No. 15-56420

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOX TELEVISION STATIONS, INC., ET AL.,

Plaintiffs-Appellants,

v.

AEREO KILLER, LLC, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court for the Central District of California,
Case Nos. 2:12-cv-06921, 2:12-cv-06950
The Honorable George H. Wu, United States District Judge

BRIEF FOR *AMICUS CURIAE* CONSUMER FEDERATION OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Consumer Federation of America certifies, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, it has no parent corporation and no publicly held company owns 10 percent or more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Consumer Federation of America (CFA) is a non-profit organization serving as a voice for consumers through research, education, and advocacy. As the largest pro-consumer association in the United States, comprising nearly 300 non-profit member organizations, which themselves have approximately 50 million consumer members nationwide, the CFA is uniquely qualified to speak on issues that impact American consumers. Founded in 1968, the CFA has actively participated in almost every major court case involving the evolution of federal copyright law to account for emerging technologies that enable consumer choice and consumer sovereignty, including *American Broadcasting Cos., Inc. v. Aereo Inc.*, 134 S. Ct. 2498 (2014).

Additionally, the CFA will release a report in April 2016 titled *Cable Market Power: The Never Ending Story of Consumers Overcharges & Excess Corporate Profits* by Dr. Mark Cooper explaining the abuse of market power by cable providers and how the cable industry urgently needs compulsory licenses for Internet retransmissions. The report explains that incumbent cable providers and

[1] All parties have consented to the filing of this amicus curiae brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5) counsel for the parties have not authored any part of this brief; no party or a party's counsel contributed money for the brief; and no one other than *Amicus* and its members and counsel have contributed money for this brief.

broadcasters use license negotiations, among other tactics, to limit market competition, which results in consumers being overcharged for cable services.

The CFA, through this brief, requests that the Court affirm the district court's decision. The CFA recognizes that the market power of cable remains as strong as ever and that cable providers continue to abuse that market power. With § 111 compulsory licenses, Internet retransmission services could compete with the market-dominating cable companies, and provide consumers with more control over how they access television programming.

INTRODUCTION AND SUMMARY OF ARGUMENT

Internet retransmission services fulfill the core purpose of 17 U.S.C. § 111 by fostering desperately needed competition in the monopolistic cable industry. The 1976 Copyright Act included the § 111 compulsory license to induce the dissemination of expressive works,[2] and to induce the creation of works that "promote the progress of science and the useful arts."[3] Specifically, the license was designed as a tool for cable companies (upstarts at the time) to obtain permission needed for retransmitting copyrighted works and to ensure that copyright owners

[2] *See generally Golan v. Holder*, 132 S. Ct. 873 (2012) (finding that Congress had initially made copyright contingent on publication thereby providing incentives not only for creation, but also for dissemination).
[3] U.S. Const. Art. I, § 8, cl. 8.

were compensated for their creative contributions.[4] In effect, § 111 gave these upstarts the tools they needed to disrupt the moribund television industry that was then dominated by broadcasting networks.

Technology has changed dramatically over the course of 40 years, and so has the way people watch television. Although the Internet has increased the availability of television programming online, these technological advances have not disrupted the television industry monopolies. The 1976 cable companies have become the incumbent service providers of 2016, and Internet retransmission services have assumed the role of upstarts. With little meaningful competition in the cable industry, consumers are forced to accept pricey cable subscriptions with high monthly costs, fixed-term contracts, additional equipment, rental and installation fees, "bundled services" and channel packages that include many unwanted channels.[5] Despite the rise of the Internet, the incumbent cable 0companies are still the dominant providers of broadcast television and consumers are once again at the mercy of a dysfunctional television market.

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[4] *Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm.,* 93d Cong. 297 (1973).

[5] PwC, *PWC US TV & VIDEO CONSUMPTION ANALYSIS: 20% of Consumers Could Ditch Cable Subscriptions in 2016* (2016), *available at* http://www.pwc.com/us/en/press-releases/2015/pwc-cis-videoquake-press-release.html (stating that the average cable subscriber "receives 194 channels but regularly watches only 17").

