

ORAL ARGUMENT NOT YET SCHEDULED  
No. 16-7013

---

IN THE  
**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

---

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

*Plaintiffs-Appellees,*

v.

FILMON X, LLC, *et al.*,

*Defendants-Appellants.*

---

On Appeal from the United States District Court  
for the District of Columbia  
The Hon. Rosemary M. Collyer  
Civ No. 1:13-cv-0758-RMC

---

**BRIEF OF WASHINGTON LEGAL FOUNDATION  
AS AMICUS CURIAE IN SUPPORT OF  
PLAINTIFFS-APPELLEES, URGING AFFIRMANCE**

---

Cory L. Andrews  
Mark S. Chenoweth  
WASHINGTON LEGAL  
FOUNDATION  
2009 Massachusetts Ave., NW  
Washington, DC 20036  
(202) 588-0302  
candrews@wlf.org  
*Counsel for Amicus Curiae*

September 7, 2016

---

**RULE 26.1 CORPORATE DISCLOSURE STATEMENTS**

Pursuant to Federal Rule of Appellate Procedure 26.1, and Circuit Rule 26.1, the undersigned counsel states that Washington Legal Foundation (WLF) is a non-profit corporation organized under Section 501(c)(3) of the Internal Revenue Code; it has no parent company, issues no stock, and no publicly held company holds a 10% or greater ownership interest.

Pursuant to Circuit Rule 26.1(b), WLF describes its general nature and purpose as follows: WLF is a public-interest law firm and policy center that devotes a substantial portion of its resources to promoting free enterprise, individual rights, a limited and accountable government, and the rule of law; WLF regularly appears in federal court in cases raising important intellectual property issues. WLF has no financial ties with any party to this appeal.

/s/ Cory L. Andrews  
Cory L. Andrews

## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	iii
IDENTITY AND INTEREST OF <i>AMICUS CURIAE</i> .....	1
STATEMENT OF THE CASE.....	2
SUMMARY OF ARGUMENT .....	5
ARGUMENT .....	8
I. THIS COURT SHOULD HONOR THE STATUTORY BALANCE STRUCK BY CONGRESS IN § 111 OF THE COPYRIGHT ACT.....	8
A. Section 111 of the Copyright Act Reflects Congress’s Desire to Strike a Careful Balance Between Incentivizing the Creation of New Content and Making Broadcast Television Available to Remote Areas .....	8
B. This Court Should Reject Defendants’ Call to Impermissibly Alter the Delicate Statutory Balance that Congress Has Watchfully Maintained.....	14
C. Because Compulsory Licenses Constitute a Rare Departure from Otherwise Broad Copyright Protections, § 111 Must Be Narrowly Construed .....	17
II. IF ANY DOUBT REMAINS AS TO THE PROPER SCOPE OF § 111, THIS COURT SHOULD DEFER TO THE COPYRIGHT OFFICE’S INTERPRETATION .....	18
A. The Copyright Office’s Interpretation of § 111 Commands <i>Chevron</i> Deference.....	18
B. At the Very Least, the Copyright Office’s Interpretation of § 111 Deserves <i>Skidmore</i> Deference.....	18

III. ADOPTING DEFENDANTS’ CONSTRUCTION OF § 111 WOULD CONTRAVENE THE PRESUMPTION THAT CONGRESS DOES NOT INTEND TO ABROGATE U.S. OBLIGATIONS UNDER INTERNATIONAL LAW WITHOUT EXPLICITLY SAYING SO.....24

CONCLUSION.....31

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
* <i>Am. Broad. Cos., Inc. v. Aereo, Inc.</i> , 134 S. Ct. 2498 (2014).....	1, 3, 4, 10, 14
<i>Ass’n of Bituminous Contractors, Inc. v. Apfel</i> , 156 F.3d 1246 (D.C. Cir. 1998).....	24
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	19, 24
<i>Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.</i> , 419 U.S. 281 (1974).....	24
<i>Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.</i> , 836 F.2d 599 (D.C. Cir. 1998).....	21, 25
* <i>Chevron USA, Inc. v. Natural Res. Def. Council</i> , 467 U.S. 837 (1984).....	7, 19, 20, 23, 24
<i>Commissioner v. Clark</i> , 489 U.S. 726 (1989).....	17
<i>Cook v. United States</i> , 288 U.S. 102 (1933).....	27
<i>Cnty. of Los Angeles v. Shalala</i> , 192 F.3d 1005 (D.C. Cir. 1999).....	22
<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. &amp; Constr. Trades Council</i> , 485 U.S. 568 (1988).....	29
<i>Exxon Mobil Corp. v. EPA</i> , 217 F.3d 1246 (9th Cir. 2000).....	19
<i>Fame Publ’g Co. v. Alabama Custom Tape, Inc.</i> , 507 F.2d 667 (5th Cir. 1975).....	18

	<b>Page(s)</b>
<i>Fortnightly Corp. v. United Artists Television, Inc.</i> , 392 U.S. 390 (1968).....	9, 10
<i>Murray v. The Schooner Charming Betsy</i> , 6 U.S. (2 Cranch) 64 (1804).....	28
<i>Nat'l Cable &amp; Telecomm. Ass'n v. Brand X Internet Servs.</i> , 125 S. Ct. 2688 (2005).....	19
<i>Nat'l Fuel Gas Supply Corp. v. FERC</i> , 811 F.2d 1563 (D.C. Cir. 1987).....	23
<i>Pacific &amp; Southern Co. v. Satellite Broadcast Networks, Inc.</i> , 694 F. Supp. 1565 (N.D. Ga. 1988).....	12
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981).....	6
<i>Satellite Broad. &amp; Commc'n Ass'n of Am. v. Oman</i> , 17 F. 3d 344 (11th Cir. 1994) .....	21
<i>Skidmore v. Swift &amp; Co.</i> , 323 U.S. 134 (1944).....	8, 25
<i>Sony Corp. of Am. v. Universal City Studios, Inc.</i> , 464 U.S. 417 (1984).....	6, 15
<i>Talbot v. Seeman</i> , 5 U.S. 1 (1801).....	28
<i>Teleprompter Corp. v. Columbia Broad. Sys., Inc.</i> , 415 U.S. 394 (1974).....	9, 10
<i>Trans World Airlines, Inc. v. Franklin Mint Corp.</i> , 466 U.S. 243 (1984).....	30
<i>United States v. Ali</i> , 718 F.3d 929 (D.C. Cir. 2013).....	29

