LOCAST:
Non-Profit Retransmission of Broadcast Television

June 2018

Executive Summary

Locast is a non-profit organization that makes available for free over the Internet the local broadcast signals of 14 New York City broadcast television stations. Locast offers the service without charge to any New Yorker with an Internet connection. Locast thus makes broadcast television, which is already distributed for free over the airwaves, available for free over the Internet as well. This White Paper examines whether Locast's service complies with the Copyright Act. We conclude that it does.

The Copyright Act of 1976 granted owners of television programs the exclusive right to transmit them to the public, while creating a statutory license permitting cable systems to retransmit programs upon payment of certain fees. Congress also created an express exemption for non-profit retransmission services. Section 111(a)(5) provides that a "secondary transmission" by an entity that is a "governmental body, or other nonprofit organization," rather than a "cable system," is exempt so long as the transmission is made "without any purpose of direct or indirect commercial advantage" and "without charge . . . other than assessments necessary to defray the actual and reasonable costs" of the service. Locast's system falls squarely within that exemption.

Locast satisfies the exemption's plain language. Locast's Internet transmissions are "secondary transmissions" within the meaning of the statute, and Locast is a non-profit organization rather than a cable system. Locast also offers its service without any purpose of commercial advantage and without charge: Locast solicits donations, but it does not require anyone to pay.

The legislative history is fully consistent with that interpretation. That history mentions non-profit "boosters" or "translators" that amplify broadcast signals to improve their reach. That is what Locast does: By pulling down broadcast signals and retransmitting them over the Internet to any New Yorker with an Internet connection, Locast acts as a "digital translator" that extends the reach of those signals throughout New York City, including to places where tall buildings or other obstructions might interfere with over-the-air reception.

Locast does not fall outside the exemption merely because it uses the Internet, a technology that did not exist in 1976. The non-profit exemption by its terms applies to devices and processes "now known or later developed." And

the fact that Congress expressly excluded only one particular medium—cable systems—implies that it did not intend to exclude any others.

To be sure, courts have refused to extend the Act's ***statutory license*** to Internet-based services, most recently in cases involving Aereo and FilmOn. But the reasoning behind those decisions does not apply here. Those cases interpreted a particular statutory term, "cable system," which contained language excluding Internet-based systems. The non-profit exemption contains no similar language. It is written in broad, technologically neutral terms, with the sole exception that it ***excludes*** cable systems. The fact that Locast is not a cable system thus ***confirms*** that it qualifies for the exemption.

Congress's broader objectives support the same conclusion. Congress balanced competing concerns. It recognized the public interest in expanding access to free broadcast television. At the same time, it believed that ***for-profit*** retransmission services should, in fairness, share their profits with the programs' creators. ***Non-profit*** retransmission services, by contrast, generate no such profits to share, so Congress exempted them from copyright liability altogether. The distinction the statute draws thus is not between Internet-based systems and over-the-air boosters and translators. It is between for-profit and non-profit systems. Locast falls squarely on the non-profit side of that line.

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I. Background

Locast is a non-profit service that makes available for free over the Internet the local broadcast signals of 14 New York City broadcast television stations. Locast offers the service without charge to any New Yorker with an Internet connection. Locast thus makes broadcast television, which is already distributed for free over the airwaves, available for free over the Internet as well to members of the public who may not be able to receive an over-the-air signal.

This White Paper examines whether Locast's service is lawful under the Copyright Act. We conclude that it is.

A. *The Copyright Act's Non-Profit Retransmission Exemption*

The Copyright Act grants owners of motion pictures, television programs, and other audiovisual works the exclusive right "to perform the copyrighted work publicly."[1] Although copyright law has long granted a public performance right in some form, the scope of that right has evolved over time—particularly with respect to television retransmission services.

At the dawn of commercial television in the 1930s and 1940s, television programming was provided by broadcasters who transmitted signals for free over the public airwaves and derived their revenue principally from advertising. Broadcast television quickly expanded throughout the country, with the percentage of homes with televisions growing from 9% to 97% between 1950 and 1977.[2] Free broadcast television thus became an important means by which the public received information and entertainment. Congress and the courts have recognized a strong public interest in expanding access to broadcast television.[3]

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[1] 17 U.S.C. §106(4).

[2] *Television Facts and Statistics – 1939 to 2000*, http://www.tvhistory.tv/facts-stats.htm.