This dysfunctional market is unique to the United States because of the ongoing consolidation of holdings between a few cable providers.[6] American households pay significantly more for Internet bundles than their international counterparts. For example, the average American household pays $90 per month for cable television,[7] whereas cable, phone, and Internet bundles typically sell for $32 per month in Paris and just $15 per month in Seoul.[8]

This Court should affirm the district court's opinion because, first, § 111 compulsory licensing was created to foster meaningful competition in the marketplace. Second, the lack of competition among incumbent cable providers has unreasonably restricted consumer choice. Third, Internet retransmission services provide consumers with greater choice in access to television content—precisely what § 111 is meant to facilitate. The proper application of § 111 to Internet retransmission services would empower consumers by promoting competition in the cable market.

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[6] Danielle Kehl et al., *Reining in the Cost of Connectivity: Policies for Better Broadband in 2014*, Open Tech. Inst. (2014), *available at* https://www.newamerica.org/oti/reining-in-the-cost-of-connectivity/.

[7] *See* Farhad Manjoo, *Comcast vs. the Cord Cutters*, N.Y. Times (Feb. 15, 2014), *available at* http://www.nytimes.com/2014/02/16/business/media/comcast-vs-the-cord-cutters.html?_r=0.

[8] *Id.*; *see also* Mark Cooper, *Cable Market Power: The Never Ending Story of Consumers Overcharges & Profits*, SSRN 35 (2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2756175.

ARGUMENT

I. SECTION 111 COMPULSORY LICENSING WAS CREATED TO FOSTER MEANINGFUL COMPETITION IN THE MARKETPLACE

Compulsory licenses have been powerful tools in alleviating the economic and consumer harm caused by dysfunctional markets in both the sound recording and broadcast industries. Even the Copyright Office has admitted that such licensing is an effective tool to "address a market obstacle or foster new modes of distribution."[9]

The § 111 cable compulsory license, enacted as part of the 1976 Copyright Act, was the Congress's way to calm the maelstrom caused by the developing cable industry.[10] Broadcasters and traditional antennae-based systems dominated the television market, but the signals could not reach geographically large and diverse audiences. In 1950, startup commercial cable television services (known as Community Antenna Television, or CATV) began to "[improve] television reception in remote areas where consumer antennae could not adequately receive

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[9] *Compulsory Video Licenses of Title 17: Hearing Before the Subcomm. on Courts, Intellectual Property and the Internet Comm. of the H. Comm on the Judiciary,* 113th Cong. 89 (2014) (statement of William H. Roberts, Jr., acting Associate Register of Copyrights and the Director of Public Information & Education at the United States Copyright Office).

[10] Register of Copyrights, *The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis* 5 (March 1992), *available at* http://copyright.gov/reports/cable-sat-licenses1992.pdf.

broadcast signals."[11] Consumers embraced cable, and "[b]y 1959, cable operators were importing broadcast signals via microwave carrier from stations that were too distant even for antenna reception."[12] Cable systems built their businesses for nearly two decades without having to compensate the broadcasters or other copyright holders for retransmissions of their works.

Cable companies were not legally required to pay broadcasters or other copyright holders to retransmit their copyrighted material as a result of two Supreme Court cases decided under the 1909 Copyright Act. The first decision, *Fortnightly Corp. v. United Artists Television, Inc.*,[13] held that cable providers do not perform the local broadcast signals programs they receive and carry and thus do not infringe a copyright holder's exclusive right.[14] Then *Teleprompter Corp. v. Columbia Broadcasting System*,[15] extended the Court's *Fortnightly* ruling to include distant broadcast signals.[16]Broadcasters were outraged that cable companies could retransmit their programming without any compensation.

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[11] Niels B. Shaumann, *Copyright Protection in the Cable Television Industry: Satellite Retransmission and the Passive Carrier Exemption*, 51 Fordham L. Rev. 637, 638 (1983), *available at* http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=4619&context=flr.
[12] *Id.*
[13] 392 U.S. 390, 395 (1968).
[14] *Id.* at 400-401.
[15] 415 U.S. 394 (1974).
[16] *Id.* at 409.

Congress responded by bringing broadcast signal retransmissions directly under the new Copyright Act, deeming them to be "public performances" under the "transmit clause."[17] However, any unauthorized cable retransmission would have constituted copyright infringement and cable was a "very, very small industry" that would have had difficulty clearing market-dominating broadcasters' public performance rights.[18] Congress enacted the § 111 compulsory license for cable retransmissions, first, to ensure a more level playing field between the cable systems, copyright holders, and broadcasters; and second, to "not retard the orderly development of the cable television industry or the service it provides to its subscribers."[19]

Cable companies have become incumbent providers, and Internet retransmission services are the new innovators struggling to survive. The Supreme Court recently held in *American Broadcasting Cos. v. Aereo, Inc.*, that, like cable

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[17] 17 U.S.C. § 101 ("To perform or display a work 'publicly' means— . . . (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or 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.").

