ORAL ARGUMENT NOT YET SCHEDULED

No. 16-7013

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FILMON X LLC, ET AL.

Defendants-Appellants,

v.

FOX TELEVISION STATIONS, INC., ET AL.,

Plaintiffs-Appellees.

On Appeal from the United States District Court
for the District of Columbia
The Honorable Rosemary M. Collyer
Case No. 1:13-cv-00758-RMC

BRIEF AMICI CURIAE OF ELECTRONIC FRONTIER FOUNDATION AND PUBLIC KNOWLEDGE IN SUPPORT OF DEFENDANTS-APPELLANTS

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, California 94109
Tel: (415) 436-9333
mitch@eff.org

John Bergmayer
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20036
Tel: (202) 861-0020
john@publicknowledge.org

Counsel for Amici Curiae Electronic Frontier Foundation and Public Knowledge

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.

A. Parties and Amici. Except for the following, all parties, intervenors, and *amicus* appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants:

Electronic Frontier Foundation and Public Knowledge are *amici curiae* in this appeal.

B. Rulings under Review. References to rulings at issue appear in the brief for Defendants-Appellants.

C. Related Cases. References to related cases appear in the Brief for Defendants-Appellants.

Dated: July 25, 2016

Respectfully submitted,

/s/ Mitchell L. Stoltz

Mitchell L. Stoltz
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, California 94109
Tel: (415) 436-9333

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amici curiae* submit the following corporate disclosure statement.

Amicus Electronic Frontier Foundation is a non-profit organization. EFF has no parent corporation, and does not issue stock.

Amicus Public Knowledge is a non-profit organization. Public Knowledge has no parent corporation, and does not issue stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

*Authorities upon which we chiefly rely are marked with asterisks.

Statutes

Federal Regulations

Constitutional Provisions

Legislative Materials

Other Authorities

INTEREST OF AMICI CURIAE[1]

The Electronic Frontier Foundation (EFF) is a member-supported, nonprofit public interest organization dedicated to protecting civil liberties and free expression in the digital world. EFF has tens of thousands of active donors. For over 25 years, EFF has promoted the sound development of copyright law as a balanced legal regime that fosters creativity and innovation. EFF's interest with respect to copyright law reaches beyond specific industry sectors and technologies to promote well-informed copyright jurisprudence. EFF has contributed its expertise to many cases applying copyright law to new technologies as party counsel, as amicus curiae, and as court-appointed attorneys *ad litem*.

Public Knowledge is a non-profit public interest 501(c)(3) corporation, working to defend citizens' rights in the emerging digital culture. Its primary mission is to promote online innovation, protect the legal rights of all users of copyrighted works, and ensure that emerging copyright and telecommunications policies serve the public interest. Applying its years of expertise in these areas, Public Knowledge frequently files amicus briefs in cases that raise novel issues at the intersection of media, copyright, and telecommunications law.

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), no one, except for the *amici* and their counsel, has authored this brief in whole or in part, or contributed money towards its preparation or submission. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Multichannel video services from FilmOn to traditional cable operators depend on statutory licenses to survive. Congress created the Section 111 license because it understood that transaction costs associated with acquiring licenses individually from the numerous individual copyright holders whose works are broadcast on even a single channel are insurmountably high. To ensure that the statutory scheme does not impede innovation, Congress also designed Section 111 to be applied in a technology-neutral manner, so that new technologies that functionally resemble traditional cable could benefit from the same license options. For over three decades, various courts have interpreted Section 111 in keeping with that intention, and Congress has maintained this principle throughout several amendments to the Copyright Act.

In light of this history, the Court should apply the statute as written: a "facility" that "receives signals transmitted or programs broadcast by one or more television broadcast stations . . . and makes secondary transmissions of such signals or programs by wires . . . or other communications channels to subscribing members of the public" is a "cable system" under the Copyright Act and should have access to the Section 111 license. 17 U.S.C. § 111(f)(3). Reversing the decision below, and clarifying that Section 111 applies to "cable systems" as defined in that section without regard to the specific technologies used, will uphold

Congress's intent. It will also promote innovation and competition by ensuring that copyright law does not privilege incumbent video distribution services over new entrants using cost-effective new technologies.

