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TV Streamer Gets Huge Victory on Road to Compulsory License to Broadcast Networks

FilmOn wins a potential landmark ruling — one that will set up a high-stakes appellate showdown with the broadcast establishment.

BY ERIQ GARDNER JULY 16, 2015 1:08PM

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The major television networks were hit with a legal earthquake on Thursday when a federal judge issued a shocking ruling by declaring that the streaming company FilmOn was potentially entitled to a compulsory license of broadcasters' copyrighted programming. If the judge's opinion survives scrutiny on appeal, it could mean that CBS, Fox, NBC and ABC have to license their programming to a digital outlet at below-market rates.

Coming less than a year after Aereo shut down following a devastating Supreme Court ruling, U.S. District Court Judge **George W. Wu**'s opinion in favor of FilmOn and against the pleas of the major broadcast networks provides a new interpretation of Section 111 of the Copyright Act, which was enacted by Congress in the 1970s thanks to a perception of the burdensome nature of requiring cable systems to negotiate with every copyright owner over the retransmission of channels on public airwaves.

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attempted unsuccessfully at a late stage to use Section 111 as its own salvation. But past courts have rejected this approach out of fear that the streamers would not be able to control where content is routed and the result would "destabilize the entire industry."

In a tentative decision, Judge Wu acknowledged the prior "analogous case" of *Ivi*, but said he "disagrees" with its conclusions. At a hearing this morning, he adopted the tentative as final and ruled in favor of FilmOn. But acknowledging the legal issues are close and of "significant commercial importance," he's also authorized an immediate appeal to the 9th Circuit Court of Appeals and preserved the status quo by maintaining an injunction upon FilmOn, which is owned by billionaire **Alki David**.

Nevertheless, an opinion that would give over-the-top distributors the same rights as a cable company provided they met certain formal requirements (like semi-annual statements and royalty payments) is a seismic one that has the potential of disrupting the broadcast business as well as provide competition to the broadcasters' own OTT platforms. The decision also comes as the Federal Communications Commission has been taking comments on a new definition of MVPD ("multichannel video programming distributor") so that it is technology-neutral and covers online video providers as well as cable and satellite operators. Broadcasters have urged the FCC to be careful lest the media regulatory agency upset negotiations for compensation for the distribution of programming.

In reaction to today's ruling, Fox emphasizes the road ahead.

"This advisory opinion contravenes all legal precedent," a spokesperson says. "The court only found that FilmOn could potentially qualify for a compulsory license, and we do not believe that is a possibility. The injunction barring FilmOn from retransmitting broadcast programming over the Internet still remains in place and the full burden of proof still lies with FilmOn. We will of course appeal and fully expect to prevail."

In coming to his decision, Judge Wu actually cites Aereo's Supreme Court loss as a point in FilmOn's favor.

"Because the Supreme Court was not answering the question at issue in this case, *Aereo III* does not control the result here," he writes. "It is, however, about as close a statement directly in Defendants' favor as could be made, and the decision's reasoning continues the trajectory started in *Fortnightly* and seen again in the satellite decisions: courts consistently reject the argument that technological changes affect the balance of rights as between broadcasters and retransmitters in the wake of technological innovation."

The judge points out that FilmOn tendered statutory license fees in 2014 and that the Copyright Office neither accepted nor rejected the payments. The Office made clear its leeriness of giving digital services a compulsory license, but with knowledge that it was under consideration by courts and the FCC, held back on a firm opinion.

Judge Wu notices this "general opposition to compulsory licensing" and must decide whether to defer to the agency's interpretation. He doesn't, and even makes light of it.

"Again, the Office noted its view that internet retransmission is even more harmful to copyright holders than cable and satellite retransmissions," he writes. "But if in the Copyright Office's view §111 is 'bad,' and 'really bad' if applied to internet transmission, we must ask what the Office's view of internet retransmission would be if it considered §111 to be 'good,' as Congress deemed it. That question is impossible to answer precisely. At least, the Copyright Office would not be as hostile to internet retransmission as it is. It might even support it."

The judge doesn't see ambiguity in the statute that sets up the compulsory licensing system. He doesn't accept arguments by broadcasters that the Internet is a "facility," and isn't swayed by "the nebulous nature of the internet" when considering whether FilmOn is operating equipment receiving television signals, reformatting those signals and sending them out to the viewing public.

"It is unnecessary to turn to the legislative history or the administrative interpretation: 'if the intent of Congress is clear and unambiguously expressed by the statutory language at issue, that would be the end of our analysis. Here, no matter how strong the policy arguments for treating traditional cable services and Defendants' service differently 17 U.S.C. §111(f)(3) simply does not draw the distinction Plaintiffs urge."

If the decision holds up on appeal, FilmOn will still need to meet certain requirements to gain a compulsory license, and that will likely depend on what the FCC says in its rulemaking on the MVPD issue. The judge writes that the broadcasters "point to no ways in which Defendants are in violation of FCC regulations" and that FilmOn has represented it "will comply with any applicable regulations that arise out of this rulemaking."

Here's the full ruling.

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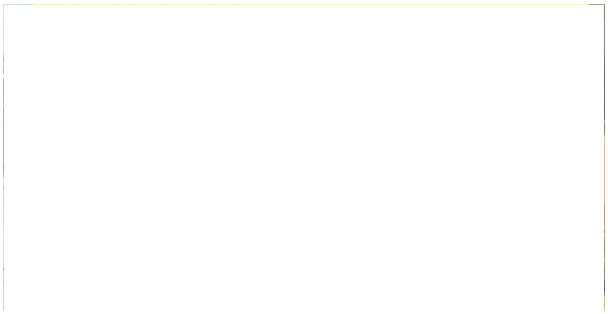

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