat. 2541, codified at Title 17 of the United States Code. This overhaul was prompted in part by a duo of Supreme Court cases holding that a cable system does not infringe a copyright holder's public performance right by retransmitting a broadcast station's television signal to a local or distant audience. *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390, 393 (1968); *Teleprompter Corp. v. CBS*, 415 U.S. 394, 396 (1974).

Those decisions effectively allowed cable companies to retransmit broadcast television signals without paying royalties to the copyright owners of the underlying programs (including local news shows, which broadcasters often produce and own). Because Congress disagreed with that policy, *see* H.R. Rep. No. 94-1476, at 88–89 (1976), it drafted Section 111, 17 U.S.C. § 111, precisely to overturn the Supreme Court's rulings and to require cable systems to compensate copyright holders for the privilege of retransmitting their works.

But Congress also decided that marketplace negotiations should not determine whether, and at what price, cable companies could retransmit broadcast television signals. Instead, Congress established a compulsory license whereby cable companies could retransmit broadcast television programming so long as they semiannually remit to the Register of Copyrights a royalty fee. 17 U.S.C. § 111(d)(1)(A)–(F). This fee is based on a complex formula that turns on, among other things, the gross receipts of the cable system and the number of signals it retransmits outside the originating station's service area. *See id.* In turn, the Copyright Royalty Board distributes these royalties among the copyright

owners whose works have been retransmitted under the compulsory license. 17 U.S.C. § 111(d)(4).

In the four decades since Section 111 was enacted, its fundamental structure has remained intact. Cable companies continue to remit royalties to the Register of Copyrights in consideration for the right to retransmit valuable broadcast television programs.

But, as shown below, this is only one part of the story.

B. The Cable Act of 1992: Congress empowers broadcasters to say "no" to cable companies

As cable systems continued to grow through the 1970s and 1980s, Congress eventually grew concerned about their perceived dominance. *See* H.R. Rep. No. 102-862, at 2 (1992) (Conf. Rep.).[1] In 1992, Congress overrode President George H. W. Bush's veto to enact the Cable Television Consumer Protection and Competition Act (the "Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460 (1992). This law dramatically changed the economic relationship between cable companies, broadcast stations, and owners of copyrights in television programs—while leaving the Copyright Act unchanged. Instead, the Cable Act amended and

1. Reprinted in 1992 U.S.C.C.A.N. 1231.

expanded the Communications Act of 1934, a freestanding law codified at Chapter 5 of Title 47 of the United States Code.

Among other things, the Cable Act amended Section 325 of the Communications Act to allow broadcasters to elect a new right known as "retransmission consent." If a broadcaster invokes this right, no "cable system" (here defined by 47 U.S.C. § 522(7)) or "multichannel video programming distributor" (MVPD) (defined by 47 U.S.C. § 522(13)) may retransmit that broadcaster's signal without the station's "express authority." 47 U.S.C. § 325(b)(1).

Since 1992, a large and growing majority of stations have elected retransmission consent,[2] in large part because doing so allows a station to bargain with cable companies that wish to retransmit its signal—and to withhold permission from cable companies unwilling to pay satisfactory prices.[3]

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2. Fed. Comm'cns Comm'n, *Spectrum Analysis: Options for Broadcast Spectrum, OBI Technical Paper No. 3*, at 8 (2010), *available at* https://transition.fcc.gov/national-broadband-plan/spectrum-analysis-paper.pdf (Exhibit C).

3. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3274–75, para. 45 (2015), *available at*

Under current law, therefore, when a cable system wishes to carry the signal of a popular broadcast station that has elected retransmission consent, the cable system has two obligations. First, it must pay that station a voluntarily negotiated rate for permission to retransmit its signal. Second, it must remit to the Register of Copyrights a royalty fee pursuant to Section 111 of the Copyright Act for the right to retransmit the copyrighted works embodied in the signal. If a cable company retransmits a broadcast signal without a Section 111 license, it is liable for copyright infringement. *See* 17 U.S.C. § 501. If a cable company does so without a station's express authority, it is subject to a civil penalty assessed by the FCC. *See* 47 C.F.R. § 1.80.