In reversing the district court's grant of summary judgment to the appellees, this Court should make clear that the Copyright Office's repeated statements against the applicability of Section 111 to Internet-based TV redistribution services are contrary to Congressional intent and therefore entitled to no deference under *Skidmore v. Swift & Co.*

The Court should also make clear that international agreements do not and cannot influence the outcome of a copyright dispute arising under the U.S. Copyright Act, where the agreements in question were entered into after the statute was enacted and are not self-executing. The district court in this case was guided to its incorrect conclusion by language in several free trade agreements, even though Congress's implementation of those agreements explicitly rejects such construction.

A technology-neutral, pro-competitive interpretation of copyright law creates new markets for both technology and creative work, fulfilling copyright's goal "to Promote the Progress of Science and useful Arts."[2] The district court's

[2] U.S. CONST. art. I, § 8, cl. 8.

decision mistakenly thwarted that goal, and *amici* urge this Court to correct that mistake.

ARGUMENT

I. The Courts Have Consistently Applied Technologically Neutral Interpretations of the Copyright Act to Television Distribution Systems.

The language and history of Section 111 show that Congress intended it to apply in a technology-neutral manner rather than confer a special privilege upon incumbent video distributors like the traditional cable industry.

A. The Supreme Court Interprets the Copyright Act in a Technologically Neutral Manner.

While the statutory backdrop has changed, the Supreme Court's technologically neutral approach to copyright enunciated in *Fortnightly Corp. v. United Artists Television, Inc.* is still persuasive. In that case, the Court held that a community antenna television (CATV) system, consisting of an array of antennas on hilltops that amplified and retransmitted television signals to individual subscribers, did not infringe on the copyright holders' public performance right. 392 U.S. 390, 401 (1968), *superseded by statute*, Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *as recognized in Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 709–10 (1984). The Court recognized that "the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer." *Id.* at 399. Six years later, in *Teleprompter v.*

CBS, the Court extended the *Fortnightly* ruling to CATV retransmission of distant signals, using similar technologically neutral reasoning. 415 U.S. 394, 408–09 (1974).

B. *Congress Intended a Technology-Neutral Definition of "Cable System"*

In 1976, Congress enacted a new Copyright Act which superseded the Court's holdings in *Fortnightly* and *Teleprompter* but preserved new video services' ability to compete in the market. The 1976 Act simultaneously brought CATV retransmissions of broadcast channels within the scope of the copyright holder's exclusive rights and instituted a compulsory license for CATV systems. The 1976 Act thus allowed CATV systems to continue retransmitting broadcast channels without the consent of copyright holders, while "bring[ing] the activities of cable systems within the scope of the Copyright Act." *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2505–06 (2014) ("Aereo III").[3]

The Section 111 license applies "where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission." 17 U.S.C. § 111(c)(1). Section 111 defines a cable system as

---

[3] The Federal Communications Commission subsequently created a regulatory structure under which CATV operators must obtain the consent of *broadcast stations*, rather than copyright holders, to retransmit TV signals. *See* 47 C.F.R. § 76.64(a).

> 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). By listing several transmission technologies and making it clear that the definition also applies to "other communications channels," the plain text of the statute shows that Congress intended the law to be technology neutral. As Professor Annemarie Bridy explains,

> the definition of 'cable system' in § 111 leaves some room for post-1976 technological developments . . . The generality of both the word 'facility' and the phrase 'other communications channels' arguably evinces congressional intent not to limit the reach of § 111 to the 1976 state of the art in signal retransmission.

Annemarie Bridy, *Aereo: From Working Around Copyright to Thinking Inside the (Cable) Box*, 2015 Mich. St. L. Rev. 465, 475.[4] Because, as the Supreme Court has explained, "we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there," *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-54 (1992), the technological specifics of Internet retransmission provide no basis for excluding

[4] As Bridy also explains, the later passage of additional technology-specific compulsory licenses is due more to the Copyright Office's views than any deficiencies in § 111 itself. *Id.* at n.56.

systems like FilmOn from the § 111 license. Indeed, as Justice Sotomayor remarked during oral argument in the *Aereo* case concerning a retransmission system similar to FilmOn's, "I look at the definition of a cable company, and it seems to fit." Transcript of Oral Argument at 4-5, *Am. Broad. Cos. v. Aereo*, 134 S. Ct. 2498 (2014) (No. 13-461) (Remarks of Justice Sotomayor).

