

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellants,

v.

FILMON X, LLC, *et al.*,

Defendants-Appellees.

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AS AMICUS CURIAE IN SUPPORT OF
PLAINTIFFS-APPELLANTS, URGING REVERSAL**

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENTS

Pursuant to Federal Rule of Appellate Procedure 26.1, Washington Legal Foundation (WLF) states that it is a non-profit, tax-exempt corporation organized under Section 501(c)(3) of the Internal Revenue Code. WLF has no parent corporation, issues no stock, and no publicly held company has an ownership interest in WLF.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*¹

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. To that end, WLF has regularly appeared before this and other federal courts in support of the property rights of owners, including owners of intellectual property. *See, e.g., Am. Broad. Co., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013).

In addition, WLF's Legal Studies Division, the publishing arm of WLF, frequently publishes articles on a variety of intellectual property issues, including issues arising from federal copyright law. *See, e.g., Ben Sheffner, Due Process Limits on Statutory Civil Damages?: Unprecedented Ruling in Copyright Case a Double-Edged Sword*, WLF LEGAL BACKGROUNDER (Aug. 6, 2010); Ronald A. Cass, *Liberty and Property: Human Rights and the Protection of Intellectual Property*, WLF WORKING PAPER (Jan. 2009).

¹ 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 case has vitally important implications for all copyright holders who create and produce original content. 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. Yet the district court below held—contrary to every other court in the country to consider the question—that Defendants’ Internet-based retransmission service constitutes a “cable system” within the meaning of the Copyright Act and thus is potentially eligible for a compulsory license under 17 U.S.C. § 111(c).

That holding is not only contrary to the law, but it threatens the continued viability of copyright protection. WLF fears that by permitting the improper, for-profit exploitation of the copyrighted works of others in exchange for a submarket statutory fee, the district court’s decision will erode broadcasters’ intellectual property rights by drastically expanding the definition of “cable system” under § 111. If allowed to stand, the holding below would 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 broadcast networks 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 over the Internet to subscribers, with each viewer assigned his or her own antenna.

When Plaintiffs brought suit against FilmOn for copyright infringement in the Central District of California, FilmOn “expressly disclaimed” any suggestion that it was a cable system under § 111. *Fox Television Stations, Inc. v. BarryDriller Content Sys.*, 915 F. Supp. 2d 1138, 1146 n.14 (C.D. Cal. 2012). Instead, FilmOn initially argued that, under this configuration, it was not “publicly performing” under § 106(4) and thus could 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 Broadcast Cos. 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 now claims that its service 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 Copyright Office. But when FilmOn submitted a § 111 license

application (along with the statutory fees) to the U.S. 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).

Nonetheless, on cross-motions for summary judgment, the district court granted partial judgment in favor of FilmOn, holding that FilmOn X is a “cable system” under § 111 and thus “potentially entitled” to a compulsory license. Slip Op. at 15. In doing so, the court rejected the Copyright Office’s view of § 111 that Internet-based retransmission services are categorically not “cable systems.” In refusing to defer to the Copyright Office’s construction of § 111, the district court effectively held that the statute’s definition of “cable system” unambiguously includes Internet-based retransmission services such as FilmOn X.

Acknowledging that its holding conflicts not only with the considered view of the Copyright Office, but also with the Second Circuit’s holding in *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012), the district court certified an immediate interlocutory appeal under 28 U.S.C. § 1292(b), and this Court granted discretionary review. This appeal asks the Court to decide whether a service that captures then retransmits television broadcasts over the Internet qualifies for a compulsory license as a “cable system” under § 111 of the Copyright Act.

SUMMARY OF ARGUMENT

As Appellant’s opening 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 Defendants 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.”). “Repeatedly, as new developments have occurred in this 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. If allowed to stand, however, the district court’s 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. Simply put, this Court should not allow the district court to substitute its own misguided view for that of the Congress.

Even assuming that § 111 lacks the plain meaning ascribed to it in Appellant’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, which is the agency charged by Congress with administering § 111’s compulsory licensing scheme. *See* 17 U.S.C. § 111(d). As the district court acknowledged, its holding squarely conflicts with the Copyright Office’s own considered view that § 111’s definition of a “cable system” categorically excludes Internet-based retransmission services—including FilmOn X.

That view is 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 interpretation would still be entitled to 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 not only forecloses such a violation of international law, but it requires an interpretative approach that avoids that violation altogether.