C. Retransmission consent applies only to cable systems and satellite carriers—the same entities that are eligible for a compulsory copyright license

The text and purpose of the Cable Act's amendments to the Communications Act show that Congress sought in 1992 to change the cable-friendly playing field it had created in 1976 with the compulsory copyright license. As Congress noted in the Cable Act's findings, "[c]able

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https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-41A1_Rcd.pdf.

systems … obtain great benefits from local broadcast signals which, until now, they have been able to obtain *without the consent of the broadcaster or any copyright liability*." Pub. L. No. 102-385, § (2)(a)(19) (emphasis added). And Congress observed that "broadcast programming … remains the most popular programming on cable systems, and a substantial portion of the benefits for which consumers pay cable systems is derived from carriage of the signals of network affiliates." *Id.* Congress explained that the policy of the Act was to "ensure that cable television operators do not have undue market power vis-a-vis video programmers and consumers." *Id.* § (2)(b)(5).

By enacting the retransmission consent provision, Congress sought to remedy a perceived imbalance between cable companies and broadcasters. Although that perceived imbalance stemmed in part from the compulsory copyright license, Congress chose not to disrupt the Copyright Act's compulsory licensing regime, but rather to effectively augment it through targeted amendments to the Communications Act.

In fact, Congress explicitly emphasized that the Cable Act's retransmission consent provision should not be "construed as modifying the compulsory copyright license established in section 111 of title 17 or

as affecting existing or future video programming licensing agreements between broadcasting stations and video programmers." 47 U.S.C. § 325(b)(3)(6). In other words, when Congress passed the Cable Act in 1992, it did not alter the scope of the compulsory license it had created in 1976. Instead, it imposed a new obligation—retransmission consent—on the same cable companies and other entities that otherwise remained eligible for a compulsory copyright license.

The end result is that permission for MVPDs to retransmit broadcast television signals requires two payments: first, a submission of royalty fees to the Register of Copyrights, and second, a payment to broadcasters of an agreed upon amount for consent to retransmit their signal.

II. THE LOWER COURT FRUSTRATED CONGRESS'S LEGISLATIVE INTENT IN CONSTRUING DEFENDANTS' SERVICE AS A "CABLE SYSTEM" UNDER THE COPYRIGHT ACT WITHOUT CONSIDERING THE IMPLICATIONS OF DOING SO UNDER THE COMMUNICATIONS ACT

A. The Copyright Act and the Communications Act contain different definitions of a "cable system"

To understand the resulting scope of the compulsory copyright license following the enactment of the Cable Act, it is also important to consider Congress's contemporaneous and subsequent enactments on the same subject matter—i.e., cable companies' obligations vis-à-vis

broadcasters. *Cf. United States v. Stewart*, 311 U.S. 60, 64 (1940) (statutes relating to the same subject matter should be construed together).

The retransmission consent provision that Congress added in 1992 applies to any "cable system or other multichannel video programming distributor." 47 U.S.C. § 325(b)(1). The Act defines a "multichannel video programming distributor" as:

> a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming[.]

47 U.S.C. § 522(13). The Act defines a "cable system" as:

> 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 which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves subscribers without using any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services; (D) an open video system that complies with section 573 of this title; or (E) any facilities of any

> electric utility used solely for operating its electric utility system[.]

47 U.S.C. § 522(7).

In contrast, 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 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).

In short, under the Communications Act, the term "multichannel video programming distributor" is a broader category than "cable system." Moreover, a "cable system" is defined more narrowly in the Communications Act than in the Copyright Act, with the former definition requiring a "set of closed transmission paths."

In practice, therefore, some entities that are *not* regulated as cable systems under the Communications Act—such as AT&T's U-verse video service[4]—are nonetheless eligible for the compulsory license afforded to

4. *See Reply Comments of AT&T Services Inc., in Section 109 Report to Congress of the Copyright Office*, Notice of Inquiry, Docket No.

cable systems by Section 111 of the Copyright Act. Nevertheless, U-verse is still considered a MVPD under the Communications Act[5]—and, therefore, is subject to the retransmission consent requirement. Nothing in the Copyright Act's definition of a cable system changes that.