The legislative history repeatedly reinforces this conclusion. It states that "the definition of a 'cable system' establishes that it is a facility that in whole or in part receives signals of one or more television broadcast stations licensed by the FCC and makes secondary transmissions of such signals to subscribing members of the public who pay for such service." H.R. Rep. No. 94-1476 (1976). Thus, for example, when Congress amended Section 111 to confirm that systems using microwave transmissions as a communications channel are included in the definition of "cable system," it stressed that the amendment was a clarification, rather than an expansion, of the definition. The Senate Report states that "[t]he proposed legislation amends the definition of the term 'cable system' . . . to *clarify* that the cable compulsory license applies not only to traditional wired cable television systems, but also . . . 'wireless' cable systems." S. Rep. No. 103-407, at 14 (1994) (emphasis added). Likewise, the House Report on the bill indicated that the Copyright Office, by excluding microwave from classification as a communications channel for Section 111 purposes, had adopted an incorrect and "unnecessarily restrictive interpretation" of the statute. H.R. Rep. No. 99-253, at 17 (1994).

And notably, in 1999 Congress abandoned a proposed amendment to Section 111 that would have expressly excluded "digital online communications service[s]"[5] recognizing that such an exclusion could impede innovation. As Rep. Bliley stated,

> I had been concerned that sections 1005(e) and 1011(c) of the Conference Report could unfairly discriminate against Internet and broadband service providers and, in doing so, would stifle the development of electronic commerce. I was particularly concerned that these provisions could be interpreted to expressly and permanently exclude any "online digital communication service" from retransmitting a transmission of a television program or other audiovisual work pursuant to a compulsory or statutory license . . . Under the agreement embodied in the bill before us, these provisions were deleted, and rightly so.[6]

Congress's preference for technology-neutral lawmaking is also illustrated in related statutes. For example, the 1992 Cable Act defined a "multichannel video

[5] 145 Cong. Rec. H11776 (Nov. 9, 1999) (Conference Report on H.R. 1554, Intellectual Property and Communications Omnibus Reform Act Of 1999).

[6] 145 Cong. Rec. H12808 (Nov 18, 1999). While opponents of Internet retransmission later stated that "there is no legal significance to the fact that this legislation omits certain technical amendments to the definition of 'cable system' and 'satellite carrier' that appeared in earlier versions of this legislation," 145 Cong. Rec. S14990 (November 19, 1999) (Remarks of Senator Hatch), and that in their view the licenses could not be construed to apply to internet systems in any event, post-hoc explanations as to why the legal result those amendments would have brought nevertheless obtains strain credibility.

programming distributor" in a similarly broad and technology-neutral way,[7] consistent with the Congressional approach in the 1976 Copyright Act. This is logical given the interrelatedness of these statutes, and Congress's goal of encouraging video competition from new technologies. *See* 138 Cong. Rec. 6487, 6487 (1992).

As this history shows, Congress has repeatedly confirmed its intent that Section 111 would provide technologically varied cable systems with access to the statutory license.

C. Three Decades of Judicial Decisions Further Establish a Technology-Neutral Interpretation of Section 111.

Many courts have adopted technology-neutral readings of Section 111. In *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125 (2d Cir. 1982), the Second Circuit found that a change in transmission technology should not alter the application of Section 111, cautioning that "[i]nterpretation of the Act must occur in the real world of telecommunications, not in a vacuum." *Id.* at 132.

The Eighth Circuit followed suit in *Hubbard Broadcasting, Inc. v. Southern Satellite Systems, Inc.*, 777 F.2d 393 (1985), allowing a satellite system to benefit

[7] The Act defines an MVPD 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).

from compulsory licensing, because "Congress specifically anticipated the transmission of other than over the air signals when it defined the term 'cable system.'" *Id*. at 401. The court emphasized the need to avoid an interpretation that "would largely freeze for section 111 purposes both technological development and implementation" or "force both primary and secondary transmitters alike to forego available, economically feasible technology." *Id*. at 400. The Eleventh Circuit also found that Section 111 could encompass satellite systems. *NBC v. Satellite Broadcast Networks, Inc. ("SBN II")*, 940 F.2d 1467 (11th Cir. 1991) (reversing *Pacific & Southern Co., Inc. v. Satellite Broadcast Networks, Inc.* ("SBN I"), 694 F. Supp. 1565 (N.D Ga. 1988)). It wrote:

> [T]here is no good reason why a satellite broadcasting company such as SBN should not be a cable system. . . . [T]o conclude that cannot be a cable system because of its geographic reach would be to prevent those in sparsely populated areas from receiving the quality television reception technology can provide. . . . In short, there is no good reason to read 'cable system' narrowly to deny SBN its license, and to do so will do an injustice to those who live in rural areas. SBN is a cable system.