**Page(s)**

* <i>United States v. Mead Corp.</i> , 533 U.S. 218 (2001).....	19, 20, 22, 24
<i>United States v. Oakland Cannabis Buyers' Cooperative</i> , 532 U.S. 483 (2001).....	15
<i>United States v. O'Hagan</i> , 521 U.S. 642 (1997).....	20
<i>Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer</i> , 515 U.S. 528 (1995).....	30
<i>WPIX, Inc. v. ivi, Inc.</i> , 691 F.3d 275 (2d Cir. 2012).....	21, 27, 31
<i>WPIX, Inc. v. ivi, Inc.</i> , 765 F. Supp. 2d 594 (S.D.N.Y. 2011) .....	26

**CONSTITUTIONAL PROVISIONS**

U.S. Const. art. I, § 8.....	6
------------------------------	---

**STATUTES**

17 U.S.C. § 101.....	2, 9, 10
17 U.S.C. § 106(4) .....	2, 3, 8
17 U.S.C. § 106(5) .....	9
17 U.S.C. § 111(c) .....	1
17 U.S.C. § 111(d) .....	7
17 U.S.C. § 111(d)(1).....	20
17 U.S.C. § 111(f)(3) .....	4, 5

	<b>Page(s)</b>
17 U.S.C. § 119 .....	13
17 U.S.C. § 702 .....	20
<b>REGULATIONS</b>	
<i>Cable Compulsory License; Definition of Cable Systems,</i> 56 Fed. Reg. 31,580 (July 11, 1991) .....	26
<i>Cable Compulsory License; Definition of Cable System,</i> 57 Fed. Reg. 3,284 (Jan. 29, 1992) .....	22
<i>Cable Compulsory License; Definition of Cable Systems,</i> 62 Fed. Reg. 18,705 (Apr. 17, 1997) .....	22
<b>LEGISLATIVE SOURCES</b>	
<i>Copyright Broadcast Programming on the Internet: Hearing Before the</i> <i>Subcomm. on Courts and Intellectual Prop. of the House Comm. on the</i> <i>Judiciary, 106th Cong. (2000) (statement of Marybeth Peters, Register</i> <i>of Copyrights) .....</i>	<i>26</i>
<i>Copyrighted Webcast Programming on the Internet: Hearing Before the</i> <i>Subcomm. on Courts and Intellectual Property of the House Judiciary</i> <i>Comm., 106th Cong., 2d Sess. (2000) (statement of Marybeth Peters,</i> <i>Register of Copyrights) .....</i>	<i>11</i>
*H.R. Rep. No. 94-1476 (1976) .....	10, 11, 14, 17
H.R. Rep. No. 100-887(I) (1988) .....	9, 11, 12
H.R. Rep. No. 100-887(II) (1988) .....	12, 13, 15
H.R. Rep. No. 108-660 (2004) .....	17
S. Rep. 103-407 (1994) .....	13
S. Rep. No. 106-42 (1999) .....	17



**Page(s)****ADMINISTRATIVE SOURCES**

Letter from Jacqueline C. Charlesworth, Gen. Counsel and Assoc. Register of Copyrights, U.S. Copyright Office, to Yelena Calendar (July 23, 2014) .....	4, 23
U.S. Copyright Office, <i>Satellite Home Viewer Extension and Reauthorization Act § 109 Report</i> (June 30, 2008) .....	26, 30
U.S. Copyright Office, <i>Satellite Television Extension and Localism Act § 302 Report</i> (Aug. 29, 2011) .....	26

**OTHER SOURCES**

Restatement (Third) of Foreign Relations (1987).....	29
Ralph G. Steinhardt, <i>The Role of International Law as a Canon of Domestic Statutory Construction</i> , 43 VAND. L. REV. 1103 (1990) .....	30

\*Authorities chiefly relied upon are designated with an asterisk.

## **IDENTITY AND INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Washington Legal Foundation (WLF) is a public-interest law firm and policy center with supporters in all 50 States. WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, a limited and accountable government, and the rule of law. WLF has long supported a legal regime of robust copyright protection to incentivize and reward the creativity and genius that are so essential for the free market to flourish. To that end, WLF has regularly appeared before this and other federal courts to defend the property rights of owners, including the owners of intellectual property. *See, e.g., Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *Fox Television Stations, Inc. v. FilmOn X, LLC*, No. 15-56420 (9th Cir., dec. pending).

This case has vitally important implications for all copyright holders who create and produce original content. The district court correctly held—consistent with nearly every other court in the country to consider the question—that because Defendants’ Internet-based retransmission service does not qualify as a “cable system” within the meaning of the Copyright Act, it is ineligible for a compulsory license under 17 U.S.C. § 111(c). On appeal from that decision, Defendants ask

---

<sup>1</sup> Pursuant to Federal Rule of Appellate Procedure 29(c), *amicus* WLF states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than WLF and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of this brief.

this Court to drastically expand the definition of “cable system” under § 111 to allow them to “license”—in exchange for a submarket, statutory fee—their improper, for-profit exploitation of the copyrighted works of others. Not only is Defendants’ construction of § 111 irreconcilable with the statute, but adopting it would require this Court to sweep aside the careful balance Congress struck between making television broadcast programming broadly available and incentivizing the creation of new content.