[18] *Copyright Law Revision: Hearing on S. 1361 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Senate Judiciary Comm.*, 93d Cong. 297, 398 (1973); *see also* H.R. Rep. No. 94-1476, at 89 (1976) (recognizing the impracticality of requiring "every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system").

[19] H.R. Rep. No. 94-1476, at 91 (1976).

providers, Internet retransmission services "publicly perform" copyrighted television programming. Additionally, the *Aereo* Court explained that Internet retransmissions bear an "overwhelming likeness to the cable companies . . ." and any technological difference between Aereo and incumbent cable companies "does not make a critical difference."[20] In 1976, cable systems were simultaneously deemed to "publicly perform" and given the § 111 compulsory license. Internet retransmission services face the same insurmountable challenges that moved Congress to include § 111 in the Copyright Act.[21]

As appellees argue at length, Internet retransmissions qualify as "cable systems" for purposes of § 111. If this Court were to rule that § 111 does not apply to Internet retransmission services, it would exclude new market entrants, and empower cable monopolies, frustrating Congress's clear intent in passing the transmit clause and § 111 together. As it was deemed impractical for cable providers to negotiate public performance licenses with individual copyright holders in 1976, it is also unreasonable for Internet retransmission services to negotiate such licenses with individual copyright holders today.

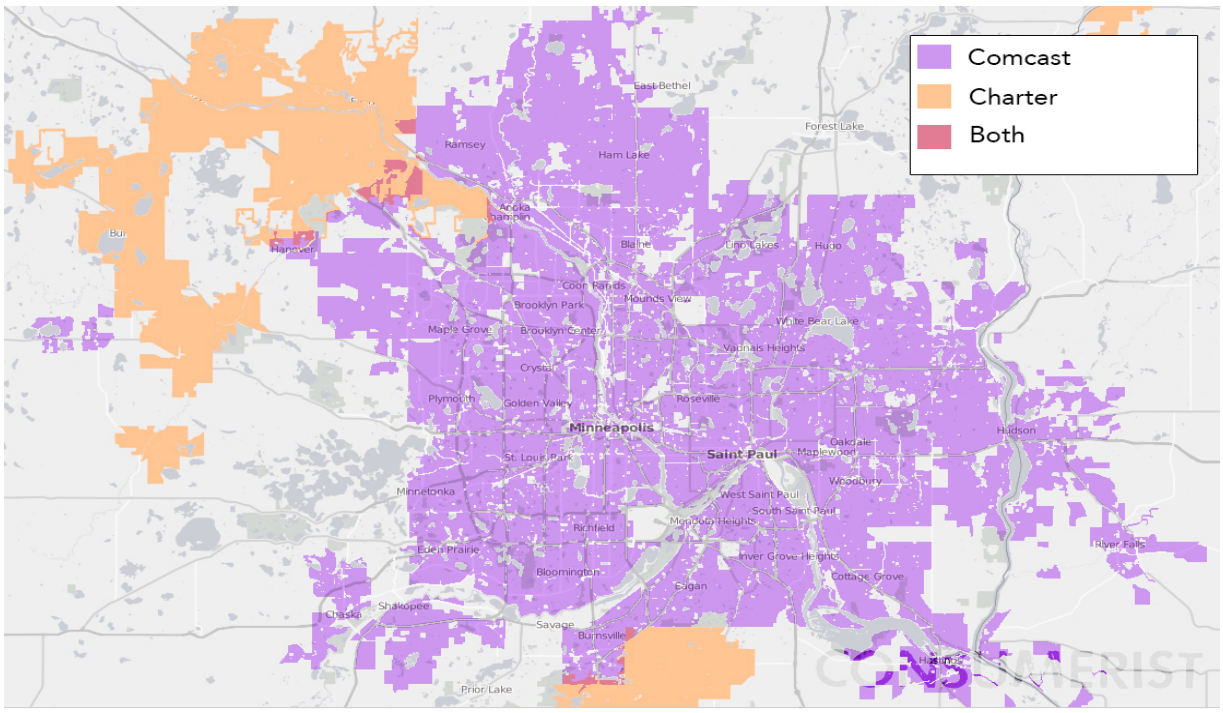
[20] 134 S. Ct. 2498, 2501 (2014).
[21] *Id*.