Id. at 1470–71.

While the Eleventh Circuit was finalizing this opinion, Congress was already working to address satellite TV services explicitly. A House of Representatives report from 1988 explained that "[t]he legality of satellite delivered broadcast signals to home satellite antenna owners is unsettled. . . . [and] H.R. 2848 resolves the legal issues surrounding provision of broadcast signals to rural America by creating an interim statutory license." H.R. Rep. No. 100-887(II), at 5643–44 (1988). The result was Section 119 of the Copyright Act. Section 119 is best understood as a congressional reversal of the District Court's interpretation of Section 111 in *SBN I*, as it was enacted before the Eleventh Circuit's reversal of that decision. By specifically providing a statutory license for satellite retransmissions of broadcast programming, Congress reaffirmed the premise of the 1976 Act that new, competitive television transmission technologies should have the benefit of such a license.

D. The Supreme Court's Decision in Aereo Also Suggests a Technology-Neutral Application of Section 111, Consistent With Precedent and Legislative History.

Contrary to the district court's opinion, the Supreme Court's recent decision in *Aereo III* bolsters a technologically neutral reading of Section 111. Interpreting the "Transmit Clause" of 17 U.S.C. § 101 in the context of an Internet-based television service similar to FilmOn, the Court held that technological difference is not enough to change the fundamental nature of a business as a cable system: "It means nothing to the subscriber. It means nothing to the broadcaster. We do not see how this single difference, invisible to subscriber and broadcaster alike, could transform a system that is for all practical purposes a traditional cable system . . . ." *Aereo III*, 134 S. Ct. at 2507.

The technologically neutral view that the Court applied to the Transmit Clause in *Aereo III* applies with equal force to Section 111. Since FilmOn's service is "for all practical purposes a traditional cable system," it qualifies as such under Section 111. *See Fox Television Stations, Inc. v. Aereokiller,* 115 F. Supp. 3d 1152, 1163 (C.D. Cal. 2015).

Nonetheless several courts, including the district court in this case, have departed from the technology-neutral approach established by precedent and legislative history, beginning with *WPIX, Inc. v. ivi, Inc.*, which held that Section 111 does not apply to a "service that streams copyrighted television programming live and over the Internet." 691 F.3d 275, 279 (2d Cir. 2012); *see also Am. Broad. Cos. v. Aereo, Inc. ("Aereo IV")*, 2014 WL 5393867 (S.D.N.Y. Oct. 23, 2014); *CBS v. FilmOn, Inc.*, 2014 WL 3702568 (S.D.N.Y. July 24, 2014), *aff'd*, 2016 WL 611903 (2d Cir. Feb. 16, 2016). Another court followed precedent and the Supreme Court's reasoning in *Aereo* and concluded that Section 111 does apply to FilmOn. *Fox,* 115 F. Supp. 3d at 1163.

This Court should correct the course and reverse the district court's aberrant interpretation of Section 111. As originally enacted, Section 111 was intended to help nascent competitors in video distribution avoid ruinous transaction costs and hold-outs, regardless of changes in transmission technology. That FilmOn and others like it make use of the Internet as part of their signal path should not disqualify them from the same benefits enjoyed by traditional cable companies.

II. Through Section 111, Congress Has Limited and Defined the Scope of Exclusivity in the Public Performance Right.

The "ultimate aim" of the Copyright Act is "to stimulate artistic creativity for the general public good." *Universal City Studios v. Sony Corp.*, 464 U.S. 417, 432 (1984). "The sole interest of the United States and the primary object in conferring the monopoly," the Supreme Court has explained, "lie in the general benefits derived by the public from the labors of authors." *Id.* (internal quotations and citations omitted). Thus, copyright sets many uses of copyrighted works beyond the rightsholder's control, requiring neither permission nor payment. And what the Act excludes from the rightsholder's legal domain—expressly or by omission—is as important to achieving the Act's goals as what it includes.

New technologies have often been challenged under copyright. However, the Supreme Court has avoided causing harm to new technologies. Instead, it has directed reviewing courts to employ a circumscribed approach when applying copyright law to new technology, and has avoided "discourag[ing] the emergence or use of different kinds of technologies." *Aereo*, 134 S. Ct. at 2502. The district court's ruling abandons the Supreme Court's approach and should be rejected.