### **STATEMENT OF THE CASE**

The Copyright Act of 1976, 17 U.S.C. §§ 101 *et seq.*, fosters and protects intellectual creativity by granting exclusive rights to copyright holders in their works. Among those protections is the exclusive right “to perform the copyrighted work publicly.” *Id.* § 106(4). In establishing the scope of protection afforded by this exclusive right of “public performance,” Congress provided that to “publicly” perform or display a protected work under the Act means “to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” *Id.* § 101.

Plaintiffs include major television broadcasters and programmers that create, produce, distribute, and transmit original broadcast television programming for

which they own the copyrights. Defendants are FilmOn X, LLC and affiliated entities (FilmOn). Using an elaborate network of thousands of tiny antennae, FilmOn captures over-the-air television broadcasts and retransmits them via the Internet to subscribers, each of whom is assigned his or her own unique antenna.

When Plaintiffs first brought suit against FilmOn for copyright infringement in the district court below, Defendants “expressly disclaimed” any suggestion that FilmOn was a cable system under § 111. *See Slip Op.* at 3 (quoting sworn declaration of Alki David, FilmOn’s founder and CEO, as conceding that FilmOn “is not a Cable system”). Instead, FilmOn initially argued that, under its elaborate multi-antennae configuration, it was not “publicly performing” copyrighted works under § 106(4) and thus could legally profit from the unauthorized retransmission of broadcast programming without providing compensation to the owners of those works.

The Supreme Court squarely rejected that argument in *American Broadcasting Companies v. Aereo, Inc.*, 134 S. Ct. 2498 (2014), which held that Internet retransmission services such as those offered by Aereo and FilmOn infringe copyright owners’ exclusive right of public performance under § 106(4). As the *Aereo* decision clarifies, the fact that retransmission is accomplished via an ingenious network of thousands of tiny antennae, including each viewer’s own antenna, makes no difference either “in terms of Congress’ regulatory objectives”

or “the Act’s purposes.” 134 S. Ct. at 2508.

Reversing course in the face of *Aereo*, FilmOn belatedly contends that it satisfies the narrow definition of a “cable system” under § 111 of the Copyright Act—a provision that effectively insulates certain bona fide cable providers from liability for copyright infringement. The Copyright Act defines a “cable system” as a “facility, located in any State” (or territory) that “receives” television broadcast “signals” or “programs,” which it then retransmits to the public “by wires, cables, microwave, or other communications channels.” 17 U.S.C. § 111(f)(3). Under § 111’s compulsory license scheme, a “cable system” is entitled to retransmit television broadcast programming in exchange for paying a statutorily fixed, submarket fee to the U.S. Copyright Office. But when FilmOn submitted a § 111 license application (along with the statutory fees) to the Copyright Office, the agency declined to process the application on the basis of its longstanding position that Internet-based retransmission services fall “outside the scope” of the § 111 license. *See* Letter from Jacqueline C. Charlesworth, Gen. Counsel and Assoc. Register of Copyrights, U.S. Copyright Office, to Yelena Calendar 1-2 (July 23, 2014).

On cross-motions for summary judgment, the district court granted partial judgment in favor of Plaintiffs and held that because FilmOn is not a “cable system” under § 111, Defendants are not entitled to a compulsory license. Slip Op.

at 4. In doing so, the court emphasized that § 111(f)(3) “defines cable systems as physical facilities that both receive and retransmit broadcast signals to paying subscribers through wires, cables, microwave, and other types of communication channels.” *Ibid.* Because FilmOn “is not such a facility,” the district court concluded, FilmOn is liable for directly infringing Plaintiffs’ exclusive right of public performance under the Copyright Act. *Id.* at 48.

Concluding that “the plain language of § 111(f)(3) contradicts Defendants’ position that Internet-based retransmitters are entitled to a compulsory license,” the district court also relied on the Copyright Office’s official interpretation to help resolve any “potential ambiguities” in the statute. Slip. Op. at 42. Although it declined to give *Chevron* deference to the Copyright Office’s long-held view that Internet-based retransmission services categorically do not qualify as “cable systems” under § 111, the district court ultimately deferred to that interpretation, under *Skidmore*, as “independently persuasive because it is grounded in the statute’s text and legislative history.” *Id.* at 40.

### **SUMMARY OF ARGUMENT**

This appeal requires the Court to decide whether a service that retransmits television broadcasts over the Internet qualifies for a compulsory license as a “cable system” under § 111 of the Copyright Act. As Appellee’s responsive brief capably demonstrates, the Copyright Act’s text, structure, and purpose all compel

the inescapable conclusion that Internet-based retransmission services like those offered by Appellants are categorically ineligible for compulsory licenses available to cable systems under § 111. WLF will not revisit those issues of statutory interpretation here. Rather, WLF writes separately to remind the Court that it “must be particularly careful not to substitute its judgment of what is desirable for that of Congress.” *Rostker v. Goldberg*, 453 U.S. 57, 68 (1981).

The Constitution assigns to Congress the task of defining the scope of the monopoly that should be granted to authors or inventors of creative works in order to give the public appropriate access to their work product. U.S. Const. art. I, § 8 (“The Congress shall have Power ... to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”). Historically, as innovative developments have transformed the country, “it has been the Congress that has fashioned the new rules that new technology made necessary.” *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 (1984). The Copyright Act thus embodies Congress’s careful deliberations as how best to adapt public policy concerns to new technologies.

If adopted by this Court, however, Defendants’ unsupported view that a service that captures and then retransmits television broadcasts over the Internet qualifies for a compulsory license as a “cable system” would effectively override

the careful balance that Congress struck in crafting § 111. That statutory balance grants copyright owners a broad, exclusive right of public performance over their works with only narrowly limited exceptions. And notwithstanding the recent avalanche of copyright litigation involving Internet retransmissions, Congress has not seen fit to alter the statutory status quo. This Court should therefore resist the Defendants' invitation to elevate their own self-serving view over that of the Congress.

