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# Judge's FilmOn Opinion Unsealed: "Congress Did Not Consider the Internet in 1976"

A dispute over TV streaming illustrates how judges differ in their approaches to new technologies.

BY ERIQ GARDNER DECEMBER 2, 2015 10:12AM



The screenshot shows a FilmOn TV player interface. On the left is a sidebar with 'Channels' and 'On demand' sections. Under 'Channels', there's a 'SUBSCRIBE NOW!' button and a search bar. Below are categories: Most Watched, Chief Keef, ORIGINALS, MOVIES, SPORTS, UK LIVE TV, HORROR, ENTERTAINMENT, and NEWS TV. The main video area is titled 'Zee Bollyworld TV' and shows a scene with two women. Subtitles at the bottom of the video read: "In spite of doing such a shameful deed.. you have no shame in eyes or repentance." Above the video, there's a 'Record in HD with no ads? click here' link. The top right shows 'Quality: SD HD' with 'FREE' and 'HD' labels. Below the video is a chat window with a 'Type your message' input and a 'Send message' button. At the bottom, there are buttons for 'TV GUIDE', 'Chat', 'Embed', 'Become a FilmOn TV Affiliate!', 'Pop Out', and a settings gear icon.

COURTESY OF FILMON, ZEE



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decided that it was violating TV broadcasters' public performance rights by retransmitting programming.

But the [Aereo ruling](#) hasn't stopped the debate over what to do in the digital age about the 1976 Copyright Act, which requires a license for retransmission. The FCC is [currently examining](#) modernizing the interpretation of a "multichannel video programming distributor" so that it covers online video providers, and in the meantime, FilmOn has been angling for a shot at a compulsory license, which is an advantage that local cable systems can get under copyright law.

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In recent months, FilmOn **experienced success** in California while **suffering defeat** in the District of Columbia. At the time of the latter ruling, the judge's opinion was under seal, but on Tuesday, a redacted copy ([see here](#)) was made publicly available.

Given that both cases are going up on appeal with totally opposing conclusions as to how to fit new technology under old legal standards, it is worth highlighting the primary difference in the judge's opinions. In many ways, the case presents an originalist vs. contextualist or "living" approach to interpreting the law.

In July, U.S. District Judge George Wu shocked many in the entertainment industry by determining that FilmOn was potentially entitled to license programming from CBS, Fox, NBC and ABC at below-market rates. He looked at Section 111, which spells out the compulsory license system, the Supreme Court's *Aereo* decision, and came to a tech-neutral approach.

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"Courts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation," wrote Wu.

Now compare this to U.S. District Judge Rosemary Collyer's newly released opinion.

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that FilmOn has “over-read” *Aereo*. “The Court does not agree that the Supreme Court adopted a technology-agnostic interpretation of the Transmit Clause, let alone the Copyright Act as a whole,” she writes.

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Collyer seizes upon the more restrained language of U.S. Supreme Court Justice Stephen Breyer’s opinion, particularly the section where he nods to how “different kinds of service or technology providers” could alter the conclusions — interpreted by some legal observers at the time at his attempt at not endangering cloud-based services — and gives herself opportunity to address Congress’ intent in adopting the compulsory license scheme in 1976.

Wu may have ruled that it was “unnecessary to turn to the legislative history,” but Collyer feels otherwise, deciding that the plain language of Section 111 doesn’t support a broad interpretation.

“If it were true that Congress intended the definition of a cable system to embrace any and all new technologies, Congress would not have amended the Act in 1994 to specify ‘microwave’ as an example of a ‘communications channel,’” she writes. “It also would not have enacted separate license schemes for satellite providers retransmitting distant signals. Congress did not consider the Internet in 1976 when §111 was enacted and has not amended the definition since to include anything resembling a distribution medium with a global footprint.”

The opinions of Wu ([here](#)) and Collyer also differ on the approach to analyzing the interpretation of the U.S. Copyright Office with respect to compulsory licenses. The California judge roasted the agency for being “hostile to internet retransmission.” The judge who is geographically closer to the U.S. Copyright Office, on the other hand, praises the administration agency’s “unique expertise in this highly technical area of the law,” and while not going so far as to give it deference under *Chevron*, decides to give it deference anyway under *Skidmore*, basically meaning that the agency’s opinion isn’t binding, but is nevertheless persuasive.

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Again, both cases are going up on appeal — to different federal circuits. There will be a lot to chew on. Given the tenor of oral arguments during the Aereo case, the Supreme Court will probably not be too excited to revisit the issue of retransmission in the digital age.