A. *Copyright Issues That Arise Out of Technological Advances and Innovation Are Best Addressed by a Fully-Informed Legislative Body.*

When faced with new technology, "the Copyright Act must be construed in light of [its] basic purpose." *Sony*, 464 U.S. at 432 (internal citation omitted). In this case, the interpretation most faithful to copyright's purpose allows new businesses to add value for consumers.

The *Sony* case illustrates the wisdom of this approach. Before the late 1970s, television viewers did not have the ability to record programs for later viewing. Then innovators brought a new product to market. Videocassette recorders ("VCRs") revolutionized television in a way that neither Congress nor industry expected. In *Sony*, broadcasters characterized the VCR as an economically harmful technology, a label they now apply to FilmOn. In 1982, the president of the Motion Picture Association of America ("MPAA") famously compared the VCR to a serial killer, predicting that "[t]he investment of hundreds of millions of dollars each year to produce quality programs to theaters and television will surely decline." *Home Recording of Copyrighted Works: Hearings on H.R. 4783, H.R. 4794, H.R. 4808, H.R. 5250, H.R. 5488, and H.R. 5705 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the H. Comm. on the Judiciary*, 97th Cong. 13 (1982) (testimony of Jack Valenti, President, MPAA), *available at* http://cryptome.org/hrcw-hear.htm.

The Court rejected the broadcasters' invitation to expand the statutory monopoly to preclude personal recording. *Sony*, 464 U.S. at 456. Just two years later, videocassettes became the motion picture industry's largest source of revenue. Aljean Harmetz, *Hollywood Braces for Directors' Strike*, N.Y. Times (Apr. 11, 1987). Broadcasters benefitted from surging demand in this new market.

The success of the VCR demonstrates the wisdom of interpreting copyright law to sustain innovation. Markets develop in unanticipated directions, and innovators deserve a chance to compete. *See Sony*, 464 U.S. at 431 ("Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.").

This principle also applies to retransmissions of broadcast television that use the Internet as a component of the signal pathway. Like the VCR, retransmission technology that utilizes the Internet may benefit incumbents, new entrants, and consumers. If Congress wishes to establish a set of rules specific to Internet-based retransmission of broadcast television, it can do so. In the meantime, this Court should not restrict the availability of Section 111 to specific technology.

B. Despite Major Technological Development, the Price of Pay TV Services Has Increased.

Economic data show that the pay-TV market is insufficiently competitive. The Government Accountability Office ("GAO") reports that "[f]rom 2005 through 2011, cable rates rose more than 33.5 percent for both basic and expanded service tiers" and increased over twice as fast as "inflation [as] captured in the Consumer Price Index." U.S. Gov't Accountability Office, GAO-13-576, *Video Marketplace: Competition Is Evolving, and Government Reporting Should Be Reevaluated* 16 (2013). Given this high (and rising) price, it is unsurprising that the thirteen largest U.S. cable providers lost an estimated 463,000 subscribers in the first six months of 2015. Barb Darrow & Stacy Jones, *Cable Consumers Keep Cutting the Cord. Can Anyone Blame Them?*, Fortune (Aug. 18, 2015), *available at* http://fortune.com/2015/08/18/cable-consumers-keep-cutting-the-cord/.

Pay TV providers' ability to raise the price of service while losing substantial numbers of customers is telling: in this market, customers often find themselves locked in to existing business arrangements and technology. But a technology-neutral interpretation of Section 111 would permit new competitors to serve consumers, driving down prices.

C. A Technologically Neutral Section 111 Can Benefit Incumbents, New Entrants, Content Creators, and Consumers.

Broadcasters hope to use copyright law to "freez[e] existing economic arrangements," *Teleprompter*, 415 U.S. at 413 n.15, and cap the number of pay-TV providers. Keeping FilmOn and other potential competitors from using the Section 111 safe harbor is part of that strategy. Not only is this approach anticompetitive, it would foreclose transformative innovation and investment that would benefit both creators and consumers.

III. Where Market-Altering Decisions of Communication Policy Are Concerned, the Copyright Office's View Should Not Preempt or Preclude Rulemaking by the Federal Communications Commission.