Even assuming that § 111 lacks the plain meaning ascribed to it in Appellee's brief, it is at the very least silent or ambiguous on the question presented, and this Court must therefore defer to the permissible and entirely reasonable interpretation of the U.S. Copyright Office—the agency charged by Congress with administering § 111's compulsory-licensing scheme. *See* 17 U.S.C. § 111(d). Here, the district court's decision is entirely consistent with the Copyright Office's longstanding interpretation of § 111, which strictly limits the availability of compulsory licenses to inherently "localized transmission services" that retransmit broadcast signals within local television markets only—not nationwide. The Copyright Office's repeated and consistent conclusion that Internet retransmission services fall outside § 111's compulsory-licensing scheme is entitled to judicial deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). And even if *Chevron* deference were



unavailable here, the Copyright Office’s highly persuasive view would still deserve deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Lastly, a well-established principle of statutory construction—the *Charming Betsy* canon—holds that domestic legislation should be interpreted, if at all “possible,” to avoid a conflict with U.S. obligations under international agreements. Here, it is undisputed that the United States has “ratified several free-trade agreements which contain the obligation that ‘neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without authorization of the right holder or right holders, if any, of the content of the signal and of the signal.’” The *Charming Betsy* canon requires an interpretation of § 111 that avoids any violation of those international obligations.

## ARGUMENT

### **I. THIS COURT SHOULD HONOR THE STATUTORY BALANCE STRUCK BY CONGRESS IN § 111 OF THE COPYRIGHT ACT**

#### **A. Section 111 of the Copyright Act Reflects Congress’s Desire to Strike a Careful Balance Between Incentivizing the Creation of New Content and Making Broadcast Television Available to Remote Areas**

The Copyright Act provides owners of copyrighted “motion pictures and other audiovisual works” with the exclusive right to perform those works publicly. 17 U.S.C. § 106(4). In order to safeguard the intellectual property rights of those who create and produce new broadcast television content, Congress enacted a

broad statute to prohibit all unauthorized retransmissions. This exclusive public-performance right protects broadcasters and content creators from the unauthorized, public retransmission of their original works. 17 U.S.C. § 106(5).

History shows that Congress has not hesitated to clarify the scope of this right when necessary, as technology has evolved. For example, after the Supreme Court held that a cable system's retransmission of broadcast signals did not constitute a "public performance" under the Copyright Act's prior incarnation, *see Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), Congress amended the Copyright Act to specifically capture rebroadcasts by commercial enterprises such as cable companies. *See* Pub. L. 94-533, 90 Stat. 2541, *codified as amended* at 17 U.S.C. § 101 *et seq.* In doing so, Congress crafted a careful balance between two public interests that had been in conflict since the advent of cable television: protecting broadcasters' intellectual property rights and making television programming available to those who live outside the reach of broadcast signals. This balance preserved broadcasters' intellectual property rights by continuing to incentivize the creation of original programming, while also creating an efficient means by which entrepreneurs could legally distribute that programming to distant, underserved markets. *See, e.g.*, H.R. Rep. No. 100-887(I), at 14 (1988) ("The bill balances the rights of copyright owners by ensuring

payment for the use of their property rights, with the rights of [rural communities], by assuring availability at reasonable rates of retransmitted television signals.”).

Congress’s first step in implementing this balance was to enact the Transmit Clause, 17 U.S.C. § 101, which defines “public performance” broadly to include the transmission of a copyrighted work “to the public, by means of any device or process, whether the members of the public capable of receiving the performance ... receive it in the same place or in separate places and at the same time or at different times.” The amendments provided for a broad, exclusive right of public performance, which “represent[ed] the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public.” H.R. Rep. No. 94-1476, at 63 (1976). By ensuring that entities could not rebroadcast copyrighted materials without a license, the Transmit Clause effectively abrogated *Teleprompter* and *Fortnightly*. See *Aereo*, 134 S. Ct. at 2510 (discussing “the history of cable broadcast transmissions that led to the enactment of the Transmit Clause”); H.R. Rep. No. 94-1476, at 89 (“Both decisions urged the Congress ... to consider and determine the scope and extent of [infringement] liability in the pending revision bill.”).

Then, recognizing that the market for cable television at that time existed primarily to serve discrete communities outside the reach of broadcast signals—which required significant upfront infrastructure investment on the part of cable

companies—Congress created the compulsory-licensing scheme under § 111. *See* 17 U.S.C. § 111(a)-(f); *see also* *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the House Judiciary Comm.*, 106th Cong., 2d Sess. (2000) (statement of Marybeth Peters, Register of Copyrights) (explaining that cable networks require “multi-billion-dollar delivery systems”).

This compromise of sorts required a license for all public retransmissions, but carved out a discrete niche of entities—namely, “cable systems”—entitled to compulsory licenses at a predetermined royalty rate. *See* H.R. Rep. No. 100-887(I), at 11 (“When Congress enacted the Copyright Act of 1976, it facilitated the distribution of distant television signals to the public ... by the creation of a compulsory license that authorized cable systems to retransmit distant broadcast signals to the viewing public.”). As Congress explained, the compulsory license was necessary to account for the exploding number of individual cable companies in an industry inherently designed to serve particular geographic networks. Accordingly, Congress conditioned § 111’s compulsory license on certain requirements and limitations, including “geographic limits on the compulsory license for copyrighted programs.” H.R. Rep. No. 94-1476, at 89-90.

Congress drafted § 111 with “inherent flexibility” to allow the statute to adapt to changes within the cable industry, but deliberately chose not to make a

compulsory statutory license available for every new technology capable of retransmitting broadcast signals. H.R. Rep. No. 100-887(I), at 9 (“By providing for balance and flexibility, the Act neither freezes the scope of copyrightable technology nor permits unlimited expansion into areas completely outside the legislative intent in 1976.”). As ever newer technology has developed, “Congress has amended the Act to keep pace with these changes.” *Ibid*; *see also* H.R. Rep. No. 100-887(II), at 15 (1988) (explaining that Congress’s failure to enact the 1988 amendments would deny broadcast television signals to millions of rural American households).

