

## Section 111 Compulsory License for Internet Streaming Still Up in the Air

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The fallout from the U.S. Supreme Court's decision in *American Broadcasting Companies, Inc. v. Aereo, Inc.*<sup>1</sup> remains unsettled almost two years after the ruling. Although Aereo itself shut down and declared bankruptcy shortly after the Supreme Court's decision, FilmOn – an Aereo competitor – continues the fight. Latching on to the Supreme Court's reasoning in *Aereo III*, FilmOn continues to champion its entitlement to a compulsory license under 17 U.S.C. § 111. Lower court decisions on FilmOn's entitlement to the compulsory license have established the potential for a circuit split that may bring Internet broadcasting before the Supreme Court once again.

In *Aereo III*, the Court found that Aereo's services were "highly similar" to those of the cable television systems Congress sought to regulate with the 1976 Copyright Act.<sup>2</sup> Attempting to capitalize on this comparison, Aereo almost immediately changed course. Aereo argued that it was in fact a cable system and therefore eligible for a compulsory license to broadcast content under § 111.<sup>3</sup> The Southern District of New York rejected Aereo's argument, holding that the Supreme Court's silence on this issue left the binding Second Circuit precedent in place.<sup>4</sup> Thus, in at least the Second Circuit, Internet-based streaming services remained ineligible for the compulsory license of § 111.<sup>5</sup> Aereo filed for bankruptcy soon after, effectively ending its fight.

FilmOn, however, has continued the fight with mixed results. FilmOn uses the same technology that Aereo did for one part of its service. It has arrays of miniature antennas connected to digital recorders, each antenna and recorder capturing and recording a unique copy of broadcast programming that are then transmitted to subscribers via the Internet. Following the Supreme Court's *Aereo III* decision, FilmOn, like Aereo, embraced its new status as a cable system and asserted its eligibility for the compulsory license of § 111. FilmOn has now made its § 111 argument in four different venues and has gained only one favorable ruling.

First, in a Southern District of New York case dating back to 2010, FilmOn relied on the § 111 argument to justify its continued operations in spite of a previous injunction by the court barring its actions.<sup>6</sup> FilmOn asserted that, based on the Supreme Court's reasoning in *Aereo III*, it was entitled to the compulsory license, and therefore its continued operation did not violate the injunction against infringing plaintiffs' copyrights. The court disagreed, explaining that the Supreme Court's mere implications in *Aereo III* were an insufficient basis to disregard the settled precedent of the Second Circuit. The court held FilmOn in contempt of its injunction and imposed a sanction of \$90,000. Largely accepting the district court's reasoning, the Second Circuit recently upheld the decision and the sanction against FilmOn on appeal.<sup>7</sup>

In another case, in the Central District of California, FilmOn and a group of plaintiff-broadcasters filed cross-motions for summary judgment on the question of the § 111 compulsory license.<sup>8</sup> In a thorough discussion of both policy and legal implications, the court rejected the interpretations of § 111 by both the Copyright Office and the Second Circuit's *ivi* decision. Instead, the court granted

FilmOn's motion for summary judgment, holding that FilmOn is entitled to a compulsory license under § 111. The court discounted the Copyright Office's interpretation due to a perceived bias by the Office, believing that the Office disagrees with Congress on the compulsory license, and thus, seeks "to cabin the statute whenever possible."<sup>9</sup> The California court also disputed the Second Circuit's interpretation of the statutory language in *ivi*, finding that court's reasoning "not persuasive."<sup>10</sup> Explaining that it is Congress's role to make policy, not the courts', the court held that, upon complying with the requirements of the statute, FilmOn was entitled to a compulsory license under § 111. Understanding the importance of this decision, the court also authorized an immediate appeal of the issue to the Ninth Circuit. Briefing is scheduled through May 2016 at the Ninth Circuit.

The D.C. District Court also weighed in on cross-motions for summary judgment on the compulsory license.<sup>11</sup> The D.C. court determined that the plain language of § 111 contradicted FilmOn's position. Congress, the court held, did not intend to include Internet-based transmitters in the compulsory licensing scheme.<sup>12</sup> Further, even if the statutory text is ambiguous, the court deferred to the long-held position of the Copyright Office, noting that Congress is and has been fully aware of the Copyright Office's position, but has not amended § 111.<sup>13</sup> For these reasons, the court held that FilmOn is not entitled to a compulsory license and granted summary judgment in favor of the plaintiffs. FilmOn appealed this ruling to the D.C. Circuit.