II. THROUGH MONOPOLIES, CABLE PROVIDERS LIMIT MARKET COMPETITION, RESULTING IN HARM TO CONSUMERS

A. Geographic Monopolies

The cable market has little meaningful competition due to the geographic monopolies held by the major cable companies.[22] The cable market is broken into local geographic zones, each dominated by monopolies and duopolies. The FCC reported that 83.9 million of the 132.5 million homes it reviewed in 2013 had access to only a single cable service provider.[23] Additionally, there are pockets across the U.S. where traditional cable services are not provided at all.[24] The map below shows the distribution of available cable service providers in the Minneapolis-Saint Paul area, a common pattern of over-lapping geographic monopolies:[25]

[22] Kate Cox, *Here's What the Lack of Broadband Competition Looks Like on a Map,* Consumerist (March 7, 2014), http://consumerist.com/2014/03/07/heres-what-lack-of-broadband-competition-looks-like-in-map-form/ (citing the National Broadband Map project).
[23] *See* FCC, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203, 28 FCC Rcd. 10,496, (2013).
[24] Cox, *supra* note 22 (showing that there are some individuals who live in areas where cable services are not provided).
[25] *Id.*



The map shows that there are only a few pockets where both Comcast and Charter compete for television subscribers. An overwhelming majority of Minneapolis-Saint Paul customers have only one option for a cable provider. Internet retransmission services can challenge these monopolies by providing consumers access to broadcast television online, regardless of their location.

B. Contractually-Created Monopolies

In addition to geographic monopolies, cable providers have attempted to suppress online video competition through contract provisions with broadcasters. The FCC is investigating

> whether big cable firms use special contract provisions to discourage media companies—from Walt Disney Co. to smaller firms—from running programming on the Internet.[26]

The FCC is concerned that such firms are using contracts to block the expansion of online video stream competition since "[s]ome evidence suggests that restrictive clauses may have effectively kept many TV programs off the Internet."[27]

In a recent meeting with the FCC, Time Warner, Inc. and HBO executives warned that Charter's proposed merger with Time Warner Cable and Bright House Networks raises a concern that Charter could and would harm over-the-top broadband competition.[28] In fact, Herring Network's affiliation agreement with Charter included a restrictive provision that prevented the Network from exhibiting its content via Internet streaming services.[29] As a result, Herring could not show its content on Internet retransmission services and had lost significant advertising

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[26] John D. McKinnon, *FCC Probes Cable Firms' Influence on Web TV*, Wall Street J. (Feb. 28, 2016), *available at* http://www.wsj.com/articles/fcc-probes-cable-firms-influence-on-web-tv-1456704465.

[27] *Id*.

[28] Comments of Time Warner, *In the Matter of Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Transfer Control of Licenses and Authorizations*, FCC MB Docket No. 15-149 (2016), *available at* http://apps.fcc.gov/ecfs/document/view?id=60001527857.

[29] Comments of Herring Networks, Inc., *Multichannel Video Programming Distribution Services*, FCC MC Docket No. 14-261 (2015), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001310010.

opportunities on such platforms.[30] Other networks such as The Tennis Channel and Al Jazeera America have also voiced concerns regarding cable market competition. Networks want their programming "available to as many consumers as possible, on whatever device they may want to use,"[31] but these anti-competitive contractual provisions prevent them from reaching their full consumer base.

C. Low Consumer Satisfaction Ratings Indicate Consumer Harm

As shown by their consistently low satisfaction ratings, the lack of competition leaves incumbent cable companies with little incentive to make service improvements. Cable companies consistently score at the bottom of the American Consumer Satisfaction Index (ACSI), which rates satisfaction based on pricing, availability of features, and customer service. According to the 2015 ACSI report, customer satisfaction with subscription television service received the lowest score among all industries covered by ACSI.[32] Incumbent cable providers

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[30] *Id.*

[31] *See* Comments of Al Jazeera America, *Multichannel Video Programming Distribution Services*, FCC MC Docket No. 14-261 (2015), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001302522; *see also* Comments of The Tennis Channel, *Multichannel Video Programming Distribution Services*, FCC MC Docket No. 14-261 (2015), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001306702.