For example, when the courts began to consider § 111’s applicability to the satellite television industry, *see Pacific & Southern Co. v. Satellite Broadcast Networks, Inc.*, 694 F. Supp. 1565, 1574 (N.D. Ga. 1988), Congress quickly intervened to preserve the balance between “the rights of copyright owners” and the “assur[ed] availability ... of retransmitted television signals,” by enacting a law that “respect[ed] the network/affiliate relationship and promote[d] localism.” H.R. Rep. No. 100-887(I), at 9, 14. As it had in 1976, Congress determined that the public interest in “bringing network programming to unserved areas” required a narrowly tailored limitation on the broadcasters’ exclusive public-performance rights, because satellite retransmissions could reach a “number of households ... not presently served,” or would “likely never be served, by cable systems.” H.R.

Rep. No. 100-887(II), at 15, 20. Rather than making § 111 licenses available to services beyond traditional cable companies, however, Congress created a special new category of licenses that applied only for satellite retransmissions. *See* 17 U.S.C. § 119.

Only once did Congress see fit to accommodate a new technology by amending the definition of a “cable system” under § 111. Confronted once again with a new industry that required substantial infrastructure investment but could retransmit programming beyond the reach of broadcast signals or traditional cable systems, Congress amended the definition of “cable system” under § 111 to include multichannel multipoint distribution service systems—or so-called wireless cable networks. *See* S. Rep. 103-407, at 14 (1994). These systems transmit microwave signals directly to residential rooftop antennae located in areas too remote to reach with cable wires.

Other than the specific instances of satellite and microwave signals—both of which expanded cable’s reach through infrastructural investment in receivers on targeted homes—Congress has left intact the exclusive public-performance rights of television broadcasters. All other services utilizing innovative technologies have purchased their retransmission rights on the open market. Congress’s silence to date in the case of Internet retransmissions is consistent with two of its stated preferences: that licensing rights be exchanged on a free, open market; and that

decisions affecting this regulation's careful balance should be made through legislation.

**B. This Court Should Reject Defendants' Call to Impermissibly Alter the Delicate Statutory Balance that Congress Has Watchfully Maintained**

As the Supreme Court has recently noted, "to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of [new] technologies and the Copyright Act, *they are of course free to seek action from Congress.*" *Aereo*, 134 S. Ct. at 2511 (emphasis added). Despite the frequency with which Congress has legislated to accommodate the Copyright Act to the demands of changing technology, Defendants nonetheless urge the Court to decree that Internet retransmission services are already entitled to the same compulsory license that Congress created for cable companies. This Court should affirm the decision below and reject Defendants' self-serving invitation to discard the careful balance that Congress has watchfully maintained for the last 40 years.

To preserve the "delicate balance" embodied in the Copyright Act, Congress has specifically urged against "any significant changes ... in areas where the Congress has not resolved the issue." H.R. Rep. No. 94-1476, at 89 ("These matters are ones of communications policy and should be left to the appropriate committees in the Congress for resolution."). Such caution is entirely consistent

with the fact that Congress “does not favor interference with workable marketplace relationships for the transfer of exhibition rights in programming.” H.R. Rep. No. 100-887(II), at 15.

Because crafting public policy involves striking a difficult balance between the interests of copyright holders, performing artists, and producers in the control and exploitation of their original content on the one hand, and society’s competing interest in having access to ideas, information, and commerce on the other, the courts are not free to reject the balance that Congress has struck. *See, e.g., United States v. Oakland Cannabis Buyers’ Cooperative*, 532 U.S. 483, 497 (2001) (explaining that federal courts can neither “override Congress’s policy choice, articulated in a statute” nor “reject the balance that Congress has struck in a statute.”).

Recognizing that “Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such a new technology,” the Supreme Court has repeatedly emphasized that “[s]ound policy, as well as history, supports [federal courts’] consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” *Sony Corp.*, 464 U.S. at 431. Unlike Congress, federal courts sitting in adversary proceedings are confined to rendering opinions on the basis of the limited evidentiary record before them



and cannot commission independent studies, hire policy experts, conduct public hearings, balance the competing interests of stakeholders, or make policy judgments on the basis of legislative facts.

The current market for providing Internet streaming services is both robust and quickly evolving, so Congress has been content to allow the developing Internet re-broadcast industry to negotiate licensing rates at a fair-market price—rather than expanding the statutory scope of the compulsory licenses Congress found necessary to foster nascent cable and satellite systems. Indeed, the unalloyed success of Hulu, iTunes, YouTube, Amazon Prime, Netflix, and numerous others illustrates the ability of evolving business models to compete while purchasing licenses on the open market, exposing even further the cynicism of FilmOn’s latest litigation strategy.

Defendants’ mistaken contention that Plaintiffs are somehow standing in the way of technological development of Internet streaming services demonstrates a fundamental misunderstanding of the balance that Congress has struck. Interfering with that balance, as Defendants urge this Court to do, is far more likely to arrest the economic incentives for broadcasters—the very copyright holders who create and produce so much of the original programming that makes Internet streaming possible. This Court should therefore reject Defendants’ invitation to second-guess

congressional policymaking as to the scope of compulsory licenses under § 111.

The well-reasoned decision of the district court should be affirmed.

**C. Because Compulsory Licenses Constitute a Rare Departure from Otherwise Broad Copyright Protections, § 111 Must Be Narrowly Construed**

As Congress explained when it added both the Transmit Clause and § 111 to the Copyright Act in 1976, the entire “approach of [those amendments] is to set forth the copyright owner’s exclusive rights in broad terms in section 106, and then to provide various limitations, qualifications, or exemptions” in the sections that follow. H.R. Rep. No. 94-1476, at 61. Where a statute sets forth exceptions to a general provision, courts generally construe those exceptions “narrowly in order to preserve the primary operation of the [general provision].” *Commissioner v. Clark*, 489 U.S. 726, 739 (1989).

