

Reprinted by permission of Radio+Television Business Report.
<http://www.rbr.com>

FilmOn X Faces Third Defeat; Court Says It's Not a "Cable System"



by Lucy Holmes Plovnick

FilmOn X, a service providing paying subscribers with access to retransmitted broadcast signals over the Internet, has been trying to be recognized by a court as a cable system. Mitchell Silberberg & Knupp intellectual property attorney Lucy Holmes Plovnick explains the significance of the case to RBR+TVBR readers.

On March 23, 2016, Judge Charles P. Kocoras of the United States District Court for the Northern District of Illinois, Eastern Division, ruled in [*FilmOn X, LLC v. Window to the World Communications, Inc.*, 13-C-8451](#), that FilmOn X, a service providing paying subscribers with access to retransmitted broadcast signals over the Internet, did not qualify for the cable statutory license in Section 111 of the Copyright Act. The Section 111 statutory license allows cable systems to simultaneously retransmit broadcast signals into distant markets, provided that the cable operators submit royalties to the Copyright Office on a semi-annual basis and comply with all applicable FCC regulations.

Judge Kocoras' decision marks the fourth court to consider the question of whether FilmOn X's technology can qualify for the Section 111 statutory license following the U.S. Supreme Court's decision in [*Am. Broad. Cos. v. Aereo, Inc. \(Aereo III\)*](#), which recognized significant similarities between FilmOn X and traditional cable systems. FilmOn X has litigated the Section 111 issue now in New York, California, the District of Columbia, and the Eastern District of Illinois.

Three of these courts (including Judge Kocoras) have found that FilmOn X does not meet the statutory definition of a "cable system" in the Copyright Act, and thus is not eligible for the cable statutory license contained in Section 111. Only Judge Wu in the Central District of California has found that FilmOn X is eligible for the cable statutory license, in [*Fox Television Stations, Inc. et al. v. AereoKiller, et al.*](#)

In his Memorandum Opinion, Judge Kocoras agreed with the Southern District of New York and the District of Columbia District Court that *Aereo III*'s statements comparing FilmOn X to a cable system were limited to the Supreme Court's consideration of whether Aereo could be subject to copyright infringement liability under the Transmit Clause in Section 101 of the Copyright Act, and could not be interpreted as instructing lower courts to apply the Section 111 statutory license in a technology-agnostic manner.

Judge Kocoras analyzed the specific technology employed by FilmOn X and held that it did not satisfy the statutory definition of a "cable system" in the Copyright Act. Section 111(f)(3) defines a "cable system" as "a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the [FCC], and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service." Judge Kocoras ruled that while FilmOn X utilized a "facility" to receive broadcast signals, it did not utilize that same, contained facility to retransmit the broadcast signals to distant subscribers. Instead, FilmOn X utilizes the open Internet, which Judge Kocoras defined as a "an international network of interconnected computers," for retransmission and delivery of broadcast signals. According to Judge Kocoras, such Internet retransmissions fail to meet Section 111's requirement of transmission to the public by a "communications channel," and thus, places FilmOn X's system outside the statutory definition of a cable system, making it ineligible for the Section 111 statutory license. Judge Kocoras also deferred to the Copyright Office's longstanding interpretations of Section 111(f)(3), which declined to extend the Section 111 compulsory license to internet-based systems.

Judge Kocoras' decision in the Northern District of Illinois, along with similar decisions in New York and the District of Columbia, are in direct conflict with Judge Wu's decision a companion case in the Central District of California last year. Judge Wu ruled that FilmOn X was a "cable system" as that term is defined in the Copyright Act, and therefore eligible for the cable compulsory license set forth in Section 111 of the Copyright Act. In reaching this decision, Judge Wu also focused on the technology employed by FilmOn X to receive and deliver broadcast signals to its subscribers, but reached a very different conclusion regarding that technology. Judge Wu held that FilmOn X's system, which receives broadcast signals "by antennas, located in particular buildings wholly within particular states" and then retransmits the signals out of those facilities on "wires, cables, microwaves, or other communications channels" satisfied the statutory definition of a cable system in Section 111(f). Judge Wu found that FilmOn X's antenna system was a physical "facility," and found that the "nebulous nature of the internet" had no bearing on that conclusion.

Judge Wu’s decision specifically rejected the Second Circuit’s opinion in [WPIX, Inc. v. ivi, Inc.](#), 69 F.3d 275 (2d Cir. 2012) (“*ivi*”), where the court held that *ivi*, a service providing broadcast signals over the internet to paying subscribers in the New York, Chicago, and Los Angeles areas, was not a “cable system,” and was ineligible for the Section 111 license. In contrast, Judge Kocoras’ ruling is consistent with the Second Circuit’s.

Judge Wu’s decision is currently on interlocutory appeal to the 9th Circuit as *Fox Television Stations, Inc. et al. v. AereoKiller, et al.*, 2:12-cv-06921. The District of Columbia District Court’s decision is also currently on appeal to the D.C. Circuit as *Fox Television Stations, Inc. et al. v. FilmOn.TV Networks, Inc., et al*, Case No. 16-7013.

The outcome of these pending cases could have a significant impact on both the cable industry and the agencies charged with regulating it. Currently, no FCC regulations appear to apply directly to FilmOn X’s system, but that could change. The [FCC](#) is actively considering whether a regulatory change should be made to expand the definition of a MVPD to include Internet-based systems. Copyright Office General Counsel Jacqueline Charlesworth has also indicated that the FCC’s decision on the MVPD issue could impact the Copyright Office’s analysis of what systems are eligible for Section 111.

These changing legal and regulatory developments raise questions about how the current statutory structure fits with new technologies, and are important for all stakeholders to watch as they evolve.

[Lucy Holmes Plovnick](#) is an intellectual property attorney at Mitchell Silberberg & Knupp LLP. Reach her at lh@msk.com.

Become a RBR+TVBR Member Today