[32] Am. Consumer Satisfaction Index, *ACSI Telecommunications and Information Report 2015* (2015), *available at* https://www.theacsi.org/news-and-resources/customer-satisfaction-reports/reports-2015/acsi-telecommunications-and-information-report-2015; *see also* Cooper, *supra* note 8, at 37-38 (explaining

are notorious for being unresponsive to customer demand, expensive, and heedless of customer complaints.[33] This may explain why a February 2015 Harris Poll survey ranked Comcast and Time Warner among the least-loved companies in America, alongside companies like Goldman Sachs and Halliburton.[34]

Without competition, incumbent cable providers are unlikely to lower prices or offer unbundled services or channels to consumers. The average American household pays cable companies $231 annually in equipment rental fees alone.[35] In total, "U.S. consumers spend $20 billion a year to lease these devices."[36] Most industry sectors have improved their services and lowered their prices because technology has advanced and become more affordable. However, since 1994, the cost of cable "has risen 185 percent while the cost of computers, televisions and

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that cable has long been ranked at the bottom of over 40 individual sectors that have been evaluated).

[33] *See* Am. Consumer Satisfaction Index, *supra* note 32 (showing that over-the-top streaming video services like Netflix, Apple, Hulu, and Amazon show much higher levels of consumer satisfaction).

[34] *See* Harris Poll, *2015 Harris Poll RQ Summary Report: A Survey of the U.S. General Public and Opinion Elites Using the Reputation Quotient* (2015), *available at* http://skift.com/wp-content/uploads/2015/02/2015-RQ-Media-Release-Report_020415.pdf.

[35] Press Release, FCC, *FCC Chairman Proposal to Unlock the Set-Top Box: Creating Choice & Innovation* 1 (2016), *available at* https://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0127/DOC-337449A1.pdf.

[36] *Id.*

mobile phones has dropped by 90 percent."[37] Competitive industries do not behave this way; monopolistic power shields incumbent cable providers from the effects of consumer dissatisfaction.

The lack of competition in the market for cable service is harmful to consumers and undermines copyright protection's main public policy purpose: to ensure public access to a rich variety of creative works. If Internet retransmission services could obtain § 111 compulsory licenses, such services could compete with incumbent cable providers and provide consumers with the improved customer service they have been waiting and asking for.

III. INTERNET RETRANSMISSION SERVICES PROVIDE CONSUMERS WITH A REASONABLE ALTERNATIVE TO INCUMBENT CABLE COMPANIES

The ubiquity of the Internet[38] and the increased availability of television content online have led to the "cord shaving" and "cord cutting" phenomena.[39]

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[37] *Id.*; *see also* Cooper, *supra* note 8, at 32.

[38] *See* Andrew Perrin & Maeve Duggan, *American Internet Access 2000-2015*, PEW Research Ctr. (2015), *available at* http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/ ("In 2000, 70% of young adults used the Internet and that figure has steadily grown to 96% today. Not until 2012 did more than half of all adults ages 65 and older report using the Internet.").

[39] *See* John B. Horrigan & Maeve Duggan, *Home Broadband 2015,* PEW Research Ctr. (2015), *available at* http://www.pewinternet.org/2015/12/21/home-broadband-2015/; *see also* Emily Steel & Bill Marsh, *Millennials and Cutting the Cord*, N.Y. Times (Oct. 3, 2015),

Cord shaving occurs when a consumer reduces their overall cable package, and cord cutting occurs when a consumer simply terminates their cable television subscription. These phenomena have become so widely known that "Cord-Cutting Guides" and cord-cutting how-to handbooks have been published by the *New York Times*, *CNN Money*, and *PC Magazine*.[40] Cord cutters or shavers, with *á la carte* subscriptions to Internet services, replace or reduce their cable subscription while still receiving the desired programming. Internet retransmission services are essentially cord cutting or shaving services designed to meet the growing consumer demand for convenient, mobile, and reasonably priced Internet television. Although there are many online video services such as Netflix and Hulu, only Internet retransmission services provide cord cutters or shavers with live streams of television—i.e. the Oscars, sporting events, and local news— as it is being aired.