The retransmission consent provision also applies to satellite carriers such as DirecTV and Dish Network, which are not cable systems (under either the Communications or Copyright Acts) but are still considered MVPDs under the Communications Act.[6] Although satellite carriers are ineligible for the Section 111 compulsory license, they are eligible for another very similar compulsory license that Congress added to the Copyright Act after its 1976 overhaul. *See* 17 U.S.C. §§ 119, 122.

Finally, and as we discuss below at pages 16 to 20, entities that are not MVPDs under the Communications Act—such as online video distributors (OVDs) like Apple TV—are not subject to the Act's

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2007-1, 72 Fed Reg. 19,039 (2007), *available at* http://www.copyright.gov/docs/section109/replies/att-reply.pdf.

5. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3263–64, para. 27 (2015).

6. *See id.* at 3262–63, para. 26.

retransmission consent provision. But neither are they eligible for the Copyright Act's compulsory license.

To recap, a compulsory license is available under the Copyright Act to (1) cable systems and (2) satellite carriers, while the Communications Act's retransmission consent provision applies to (1) cable systems (under a slightly different definition than in the Copyright Act) and (2) other MVPDs—a much broader definition encompassing every retransmission service that could be considered either a cable system or a satellite carrier under the Copyright Act. Neither provision applies to services that are not MVPDs at all.

In practice, *and by design*, therefore, a service that retransmits television programming is subject to *both* provisions, or *neither* of them, depending on the technical details of the service. Congress affirmed its intent that these provisions go hand-in-hand in 1994, after the Copyright Office had concluded that "wireless" cable operators, known as "Multichannel Multipoint Distribution Services," were ineligible for the statutory license[7]—even though they are explicitly defined as MVPDs in the Cable Act, 47 U.S.C. § 522(13). In response to the Copyright Office's

7. Cable Compulsory License, 57 Fed. Reg. 3284, 3296 (Jan. 29, 1992).

ruling, Congress added the word "microwave" to the definition of "cable system" in Section 111, thereby ensuring that wireless cable operators would be eligible for the compulsory license but also subject to the retransmission consent provision. Pub. L. No. 103-369, § 3(a), 108 Stat. 3477 (1994).

B. The lower court impaired Congress's legislative scheme in finding Defendants' service to be eligible for the Copyright Act's compulsory license, even though it is not an MVPD subject to the Communications Act's retransmission consent provision

With that background, we come to the crux of the issue in this case. Defendants seek a compulsory license under Section 111 of the Copyright Act, which would allow them to sell a service that retransmits copyrighted television shows without permission from the program owners—while paying only statutorily determined royalties that do not come close to market rate for Plaintiffs' programming. At the same time, however, Defendants have configured their service so that they do not need to obtain consent from the broadcasters whose signals they wish to retransmit, because Internet-based retransmission services do not meet the Communications Act's definition of an MVPD.

On the latter point Defendants are correct: Internet-based retransmission services are not MVPDs. However, treating their service as a "cable system" under the Copyright Act, but not under the Communications Act, is contrary to the statutory framework Congress created.

III. AS A MATTER OF LAW AND POLICY, INTERNET-BASED RETRANSMISSION SERVICES ARE INELIGIBLE FOR THE COPYRIGHT ACT'S COMPULSORY LICENSE

A. The lower court's ruling would cripple video programmers' ability to recoup their production costs and thus hurt their ability to produce television programming

The term "broadcasters" is shorthand for companies that own and operate FCC-licensed stations that transmit free television signals to the public over the airwaves. Most popular broadcasters are contractually affiliated with one of four major "networks"—ABC, NBC, CBS, and Fox—which produce most of the broadcast television shows aired during prime time. Copyrights in programs aired by broadcasters are owned by various entities, including networks, production studios, and/or the broadcasters themselves.

