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EX PARTE VIA ELECTRONIC FILING

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Re: Written Ex Parte Communication, MB Docket No. 14-261

Dear Ms. Dortch:

FilmOn X, LLC (“FilmOn X”), by counsel, respectfully submits this *ex parte* letter in the above-referenced docket “to update the record with respect to how expanding the definition of MVPD [“Multichannel Video Programming Distributor”] in the Communications Act to include some Internet-based distributors interrelates with copyright law.”¹ The Commission has proposed to clarify that the MVPD definition applies to Internet-based transmissions of certain video-programming services. FilmOn X provides this update to aid the Commission’s consideration of the related copyright issues.²

On July 24, 2015, the Honorable George H. Wu in the U.S. District Court for the Central District of California ruled that the cable system compulsory copyright license set forth in 17 U.S.C. Section 111(c)³ is available to FilmOn X as an Internet-based retransmission service.⁴ In a 15-page order, the court examined the Copyright Act’s statutory text and legislative history. It held that in 1976, Congress amended the Copyright Act to subject cable systems to copyright liability, while preserving their ability to engage in secondary transmissions by enacting Section 111. The court concluded that FilmOn X fit squarely within the Section 111 definition of a cable system, finding that “the undisputed facts” show that the broadcast signals are “received by antennas, located in particular buildings wholly within particular states. They are then retransmitted out of

¹ *Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services*, Notice of Proposed Rulemaking, 29 FCC Rcd 15995, 16024 (rel. Dec. 19, 2014). Contemporaneous with this filing, FilmOn X is submitting separate comments in MB Docket No. 15-158 (“Media Bureau Seeks Comment on the Status of Competition in the Market for the Delivery of Video Programming”).

² 47 U.S.C. §522(13).

³ 17 U.S.C. §111(c).

⁴ *Fox Television Stations, Inc. v. FilmOn X, LLC* (Case No. 2:12-cv-06921), consolidated with *NBCUniversal Media, LLC v. FilmOn X, LLC* (Case No. 2:12-cv-06950).

those facilities on ‘wires, cables, microwave, or other communication channels.’” A copy of the decision is attached.

Based on the statute’s plain language, the court found it “unnecessary to turn to the legislative history or the administrative interpretation” to determine whether FilmOn X was entitled to a Section 111 license. Indeed, the court also concluded that the Copyright Office’s opposition to the extension of the Section 111 license to Internet retransmission services is not grounded in the statutory text or congressional intent, but instead is based on policy views, to which the Court declined to defer.

The court ruled that the Second Circuit in *Cartoon Network LP, LLP v. CSC Holdings, Inc.*,⁵ and *WPIX, Inc. v. ivi, Inc.*,⁶ had applied an “overly narrow reading of the Copyright Act” that incorrectly focused on the specific technology employed to retransmit copyrighted works. It reasoned that the 1976 amendments to the Copyright Act were drafted in a technology-agnostic fashion. It further concluded that, although the U.S. Supreme Court’s decision in *Aereo* “does not control the result here[,]” the opinion came “about as close a statement directly in Defendants’ favor as could be made[.]”

In light of last month’s court decision in California, FilmOn X respectfully submits that the Commission’s proposed interpretation of “MVPD” is consistent with both the Communications Act and with the Copyright Act. Accordingly, FilmOn X renews its support for the Commission’s proposed interpretation of MVPD to include certain Internet-based distributors of multiple channels of video programming.

Please contact the undersigned counsel if there are any questions regarding this filing.

Respectfully submitted,

RINI O’NEIL, PC

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Enclosure

⁵ 536 F.3d 121 (2d Cir. 2008).

⁶ 691 F.3d 275 (2d Cir. 2012).