As the relevant legislative history confirms, because they are “in derogation of the exclusive property rights granted by the Copyright Act to copyright holders,” compulsory licenses are crafted “as narrowly as possible to minimize the effects of the government’s intrusion on the broader market in which affected property rights and industries operate.” S. Rep. No. 106-42, at 10 (1999); H.R. Rep. No. 108-660, at 8-9 (2004) (emphasizing that compulsory licenses constitute an “abrogation of copyright owners’ exclusive rights” and are therefore “crafted to represent a careful balance” between important competing interests).

Chief among compulsory licensing's market intrusions is that it distorts the fair value of copyrighted works by effectively imposing government-set prices. For that reason, a "compulsory license provision is a limited exception to the copyright holder's exclusive right to decide who shall make use of his [work]. As such, it must be construed narrowly, lest the exception destroy, rather than prove, the rule." *Fame Publ'g Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667, 670 (5th Cir. 1975). Here, an appropriately narrow construction of "cable system" under § 111 would necessarily reject FilmOn's invitation to expand the license beyond what Congress specified. A contrary result would permit the exception to swallow the rule.

**II. IF ANY DOUBT REMAINS AS TO THE PROPER SCOPE OF § 111, THIS COURT SHOULD DEFER TO THE COPYRIGHT OFFICE'S INTERPRETATION**

**A. The Copyright Office's Interpretation of § 111 Commands *Chevron* Deference**

WLF agrees with Appellees that a fair reading of § 111 requires affirmance in this case. But even assuming that the statutory text lacks the meaning ascribed to it by Appellees, it is at the very least silent or ambiguous on the question presented, and this Court must therefore defer to the authoritative and entirely reasonable interpretation of the U.S. Copyright Office.

"The responsibilities for assessing the *wisdom* of ... policy choices and resolving the struggle between competing views of the public interest are not

judicial ones.” *Chevron*, 467 U.S. at 843 (emphasis added). Under *Chevron*, when considering whether an agency’s interpretation of a statute is permissible, courts “must decide (1) whether the statute unambiguously forbids the Agency’s interpretation, and, if not, (2) whether the interpretation, for other reasons, exceeds bounds of the permissible.” *Barnhart v. Walton*, 535 U.S. 212, 218 (2002). In other words, “[i]f a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute, even if the agency’s reading differs from what the court believes is the best statutory interpretation.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005); *see also United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (“[A] reviewing court ... is obliged to accept the agency’s position if ... the agency’s interpretation is reasonable.”).

Such deference under *Chevron* rests on the premise “that it is for agencies, not courts, to fill statutory gaps.” *Brand X*, 125 S. Ct. at 2700. Under this highly deferential standard, “the court need not conclude that the agency construction was the only one it permissibly could have adopted ..., or even the reading the court would have reached if the question *initially* had arisen in a judicial proceeding.” *Chevron*, 467 U.S. at 843 (emphasis added). Rather, courts must defer to “any reasonable agency interpretation.” *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1250 (9th Cir. 2000) (emphasis added).

*Chevron* applies where Congress has delegated to an agency authority to “speak with the force of law.” *Mead*, 533 U.S. at 229. As the Supreme Court noted in *Mead*, “a very good indicator of delegation meriting *Chevron* treatment [can be found] in express congressional authorizations to engage in the process of rulemaking ... that produces the regulations ... for which deference is claimed.” *Ibid.* Thus, if reasonable, a regulation promulgated pursuant to express congressional authorization and notice-and-comment rulemaking is entitled to *Chevron* deference. *Id.* at 230.

Here, Congress has expressly delegated rulemaking authority to the Copyright Office. Under § 702 of the Copyright Act, Congress authorized the Register of Copyrights “to establish regulations ... for the administration of the functions and duties made the responsibility of the Register under this title.” 17 U.S.C. § 702. And § 111(d)(1) requires cable systems to deposit their compulsory-license fees with the Register of Copyrights “in accordance with requirements that the Register shall ... prescribe by regulation.” 17 U.S.C. § 111(d)(1). Under *Mead*, this is precisely the kind of express delegation that warrants application of *Chevron* to analyze the validity of an agency’s interpretation of an ambiguous statute. *Mead*, 533 U.S. at 229-31; *see also United States v. O’Hagan*, 521 U.S. 642, 673 (1997) (“Because Congress has authorized the [SEC], in § 14e, to prescribe legislative rules, we owe the Commission’s judgment more than mere deference or weight ....

[W]e must accord the Commission’s assessment controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute.”).

Indeed, this Court has squarely held that the Copyright Office’s interpretations of § 111 warrant *Chevron* deference. *See Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 836 F.2d 599, 608 (D.C. Cir. 1998) (“Given Congress’ awareness of the rapid changes taking place in the cable industry, we cannot believe that Congress intended that there be no administrative overseer of this [§ 111] scheme.”). As *Cablevision* rightly recognized, “Congress saw a need for continuing interpretation of section 111 and thereby gave the Copyright Office statutory authority to fill that role. Its interpretations are therefore due the same deference given those of any other agency.” *Ibid.*

Two other federal courts of appeals have arrived at the same conclusion, specifically deferring to the Copyright Office’s reasonable interpretation of § 111. *See WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012) (“In light of the Copyright Office’s expertise, the validity of its reasoning, the consistency of its earlier and later pronouncements, and the consistency of its opinions with Congress’s purpose in enacting § 111, we conclude that the Copyright Office’s position is reasonable and persuasive.”); *Satellite Broad. & Commc’n Ass’n of Am. v. Oman*, 17 F.3d 344, 347-48 (11th Cir. 1994) (holding under *Chevron* “that the Copyright Office’s construction of ‘cable system’ to exclude satellite carriers is

neither arbitrary, capricious, nor contrary to the statute's 'clear meaning'). No federal circuit has held otherwise.