When a cable system or MVPD negotiates retransmission consent with a network-affiliated broadcaster, the MVPD values that broadcast

signal not only for the station's own programming—e.g., local news shows—but, far more importantly, for *network programming*—chiefly, prime time content.[8] Well aware of this dynamic, networks are increasingly demanding a major cut of their affiliates' retransmission consent revenue. As the FCC recently observed, "[n]etwork compensation to television broadcast stations has all but disappeared, and today, television stations instead commonly pay compensation to networks in order to air their programming."[9]

Ultimately, retransmission consent payments made by cable companies and other MVPDs to broadcasters essentially substitute for market-negotiated copyright royalties paid by broadcasters to program content owners. These payments end up in large part not in the station owners' pockets, but in the hands of the networks and studios that produce popular television programming. Through voluntary negotiation, copyright owners can charge broadcasters market rates for

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8. *See, e.g.*, Bruce Owen, *The FCC and the Unfree Market for TV Program Rights*, 6 FREE ST. FOUND. PERSPECTIVES 3 (2011), *available at* http://goo.gl/SsN0Xu.

9. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixteenth Report, 30 FCC Rcd 3253, 3345–46, paras. 202–03 (2015).

their programming—and broadcasters, in turn, can pass along these costs by collecting fees from cable systems and satellite carriers. All told, MVPDs paid an estimated $4.9 billion to broadcasters in 2015.[10] These payments, along with advertising revenues, ultimately sustain the rising costs needed to produce hit television shows. When broadcasters negotiate with networks for permission to air popular television programs, they must bargain for copyrights at market prices—broadcasters enjoy no statutory license to publicly perform copyrighted television shows. Yet the lower court's ruling would permit services like the Defendants' to make an end-run around this compensation regime.

B. Internet-based retransmission services do not meet the FCC's definition of an MVPD, and the agency does not plan to depart from this interpretation

The FCC's Media Bureau concluded in 2010 that an Internet-based programming distributor is not an MVPD under the Communications Act.[11] After soliciting public comment on whether the agency should

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10. David Lieberman, *Retransmission Consent Payments to Hit $9.3B In 2020*: SNL Kagan, DEADLINE (Oct. 27, 2014, 11:22 AM), http://deadline.com/2014/10/tv-station-retransmission-consent-payments-862748/.

11. *Sky Angel U.S., LLC*, Order, 25 FCC Rcd 3879, 3882–83, para. 7 (MB 2010).

exercise its discretion and amend its interpretation of this statutory term, in late 2014, the FCC proposed a rule that would have expanded the regulatory definition of an MVPD to encompass certain Internet-based distributors.[12] However, this notice met significant opposition, leading the FCC Chairman to state at a House Committee on Energy and Commerce hearing in November 2015 that the agency did not intend to move forward on that rulemaking, given the resistance the agency had encountered since issuing the proposal.[13] The significant legal concerns raised by commenters in that proceeding make it doubtful that the agency could permissibly construe the Communications Act's MVPD definition as encompassing Internet-based video distributors.[14]

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12. *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2014), https://apps.fcc.gov/edocs_public/attachmatch/FCC-14-210A1_Rcd.pdf.

13. Mario Trujillo & David McCabe, *FCC Puts Online Video Regs on Hold*, THE HILL (Nov. 17, 2015, 5:32 PM), http://goo.gl/fGr6OM.

14. *See, e.g.*, Comments of CEI, ICLE, and TechFreedom, *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995 (2015), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001039178.

For the FCC to attempt to reinterpret the statutory definition of an MVPD to encompass Internet-based retransmission services would constitute the very sort of "voyage of discovery" by a federal agency that the Supreme Court recently criticized in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, 2446 (2014) (emphasizing that "an agency may not rewrite clear statutory terms" to suit its policy preferences). But under the lower court's erroneous determination that Defendants are eligible for the Section 111 compulsory copyright license, they and other Internet-based services can resell broadcast television programming they obtain at government-set prices—without the consent of station owners, copyright holders, or broadcast networks.

CONCLUSION

Congress crafted the statutory regime as it did precisely to prevent the unjust enrichment of television resellers at the expense of broadcasters and copyright owners. Defendants do not operate a cable system and are thus ineligible for the compulsory copyright license. If they wish to retransmit plaintiffs' television programming, they are free to bargain for a copyright license, as so many other Internet-based video

distributors have done. The District Court's order granting partial summary judgment to Defendants should be reversed.

Respectfully submitted,

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February 3, 2016

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 3,808 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/ Hans Bader
Hans Bader

February 3, 2016

CERTIFICATE OF SERVICE

I certify that, on February 3, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Hans Bader
Hans Bader

February 3, 2016