ARGUMENT

I. THIS COURT SHOULD HONOR THE STATUTORY BALANCE CONGRESS STRUCK 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

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 unauthorized retransmissions. The Copyright Act provides owners of copyrighted “motion pictures and other audiovisual works” with an exclusive right to perform those works publicly. 17 U.S.C. § 106(4). This exclusive right protects broadcasters from the 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 the broadcasters' intellectual property rights and making television programming available to those who live outside the reach of broadcast signals. This balance protected broadcasters' property rights by continuing to incentivize content creators to produce 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). Enactment of the

Transmit Clause effectively abrogated *Teleprompter* and *Fortnightly* by ensuring that entities could not rebroadcast copyrighted materials without a license. *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 license scheme under § 111. *See* 17 U.S.C. § 111; *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.”). Congress explained that 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 § 111 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 re-transmission rights on the open market. Congress’s silence to date in the case of Internet re-transmissions 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. The District Court’s Holding Impermissibly Alters the Delicate Statutory Balance that Congress Has Achieved

Although it expressly recognized the frequency with which Congress has legislated in this area and even acknowledged that courts often defer to the legislative branch to “adjust[] the statute in response to changing technology,” Slip Op. at 8, the court below became the first court in the country to hold that Internet retransmission services are entitled to the compulsory license that Congress intended for cable companies. If allowed to stand, that error will upset the careful balance that Congress has watchfully maintained for the last 40 years. This Court

should reject the district court's attempt to substitute its own misguided view for that of Congress.

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) (“A district court cannot ... override Congress's policy choice, articulated in a statute Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute.”).

“Sound policy, as well as history, supports our consistent deference to Congress when major technological innovations alter the market for copyrighted materials.” *Sony Corp.*, 464 U.S. at 431 (“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.”). Unlike Congress, district court judges sitting in adversary proceedings are confined to entering orders 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.

Because the current market for providing Internet streaming services is both robust and quickly evolving, 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 scope of the compulsory licenses that were necessary to foster nascent cable and satellite systems. Indeed, Hulu, iTunes, YouTube, Amazon Prime, Netflix, and numerous other companies illustrate the ability of this rapidly changing business model to compete while purchasing licenses on the open market, exposing even further the cynicism of FilmOn X’s latest litigation strategy.

Nor does FilmOn X possess the qualities that, in the past, have compelled Congress to readjust the Copyright Act’s delicate balance between intellectual

property rights and the public interest in expanding broadcast television’s geographic reach. Unlike cable, satellite, and “wireless” cable, which were all uniquely situated to further the public interest of providing the nation’s most remote areas with a “window on the world” that was often “their only source of popular news, sports, and entertainment programming,” *see* S. Rep. 103-407, at 8, FilmOn X sells a product that many broadcasters can—and already do—offer to customers directly.

The district court’s mistaken belief that a decision for the broadcasters would “freeze ... technological development” of Internet streaming services, Slip Op. at 8, demonstrates a fundamental misunderstanding of the balance that Congress struck. Interfering with that balance, as the district court did below, is far more likely to freeze the economic incentives for broadcasters—the very copyright holders who create original programming and content. This Court should therefore reject the district court’s attempt to second-guess congressional policymaking when it comes to the scope of compulsory licenses under § 111.

II. THE DISTRICT COURT ERRED IN REFUSING TO DEFER TO THE COPYRIGHT OFFICE’S INTERPRETATION OF §111

A. The Copyright Office’s Interpretation of § 111 Is Entitled to *Chevron* Deference

“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. 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.”). This follows from *Chevron*’s 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. Rather, courts must defer to “any reasonable agency interpretation.” *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1250 (9th Cir. 2000).

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, regulation promulgated pursuant to express congressional authorization and notice-and-comment rulemaking are entitled to *Chevron* deference if reasonable. *Id.* at 230.

Here, Congress expressly delegated rulemaking authority to the Copyright Office. Indeed, § 702 of the Copyright Act authorizes 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 the 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.”)

The Copyright Office's 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) (codified at 37 C.F.R. § 201.17) (“[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.”). Under this interpretation, it necessarily follows that nationwide Internet retransmission services such as Defendants' are not cable systems and therefore fall outside § 111.

Not only do these unambiguous statements constitute a permissible and reasonable interpretation of the § 111's compulsory licensing requirement, but they also clarify any perceived ambiguity or tension created by advances in technology that were unforeseen at the time of the 1976 amendments to the Copyright Act.

Accordingly, these legislative rules warrant *Chevron* deference. *See Mead*, 533 U.S. at 230-31; *Barnhart*, 535 U.S. at 219-20 (deferring to the Social Security Administration’s interpretation of the Social Security Act contained in its regulations because it “makes considerable sense in terms of the statute’s basic objectives,” and because it is an “interpretation of ‘longstanding’ duration”); *Batjac Prods. Inc. v. Good Times Home Video Corp.*, 160 F.3d 1223, 1230 (9th Cir. 1998) (“[T]he Register has the authority to interpret the copyright laws and [] its interpretations are entitled to judicial deference if reasonable.”).

More importantly, the Copyright Office demonstrated its continuing commitment to its statutory interpretation when, in response to FilmOn X’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 this interpretation through a less formal means than notice-and-comment rulemaking deprive it 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 222. Here, the “long history and stability of the interpretation in question” further reinforce the case for *Chevron* deference. *See Fournier v. Sebelius*, 718 F.3d 1110, 1121 (9th Cir. 2013) (deferring to the HHS Secretary’s longstanding interpretation of the Medicare Act adopted in an intermediary letter).