Consumers have voiced their demands for more flexible Internet streaming in recent comments filed with the FCC. For example, consumer WonKyung Choi wrote, "As a mobile consumer, I would like affordable, live, local broadcast

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http://www.nytimes.com/interactive/2015/10/03/business/media/changing-media-consumption-millenials-cord-cutters.html;
see also Editorial Board, *Preparing for Life After Cable*, N.Y. Times (Aug. 21, 2015), *available at* http://mobile.nytimes.com/2015/08/21/opinion/consumers-are-cutting-the-cord-to-gain-choices-and-pay-less.html.

[40] PwC, *supra* note 5, at 3.

television online, without having to purchase big, bundle service."[41] Unsurprisingly, many customers have found the Internet subscription model—with the ability cancel at will, and without needing to bundle services—to be a practical and reasonable alternative to cable. While consumers can receive local broadcasts for free using an antenna, constant and mobile access is valuable for a generation used to watching video on smartphones and laptops.

The number of cord cutters and shavers has increased rapidly, despite the cable industry's attempts to limit its expansion.[42] Although 79% of Americans still subscribe to some form of traditional cable service,[43] in 2015, the "thirteen largest pay-TV providers in the US—representing about 95% of the market—lost about 385,000 net video subscribers."[44] In just the last year, 16% of consumers have

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[41] Comments of WonKyung Choi, *Multichannel Video Programming Distribution Services*, FCC MC Docket No. 14-261 (2014), *available at* http://apps.fcc.gov/ecfs/comment/view?id=60001310214.

[42] Claire Atkinson, *Nielsen revises viewing numbers to help ESPN*, N.Y. Post (Jan. 30, 2016), http://nypost.com/2016/01/30/nielsen-revises-viewing-numbers-to-help-espn/ ("Nielsen (under client pressure) decided to remove broadband-only homes from its sample, but it didn't restate historical data. It is now showing that, as of December, 1.2 million homes had cut the cord, a much smaller number than its earlier figure of 4.33 million homes for the year.").

[43] PwC, *supra* note 5.

[44] Press Release, Leichtman Research Grp., *Major Pay-TV Providers Lost About 385,000 Subscribers In 2015* (2016), *available at* http://www.leichtmanresearch.com/press/031016release.html (stating that these same providers lost about 150,000 in 2014 and 100,000 in 2013. "2015 marked the third consecutive year for pay-TV industry net loses").

unsubscribed from pay-TV services altogether.[45] Additionally, since 2013, 45.2% of all American adults have become cord shavers,[46] 23% of whom have reduced their subscriptions in just the last year.[47]

Cord cutting and shaving trends are especially noticeable among millennials: 77% of people ages of 18 to 24 access television content via the Internet.[48] Furthermore, people ages 14 to 25 watch 57% of their television on a computer, tablet, or smartphone.[49] Though millennials are just a portion of the consumer landscape, these consumers determine market trends and their preferences suggest how programming will be viewed in the future.

Internet retransmission services honor a fundamental purpose of the Copyright Act by disseminating expressive works. Section 111 was enacted to help infant cable providers enter the television landscape, and now, forty years later, Internet retransmission services need the license to enter the same monopolistic landscape. Granting Internet retransmissions services § 111 compulsory licensing will allow them to disrupt the industry monopoly that cable providers have

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[45] PwC, *supra* note 5.
[46] Steel, *supra* note 39.
[47] PwC, *supra* note 5 (adding that "[i]n 2014, 91% of consumers said they could see themselves subscribing to cable in the following year. In 2015, that figure dropped to 79%, implying more than one-fifth of consumers could ditch their cable subscription in the next year").
[48] *Id.* (adding that for the 18-24 age group, "[i]ncreasingly, their internet is mobile. The multi-screen environment allows consumers to view wherever, whenever").
[49] Steel, *supra* note 39.

diligently maintained, as well as provide consumers with the cord cutting and shaving services they wholeheartedly embrace.

CONCLUSION

For the foregoing reasons, the district court's decision should be affirmed.

Dated: April 1, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel for Amicus Consumer Federation of America certifies that this Brief complies with the type and length limits required by the Federal Rules of Appellate Procedure and the Ninth Circuit. It was prepared using Microsoft Office Word and contains 4,754 words.

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CERTIFICATE OF SERVICE

No. 15-56420

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit on April 1, 2016, using the Ninth Circuit's Appellate CM/ECF upgraded system. All participants in the case are registered users of the system and service was accomplished electronically through the system.

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