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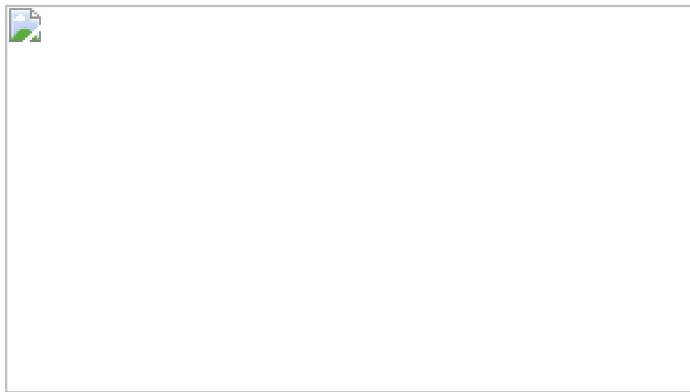
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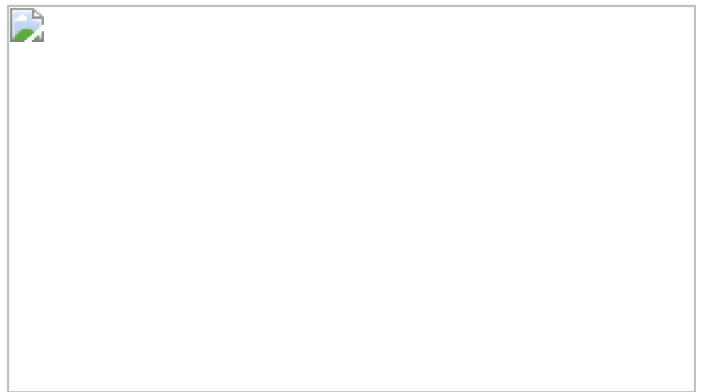
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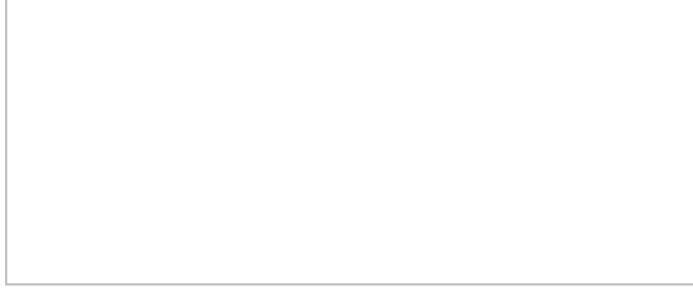
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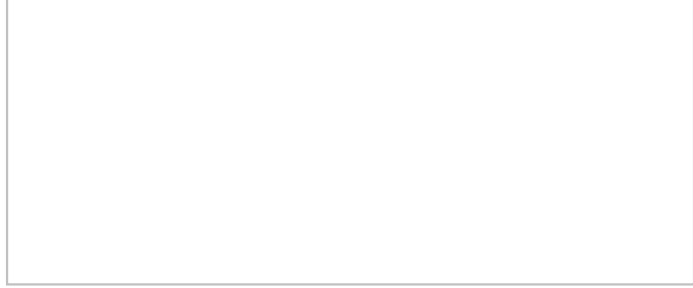
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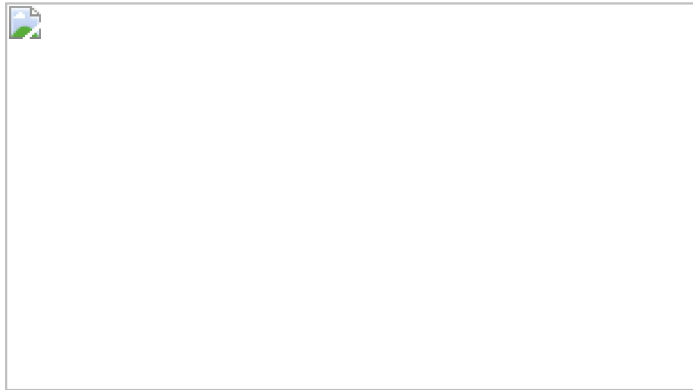
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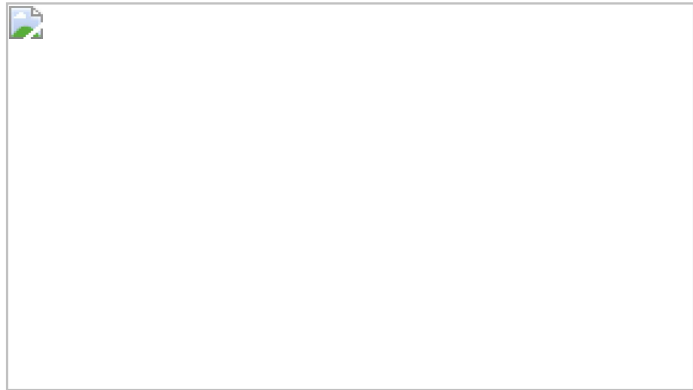
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