Finally, the Northern District of Illinois also confronted cross-motions for summary judgment on the compulsory license.<sup>14</sup> The court analyzed the statutory language, *Aereo III*'s discussion of "cable systems," the statutory scheme, legislative history, and the Copyright Office's view before siding with the Second Circuit, Southern District of New York, and District of D.C. courts.<sup>15</sup> The court denied FilmOn's entitlement to the statutory license and granted summary judgment against FilmOn.

Although there is a split in the application of the § 111, FilmOn remains barred from offering its broadcast-retransmission service nationwide while the legal issue remains unsettled. The D.C. District Court granted an injunction against FilmOn's streaming service nationwide, with the exception of the Second Circuit, which was previously exempted due to the previous Second Circuit ruling allowing *Aereo* to operate.<sup>16</sup> Also, despite granting summary judgment in FilmOn's favor with regard to the compulsory license, the Central District of California court maintained its preliminary injunction barring FilmOn's streaming services pending the outcome of the appeal, citing the close legal issues and its recognized disagreement with existing Second Circuit precedent.<sup>17</sup> And, based on the contempt ruling from the Second Circuit, FilmOn is now barred from transmitting broadcast television there.<sup>18</sup>

Although the votes weigh against FilmOn, a Ninth Circuit affirmation of the California court's ruling that FilmOn is eligible for the § 111 compulsory license could nonetheless create a circuit split allowing FilmOn to operate only in the Ninth Circuit, while remaining barred from operating anywhere else in the United States. Such a split could lead the issue of Internet-based retransmission back to the Supreme Court, with the question of the § 111 compulsory license – which the Court neatly avoided in *Aereo III* – squarely presented and unavoidable.

<sup>1</sup> 134 S. Ct. 2498 (2014) [hereinafter *Aereo III*].

<sup>2</sup> 134 S. Ct. at 2511 (2014).

<sup>3</sup> *Am. Broad. Cos., Inc. v. Aereo, Inc.*, No. 12-cv-1540, 2014 WL 5393867, at \*2 (S.D.N.Y. Oct. 23, 2014).

<sup>4</sup> *Id.* at 4–6.

<sup>5</sup> *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 282–84 (2d Cir. 2012).

<sup>6</sup> *CBS Broad. Inc. v. FilmOn.com, Inc.*, No. 10-cv-7532, 2014 WL 3702568, at \*4 (S.D.N.Y. July 24, 2014).

<sup>7</sup> *CBS Broad. Inc. v. FilmOn.com, Inc.*, 814 F.3d 91, 98–99 (2d Cir. 2016).

<sup>8</sup> *Fox Television Stations, Inc. v. AereoKiller*, 115 F. Supp. 3d 1152, 1154 (C.D. Cal. 2015).

<sup>9</sup> *Id.* at 1164.

<sup>10</sup> *Id.* at 1169.

<sup>11</sup> *Fox Television Stations, Inc. v. FilmOn X LLC*, No. 13-cv-758, 2015 WL 7761052 (D.D.C. Dec. 2, 2015).

<sup>12</sup> *Id.* at \*11–16.

<sup>13</sup> *Id.* at \*16–21.

<sup>14</sup> *FilmOn X, LLC v. Window to the World Commc'ns, Inc.*, No. 13-cv-8451, 2016 WL 1161276, at \*1 (N.D. Ill. Mar. 23, 2016).

<sup>15</sup> *Id.* at 5–13.

<sup>16</sup> *Fox Television Stations, Inc. v. FilmOn X LLC*, 966 F. Supp. 2d 30, 51–52 (D.D.C. 2013) (citing disagreement with the Second Circuit in *WNET, Thirteen v. Aereo*, 712 F.3d 676 (2d Cir. 2013) (overruled by *Aereo III*)).

<sup>17</sup> *AereoKiller*, 115 F. Supp. 3d at 1171.

<sup>18</sup> *CBS Broad. Inc.*, 814 F.3d at 100.