The district court broadly stated that "given the Copyright Office's unique expertise in this highly technical area of the law, it has the authority to issue binding interpretations of the Copyright Act." *Fox TV Stations, Inc. v. Filmon X LLC*, No. 13-758 (RMC), 2015 U.S. WL 7761052 at *16 (D.D.C. Dec. 2, 2015). This is incorrect: as the district court itself later explained, the Copyright Office's policy statements are not binding on the courts. *Id. at *17* (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 139-140 (1944)). Only *Chevron* deference, where courts must accept reasonable interpretations of statutes that agencies administer, can properly be described as "binding." *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). In *this* case, the agency's actions only "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co*, 323 U.S. at 139-140.

Thus, while the Copyright Office's conclusions may be due respect under *Skidmore,* they are far from "binding." The district court correctly rejected the application of *Chevron* deference. And in the past several months, a federal court expressly rejected the Copyright Office's interpretation of a copyright statute,[8] and the Department of Justice rejected the Copyright Office's interpretation of copyright law in another matter.[9] At a minimum, the Court should consider the policy views of other agencies and parts of government when it comes to the video marketplace. Moreover, *Skidmore* respect is conditioned "upon the thoroughness evident in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." *Id.* at 140. Part of this analysis should include the weight given the Copyright Office by other government bodies or courts, such as the recent rejections of the Copyright Office's statutory arguments by the Second Circuit and the Department of Justice. Additionally, *Skidmore* respect does not preclude the Court from looking to other sources of guidance, such as the considered policy views of other agencies on related issues of video competition.

---

[8] The Second Circuit stated that despite "the Copyright Office's superior expertise on the Copyright Act," "its reading of § 512(c) . . . is based in major part on a misreading of the statute." *Capitol Records, LLC v. Vimeo, LLC*, ___F.3d___, 2016 WL 3349368, at *7 (2d Cir. June 16, 2016).

[9] The Copyright Office had recommended that the DOJ interpret antitrust consent decrees governing musical composition licensing to allow for fractional licensing. *See* Views of the United States Copyright Office Concerning PRO Licensing of Jointly Owned Works, http://www.copyright.gov/policy/pro-licensing.pdf (Jan. 2016). The DOJ did not do so. *See* Ed Christman, *Department of Justice to Deny Consent Decree Amendment*, Billboard (Jun. 30, 2016), http://www.billboard.com/articles/news/7423321/department-of-justice-deny-consent-decree-amendment.

In this case, the FCC and DOJ's express statements that online video distributors (OVDs) be able to compete with MVPDs on a level playing field, should caution this Court against adopting the Copyright Office's analysis.

A. *The FCC's Recent Notice of Proposed Rulemaking Demonstrates a General Policy Preference for Video Competition*

The District Court states that "The FCC has never issued any regulation or expressed any policy view that contradicts the Copyright Office's longstanding interpretation." *Fox TV Stations*, 2015 WL 7761052, at *16. But the Commission's recent Notice of Proposed Rulemaking, while not carrying the force of law, certainly expresses a "policy view." *See Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, 80 Fed. Reg. 2078 (Jan. 15, 2015). In that document, the Commission expressly considers applying traditional video marketplace rules to online systems such as FilmOn. While only a formal order would be entitled to *Chevron* deference, the Commission's NPRM has the same power to persuade, backed by expertise, as the Copyright Office's informal opinions.

While MVPD status has implications beyond retransmission consent, a finding that systems such as FilmOn cannot qualify for the copyright licenses where traditional MVPDs do would solidify an incumbent advantage against new entrants. This would be contrary to the FCC's statutory goal of "increasing competition and diversity" in the video marketplace. 47 U.S.C. § 548.

Additionally, where the FCC revises the definition of MVPD to include Internet retransmission services, a decision not to grant a §111 license would be in opposition to Congressional intent. By contrast, a technology-neutral interpretation of Section 111 accords with Congressional intent and public policy, and leaves communications policy matters within the discretion of the FCC. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592–95 (1983) (upholding public policy determinations of the Internal Revenue Service).

B. The Department of Justice's Latest Video-Related Consent Decree Likewise Shows a Commitment to Nondiscriminatory Access to Video By Online Competitors.