The Copyright Office's own regulations, which were promulgated pursuant to specific congressional authorization and after notice-and-comment rulemaking, clarify that compulsory licenses for cable systems under § 111 are available only to inherently "localized transmission services" that retransmit broadcast signals within local television markets. *See, e.g., Cable Compulsory License; Definition of Cable System*, 57 Fed. Reg. 3,284, 3,292 (Jan. 29, 1992) ("Examination of the overall operation of section 111 proves that the compulsory license applies only to localized retransmission services regulated as cable systems by the FCC."); *see also Cable Compulsory License; Definition of Cable Systems*, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997) ("[T]he Office retains the position that a provider of broadcast signals be an inherently localized transmission media of limited availability to qualify as a cable system.").

Not only do these unambiguous, authoritative statements constitute a permissible and reasonable interpretation of § 111's compulsory-licensing requirement, but they also clarify any perceived ambiguity or tension created by innovative advances that were unforeseen at the time of the 1976 amendments to the Copyright Act. Such legislative rules warrant *Chevron* deference. *See Mead*, 533 U.S. at 230-31; *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1016 (D.C.

Cir. 1999) (“Where ... Congress enacts an ambiguous provision within a statute entrusted to the agency’s expertise, it has ‘implicitly delegated to the agency the power to fill those gaps.’”) (quoting *Nat’l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1569 (D.C. Cir. 1987)) .

Under the Copyright Office’s consistent view, then, nationwide Internet retransmission services such as Defendants’ are *not* inherently local cable systems under § 111. More recently, the Copyright Office reinforced that statutory interpretation when, in response to FilmOn’s application for a § 111 license in the early stages of this litigation, it refused to process the application, explaining: “We understand FilmOn to be an Internet-based service that retransmits broadcast television programming. In the view of the Copyright Office, such a service falls outside the scope of the Section 111 license.” Letter from Jacqueline C. Charlesworth to Yelena Calendar 1-2. Nothing in the Supreme Court’s decision in *Aereo*, the Copyright Office emphasized, undermines the agency’s view that only inherently “localized transmission services” within local television markets are eligible for § 111 licenses.

Nor does the fact that the Copyright Office reaffirmed its long-held interpretation through a less formal means than notice-and-comment rulemaking deprive that interpretation of the *Chevron* deference to which it is otherwise due. “As significant as notice-and-comment is in pointing to *Chevron* authority, the



want of that procedure here does not decide the case.” *Mead*, 533 U.S. at 230. Indeed, the Supreme Court has expressly “found reasons to afford *Chevron* deference even when no such administrative formality was required and none was afforded.” *Id.* at 231; *see also Barnhart*, 535 U.S. at 221-22 (citing “instances in which the Court has applied *Chevron* deference to agency determinations that did not emerge out of notice-and-comment rulemaking”). Here, the “careful consideration the Agency has given the question over a long period of time,” *Barnhart*, 535 U.S. at 222, further reinforces the case for *Chevron* deference. *See Ass’n of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246, 1251-52 (D.C. Cir. 1998) (recognizing that “an agency need not promulgate a legislative rule setting forth its interpretation of a statutory term for that interpretation to be entitled to deference”).

In sum, because the Copyright Office’s considered and consistently held view that § 111’s definition of a “cable system” categorically excludes Internet-based retransmission services is both permissible and reasonable, this Court “is not empowered to substitute its judgment for that of the agency.” *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974). The Copyright Office’s view is entitled to controlling weight under *Chevron*.

**B. At the Very Least, the Copyright Office’s Interpretation of § 111 Deserves *Skidmore* Deference**

Even if the Court concludes that *Chevron* deference is unavailable, the

rulings, interpretations, and opinions of an agency charged with enforcing or administering a particular statute, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore*, 323 U.S. at 140. Under *Skidmore*, deference is grounded on the desirability of drawing upon the “specialized experience and broader investigations and information” available to the agency, *id.* at 139, and on the need to preserve uniformity between administrative and judicial understandings of the requirements of a federal regulatory policy. *Id.* at 140.

*Skidmore* thus instructs courts to give careful consideration to an agency’s views, grounded in experience, about the meaning of statutes for which it has acquired significant and relevant expertise. *Skidmore* deference is therefore especially appropriate here given the Copyright Office’s unique, accumulated expertise in this complex and rapidly changing area of copyright law. As this Court has already observed in deferring to the agency’s interpretation of § 111, “[t]he Copyright Office certainly has greater expertise in such matters than do the federal courts.” *Cablevision*, 836 F.2d at 608. Not only was the Copyright Office heavily involved in congressional proceedings that led to the enactment of § 111, but it has administered the § 111 compulsory-licensing regime for some 40 years.

Congress has repeatedly consulted the Copyright Office’s expertise by

soliciting testimony from the agency on matters concerning § 111. *See WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 606-611 (S.D.N.Y. 2011) (detailing the Copyright Office’s congressional testimony on § 111). Likewise, at Congress’s request, the agency has submitted detailed reports related to the implementation of § 111’s compulsory-license scheme. *See, e.g.*, U.S. Copyright Office, *Satellite Television Extension and Localism Act § 302 Report* (Aug. 29, 2011); U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* (June 30, 2008).