Moreover, three federal courts of appeals have squarely held that the Copyright Office’s interpretations of § 111 warrant *Chevron* deference. *See ivi, Inc.*, 691 F.3d at 284 (“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’”); *Cablevision Sys. Dev. Co. v. Motion*

Picture Ass'n of Am., Inc., 836 F.2d 599, 608 (D.C. Cir. 1998) (“We think 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.”). None has held otherwise.

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, the district court “may not substitute its judgment for that of the agency.” *River Runners for Wilderness v. Martin*, 593 F. 3d 1064, 1070 (9th Cir. 2009). The Copyright Office’s view is entitled to controlling weight under *Chevron*.

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

Even when *Chevron* deference is unavailable, the Supreme Court has long held that 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.

The weight an agency's view should receive under *Skidmore* "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade." *Ibid.* *Skidmore* thus instructs courts to give careful consideration to an agency's views, grounded in experience, about the meaning of statutes that it has developed significant and relevant expertise in understanding and applying.

The Copyright Office is a part of the Library of Congress, which is unquestionably a part of Congress. The Copyright Office is thus part of the *legislative* branch of government. *See, e.g., Keeffe v. Library of Congress*, 777 F.2d 1573, 1574 (D.C. Cir. 1985) ("[T]he Library of Congress ... is a congressional agency."); *United States v. Brooks*, 945 F. Supp. 830, 833 (E.D. Pa. 1996) ("The Copyright Office is a division of the Library of Congress, which is part of the legislative branch, and thus the Copyright Office is part of the legislative branch."). Arguably, because the Copyright Office is wholly a creature of Congress, its views should be accorded a higher degree of deference than Executive Branch agencies.

Skidmore deference is especially appropriate here given the Copyright

Office's accumulated expertise in this complex and rapidly changing area of copyright law. As the D.C. Circuit has 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 40 years. And the Office has long engaged in rulemaking processes concerning the applicable scope of § 111 licensing for a variety of innovative services seeking to qualify as "cable systems." *See, e.g.*, Inquiry of Definition of Cable Systems, 53 Fed. Reg. 17,962 (May 19, 1988); Definition of Cable Systems, 51 Fed. Reg. 36,705 (Oct. 15, 1986).

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).

Moreover, 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 always 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). 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 consistent view is certainly worthy of judicial deference.

The Copyright Office’s rulemaking, reports, and testimony all demonstrate that the agency has thoroughly considered whether the scope of § 111’s compulsory license extends to Internet retransmissions. Here, as in *Skidmore*, the Copyright Office’s interpretation of § 111 should “surely claim the merit of its writer’s thoroughness, logic, and expertness, its fit with prior interpretations, and

any other source of weight”—including its power to persuade. *Skidmore*, 323 U.S. at 140.

III. THE DISTRICT COURT’S HOLDING CONTRAVENES 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 district court adopted the 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 district court’s novel construction of § 111 thus violates the *Charming Betsy* canon, which 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).

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 congress 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.”); 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.”).²

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

² This Court has repeatedly embraced the *Charming Betsy* canon. See, e.g., *In re Korean Air Lines Co. Antitrust Litig.*, 642 F.3d 685, 696 (9th Cir. 2011) (citing *Charming Betsy* and rejecting a statutory construction that “would discriminate against foreign air carriers in favor of domestic ones, contrary to U.S. treaty obligations mandating nondiscrimination”); *Alvarez-Machain v. United States*, 331 F.3d 604, 629 (9th Cir. 2003) (citing *Charming Betsy* and declining to “make the untenable assumption that Congress, in drafting such a statute, turned a blind eye to the interests of equal sovereigns and the potential violations of international law that would inevitably ensue”).

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). Accordingly, granting Defendants a compulsory license under § 111 would violate these international obligations. *See Fox Television Stations, Inc. v. FilmOn X LLC*, No. 1:13-cv-0758-RMC, 2015 WL 7761052, at *16 (D.D.C. Dec. 2, 2015); *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.”).

The *Charming Betsy* canon requires an interpretative approach that avoids such 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.”).

Under this venerable canon of statutory construction, the district court was obliged to consider U.S. treaty obligations in determining the proper scope of compulsory licenses under § 111 of the Copyright Act. It failed to do so. And 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.

CONCLUSION

For the foregoing reasons, *amicus* Washington Legal Foundation respectfully requests that the Court reverse the judgment below and vacate the district court’s order granting partial summary judgment to Defendants.

Date: February 3, 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 6,977 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: February 2, 2016

/s/ Cory L. Andrews

Cory L. Andrews

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(d), I hereby certify that on February 3, 2016, the foregoing *amicus curiae* brief was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth 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