Additionally, the Department of Justice has recognized the need for Online Video Distributors have access to video content in the same way as MVPDs. The Department of Justice explains in the *US v. Charter* Competitive Impact Statement that OVDs face many more barriers when accessing content than MVPDs, including Alternative Distribution Means ("ADMs") which can block a programmer from licensing to OVDs all together. *Charter Competitive Impact Statement*, Civil Action No. 1:16-cv-00759 (RCL) (May 10, 2016), at 12, *available at* https://www.justice.gov/atr/file/850161/download. The DOJ has concluded that OVDs increasingly compete with MVPDs [10] but face barriers in obtaining programming on the same terms as MVPDs [12]. It therefore imposed a requirement on Charter that it not discriminate against OVDs through restrictive programming contracts.[10] This policy statement has bearing on the analogous issue of whether internet-based video providers should be treated as equivalent to incumbent video distributors when it comes to the Copyright Act.

This Court should take account of these policy considerations when giving considering the views of federal agencies on the proper legal treatment of online video providers.

IV. Copyright Provisions in Trade Agreements Negotiated in Secret By the Executive Do Not Control the Outcome of Domestic Copyright Litigation.

The district court reasoned that "several free trade agreements" required the court to deny FilmOn the use of the Section 111 license, via the "*Charming Betsy* canon." Order at 33 (citing *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). This reasoning is legally incorrect, and would have troubling implications if upheld by this Court.[11]

In *Charming Betsy*, the Supreme Court of 1804 expressed a canon of statutory construction that U.S. statutes should be construed "so as not to conflict with international law or with an international agreement of the United States." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES

[10] [Proposed] Final Judgment, https://www.justice.gov/opa/file/846051/download.

[11] *Amici* are indebted to the law professors and scholars of international and comparative copyright law who submitted an *amicus curiae* brief in support of respondents in *Am. Broad. Cos. v. Aereo* for the substance of this section.

§114 (1987). The *Charming Betsy* canon is a device to preserve separation of powers, and cannot apply where Congress has specifically announced a contrary intent. Curtis A. Bradley, *The Charming Betsy Canon and Separation of Powers: Rethinking the Interpretive Role of International Law*, 86 GEO. L.J. 479, 484 (1997). The canon reflects judicial deference to the political branches, and therefore it has no application where Congress has expressed its intent that a given international obligation does not control U.S. law. *See Weinberger v. Rossi*, 456 U.S. 25, 32-35 (1982) (using legislative history to determine Congress's intent in permitting abrogation of U.S. statutory requirement through a "treaty"); *see generally* Rebecca Crootof, *Note, Judicious Influence: Non-Self-Executing Treaties and the Charming Betsy Canon*, 120 YALE L.J. 1784, 1995-96 (2011) (describing lack of uniformity in applying *Charming Betsy* to non-self executing treaties); Oona A. Hathaway et al., *Int'l Law at Home: Enforcing Treaties in U.S. Courts*, 37 YALE J. INT'L L. 51, 87-90 (2012) (describing history and application of the *Charming Betsy* canon).

Congress intended that U.S. copyright law be free from any international constraint not specifically enacted into the Copyright Act, especially in the context of a dispute between U.S. entities over their domestic businesses. For example, Congress refused numerous Executive Branch requests to ratify the Berne Convention, a preeminent international copyright agreement, until 1988—roughly a century after the Convention's initial coming into force. When Congress did accept the Convention, its implementation statute evinced a "minimalist approach," making "only those changes to American copyright law that [were] clearly required under the treaty's provisions." *Golan v. Holder*, 132 S. Ct. 873, 879 (2012). "Almost a third of the [Berne Convention Implementation Act's] thirteen sections are designed, in whole or in part, to forestall any claim that the Berne Convention is self-executing under Unites States law." 1 M.B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §1.12[A] (2013); *see* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568 §2(1) (declaring Berne Convention provisions "not self-executing").

Congress made similar statements of intent when it implemented the WIPO Copyright Treaty in 1998. Congress expressly stated in the WIPO Treaties Implementation Act that "[n]othing in this section shall affect rights, remedies, limitations, or defenses to copyright infringement . . . under title 17, United States Code." Digital Millennium Copyright Act ("DMCA"), Pub. L. No. 105-304, 112 Stat. 2860, 2865 (Oct. 28, 1998) Section 102(c); codified at 17 U.S.C. § 1201(c) (Other Rights, etc., Not Affected); *see* H.R. Rep. No. 105-551, at 9 (1998) ("The treaties do not require any change in the substance of copyright rights or exceptions in U.S. law.").