Lastly, the Copyright Office’s view on this question has never changed. *See Copyright Broadcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary*, 106th Cong. (2000) (statement of Marybeth Peters, Register of Copyrights) (noting that the Copyright Office’s “view on this matter has never changed: if there is to be a compulsory license covering [Internet] retransmissions, it will have to come from newly enacted legislation and not existing law”). Indeed, the Office has consistently maintained that § 111 should be “construed according to its terms, and should *not* be given a wide scale interpretation which could, or will, encompass any and all new forms of retransmission technology.” *Cable Compulsory License; Definition of Cable Systems*, 56 Fed. Reg. 31,580, 31,590 (July 11, 1991) (emphasis added). As the Second Circuit correctly observed, “[t]he Copyright

Office has consistently concluded that Internet retransmission services are not cable systems and do not qualify for § 111 compulsory licenses.” *ivi*, 691 F.3d at 283. That highly persuasive and unwavering view is certainly worthy of judicial deference.

**III. ADOPTING DEFENDANTS’ CONSTRUCTION OF § 111 WOULD CONTRAVENE THE PRESUMPTION THAT CONGRESS DOES NOT INTEND TO ABROGATE U.S. OBLIGATIONS UNDER INTERNATIONAL LAW WITHOUT EXPLICITLY SAYING SO**

Confronted in this litigation with two very different readings of § 111, the Court should not adopt one that would require the United States to violate its international treaty obligations by granting a compulsory license to Internet retransmissions of broadcast programming. The *Charming Betsy* canon holds that “[a] treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.” *Cook v. United States*, 288 U.S. 102, 120 (1933). Under this venerable canon of statutory construction, this Court is obliged to consider U.S. treaty obligations in determining the proper scope of compulsory licenses under § 111 of the Copyright Act. Because § 111 lacks any “explicit, comprehensive, and conscious” override suggesting that Congress intended to modify these principles, § 111 should be read narrowly so as to avoid abrogating any international obligations.

More than 200 years ago, the Supreme Court first recognized that “the laws of the United States ought not, if it be avoidable, so to be construed as to infract the

common principles and usages of nations.” *Talbot v. Seeman*, 5 U.S. 1, 43 (1801). In *Talbot*, a U.S. captain recaptured a neutral ship previously seized by the French, and the issue before the court was whether the neutral owner of the ship owed compensation to the captain for the rescue. *Id.* at 28. Chief Justice Marshall’s opinion rejected the captain’s claim that he was entitled to one-half the value of the ship and cargo under a U.S. statute providing for such compensation if “re-taken from the enemy.” *Id.* at 43. Construing the word “enemy” to mean the enemy of both the United States *and* the country of the owner of the vessel, the court held that “[b]y this construction the act of [C]ongress will never violate those principles which we believe, and which it is our duty to believe, the legislature of the United States will also hold sacred.” *Id.* at 44.

Three years later, in *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804), the Supreme Court considered whether the owner of a sailing vessel had violated a federal law prohibiting commercial intercourse with France. In construing the law, Chief Justice Marshall proclaimed that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains,” and went on to hold the act inapplicable because the vessel’s owner was not a resident “within or under” the protection of the United States. *Id.* at 118-21.

The rule announced by Chief Justice Marshall, which came to be known as

the *Charming Betsy* canon, has since occupied a vital role in interpreting federal statutes. See, e.g., *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“This cardinal principle has its roots in Chief Justice Marshall’s opinion for the Court in [*Charming Betsy*], and has for so long been applied by this Court that it is beyond debate.”); *United States v. Ali*, 718 F.3d 929, 936 (D.C. Cir. 2013) (“But because *Charming Betsy* counsels against interpreting federal statutes to contravene international law, we must satisfy ourselves that prosecuting [the defendant] for aiding and abetting piracy would be consistent with the law of nations.”); Restatement (Third) of Foreign Relations § 114 (1987) (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”).

While Congress enjoys the domestic power to pass laws that may violate its international treaty obligations, the *Charming Betsy* canon obliges courts to presume that Congress did not intend to do so absent explicit and express intent:

The *Charming Betsy* principle is designed to prevent inadvertent violations of international law, and before accepting apparent violations as congressional policy, the court should assure itself that apparent violations were intended. If the violations were inadvertent, the court should interpret the statute sufficiently narrowly to avoid the violation. Thus, a court fully respecting both congressional supremacy and the *Charming Betsy* principle may insist that an attempted legislative override be explicit, comprehensive, and conscious. This approach is not purely textual: a court may recognize a statutory override of international law only when there is both evidence of an

intent to override the norm and a text that is irreconcilable with the norm.

Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1167 (1990).

Here, it is undisputed that the United States has “ratified several free trade agreements which contain the obligation that ‘neither Party may permit the retransmission of television signals (whether terrestrial, cable, or satellite) on the Internet without authorization of the right holder or right holders, if any, of the content of the signal and of the signal.’” U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act § 109 Report* (June 30, 2008). The *Charming Betsy* canon requires an interpretative approach that avoids violations of international law altogether. *See, e.g., Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (“If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its court should be most cautious before interpreting its domestic legislation in such manner as to violate international agreements.”); *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984) (“There is ... a firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.”).

As the district court rightly recognized, because granting Defendants a compulsory license under § 111 would violate these international obligations,

another statutory construction is presumed. *See* Slip Op. at 34; *see also* *ivi*, 765 F. Supp. 2d at 611 (“[I]t also would place the United States dangerously close to violating its obligations under the international treaties governing intellectual property rights, such as the Berne Convention.”).

### CONCLUSION

For the foregoing reasons, *amicus curiae* Washington Legal Foundation respectfully requests that the Court affirm the judgment below.

Date: September 7, 2016

Respectfully submitted,

/s/ Cory L. Andrews

Cory L. Andrews

Mark S. Chenoweth

WASHINGTON LEGAL

FOUNDATION

2009 Mass. Ave., NW

Washington, DC 20036

(202) 588-0302

*Counsel for Amicus Curiae*



## COMBINED CERTIFICATIONS

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,979 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced serif typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Dated: September 7, 2016

/s/ Cory L. Andrews

Cory L. Andrews

**CERTIFICATE OF SERVICE**

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on September 7, 2016, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, which will electronically serve a copy of the brief on all parties.

/s/ Cory L. Andrews  
Cory L. Andrews