The free trade agreements (FTAs) referenced by the district court[12] evoked even stronger statements from Congress rejecting the FTAs' power to modify U.S. law. Each FTA Implementation Act explicitly abrogates any provisions of the agreement that come to conflict with U.S. law. For example, the U.S.-Australia FTA Implementation Act states that

> (1) United States law to prevail in conflict.—No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.
>
> (2) Construction.—Nothing in this Act shall be construed—
>
> (A) to amend or modify any law of the United States, or
>
> (B) to limit any authority conferred under any law of the United States, unless specifically provided for in this Act.

United States-Australia Free Trade Agreement Implementation Act, P.L. 108-286, 108th Congress 118 Stat. 919, § 102. This section, repeated in all FTA implementation acts, expresses Congress's intent that FTAs do not amend or modify any law of the United States, including through the "construction" of

[12] The district court refers to agreements cited in a 2008 report by the Register of Copyrights. *Fox TV Stations*, 2015 WL 7761052, at *16. These are bilateral trade agreements with Australia, Bahrain, Morocco, and several other countries, which contain provisions relating to copyright. U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 188 (2008) (available at http://www.copyright.gov/reports/section109-final-report.pdf).

existing law, and therefore the *Charming Betsy* canon can have no application. *See Cook v. United States*, 288 U.S. 102, 120 (1933) (international commitments do not bind U.S. law where Congress has "clearly expressed" intent to abrogate the international commitment).

Moreover, the Supreme Court has never applied the Charming Betsy canon when the international agreement provisions at issue are contained in later-in-time, non-self-executing agreements. Like all international copyright agreements, the cited agreements here are not self-executing, meaning that they only become judicially cognizable through domestic legislation implementing their mandates. 1 M.B. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT § 1.12[A] (2013). And each of the agreements was ratified after the applicable statutory licensing language was enacted by Congress in 1976.

The Supreme Court has also noted that FTA copyright provisions do not affect domestic litigation. In *Quality King Distributors v. L'anza Research International*, 523 U.S. 135, 153 (1998), the Court concluded that FTA provisions on international exhaustion were "irrelevant" to its consideration of copyright's first sale doctrine, because they were negotiated long after the statute had been enacted. *Id.* at 154. In *Kirtsaeng v. John Wiley & Sons, Inc.*, the Court again refused to consider FTA provisions on international exhaustion as authority for interpreting the Copyright Act. 133 S. Ct. 1351, 1371 (2013).

Besides contradicting the express intent of Congress, the district court's reasoning would put the Executive Branch in control of substantive, domestic U.S. copyright law through a secretive and unaccountable process. FTAs, including those referenced by the district court in this case, are implemented through a process known as Fast Track. Under Fast Track, Congress must vote an implementation act up or down within a fixed time period, and cannot amend it. Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J. INT'L L. 143, 143 (1992). The substantive provisions of such agreements are set by the U.S. Trade Representative and its foreign counterparts in classified negotiations. Neither the public nor most members of Congress have access to drafts of the provisions. They are, rather, presented to Congress and the public as a fait accompli. For agreements drafted thusly to control the outcome of domestic litigation through unwarranted application of the *Charming Betsy* canon would raise serious questions of due process and accountability.

This Court should make clear that the district court erred when it held that recent agreements between the U.S. and foreign countries should control the result of a lawsuit among U.S. firms over the application of a pre-existing statute.

CONCLUSION

The Supreme Court opined that "[where] Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests." *Sony*, 464 U.S. at 431. This Court should apply that wise approach in this case by reversing the district court's decision.

Dated: July 25, 2016

Respectfully submitted,
/s/ Mitchell L. Stoltz

Mitchell L. Stoltz
DC Bar No. 978149
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109
(415) 436-9333
mitch@eff.org

John Bergmayer
PUBLIC KNOWLEDGE
1818 N Street NW, Suite 410
Washington, DC 20036
Tel: (202) 861-0020
john@publicknowledge.org

Counsel for Amici Curiae Electronic Frontier Foundation and Public Knowledge

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify as follows:

1. This Brief Amici Curiae complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(d) because this brief contains 5,982 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011, the word processing system used to prepare the brief, in 14 point Times font.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on July 25, 2016.

/s/ Mitchell L. Stoltz
Mitchel L. Stoltz

CERTIFICATE OF SERVICE

I certify that I caused the foregoing to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system on July 25, 2016.

All participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I will cause eight (8) paper copies of this brief to be filed with the Court.

/s/ Mitchell L. Stoltz
Mitchel L. Stoltz