[3] *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §2(a)(11)-(12), 106 Stat. 1460, 1461 ("Broadcast television stations continue to be an important source of local news and public affairs programming and other local broadcast services critical to an informed electorate. . . . There is a substantial governmental interest in promoting the continued availability of such free television programming . . . ."); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 454 (1984) (stating that "expand[ing] public access to freely broadcast television programs . . . yields societal benefits" and that there is a "public interest in making television broadcasting more available"). The public's interest in access to broadcast television

And because broadcast frequencies are a scarce public resource, Congress requires the broadcasters that use that resource to operate in the public interest.[4]

Despite the growth of broadcast television, many members of the public encounter difficulty receiving broadcast signals. Some reside too far from the nearest broadcaster; others reside in areas where mountainous terrain or other obstacles obstruct signals. Cable systems emerged in the 1940s and 1950s as a solution to those reception problems. Cable operators would erect "community antennas" on mountaintops or other high points to receive broadcast signals. The systems would then retransmit the programming over cable lines to their subscribers, typically for a fee. Many of those cable systems were operated by large for-profit enterprises such as Westinghouse and Cox.[5] Although consumers increasingly subscribed to cable over the years, even as late as 1977 only a minority received television programming through cable (17%), with the rest receiving programming for free over the air.[6]

Before 1976, it was unclear whether cable systems engaged in "public performances" of the television programs they retransmitted within the meaning of the copyright laws, such that they had to obtain permission from content owners to carry their shows. In a pair of decisions in 1968 and 1974, the Supreme Court answered that question in the negative.[7] An individual homeowner would not need a license to put an antenna on his rooftop to improve reception, the Court reasoned, so a cable system operator should not be deemed to publicly perform copyrighted works merely because it provided a similar service on a larger, commercial scale.

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has constitutional dimensions. *See Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (discussing First Amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences" though broadcast television).

[4] *See* 47 U.S.C. §309(a) (requiring broadcast licensees to serve the "public interest, convenience, and necessity"); *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984) ("[G]iven spectrum scarcity, those who are granted a license to broadcast must serve in a sense as fiduciaries for the public . . . .").

[5] *See* Cal. Cable & Telecomms. Ass'n, *History of Cable*, https://www.calcable.org/learn/history-of-cable/.

[6] *Television Facts and Statistics – 1939 to 2000*, http://www.tvhistory.tv/facts-stats.htm (citing Nielsen Media Research data).

[7] *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974).

Congress responded to those decisions by enacting the Copyright Act of 1976.[8] Congress "believe[d] that cable systems are commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material and that copyright royalties should be paid by cable operators to the creators of such programs."[9] Congress thus modified the public performance right to bring cable systems within its scope. The Act now provides that "[t]o perform . . . a work 'publicly' means," among other things, "to transmit or otherwise communicate a performance . . . of the work . . . to the public, by means of any device or process."[10] To "transmit" a performance is to "communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent."[11] And the terms "device" and "process" include any device or process "now known or later developed."[12]

While bringing cable systems within the scope of the public performance right, Congress did not grant content owners unrestricted control over their programs. Instead, Congress created a statutory licensing scheme for "secondary transmissions" by "cable systems."[13] The Act defines "cable system" as follows:

> A "cable system" is a facility . . . that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, 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.[14]

A "secondary transmission," in turn, is defined as "the further transmitting of a primary transmission," such as an over-the-air television broadcast,

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[8] Pub. L. No. 94-553, 90 Stat. 2541.

[9] H.R. Rep. No. 94-1476, at 89 (1976).

[10] 17 U.S.C. §101.

[11] *Id.*

[12] *Id.*

[13] 17 U.S.C. §111(c)(1) ("[S]econdary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission . . . shall be subject to statutory licensing upon compliance with the requirements [of the statute].").

[14] 17 U.S.C. §111(f)(3).

"simultaneously with the primary transmission."[15] To qualify for the statutory license, a cable system must file semiannual statements of account with the Register of Copyrights and pay prescribed royalties based on the cable system's gross receipts for providing basic cable service.[16] So long as the cable system pays those royalties, it can carry copyrighted programs without having to negotiate licenses from content owners.

In addition to the statutory license for cable systems, the 1976 Act also created a separate exemption for non-profit retransmission services. Specifically, Section 111(a)(5) provides:

> The secondary transmission of a performance or display of a work embodied in a primary transmission is not an infringement of copyright if . . . the secondary transmission is not made by a cable system but is made by a governmental body, or other nonprofit organization, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the secondary transmission other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service.[17]

Unlike the statutory license for cable systems, the non-profit exemption is a wholesale exclusion from liability: The operator need not pay any royalties to retransmit broadcast programming, statutory or otherwise. Congress limited the exemption to non-profit entities, requiring that the transmission be made by "a governmental body, or other nonprofit organization," "without any purpose of direct or indirect commercial advantage," and "without charge to the recipients" except to cover costs.[18] Congress also specifically excluded "cable systems" from the exemption—entities Congress understood to be "commercial enterprises" and which, by definition, retransmitted programming to "members of the public who pay for such service."[19]

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[15] *Id.* §111(f)(2).

[16] *Id.* §111(d)(1).

[17] 17 U.S.C. §111(a)(5).

[18] *Id.*

[19] *Compare id. with* H.R. Rep. No. 94-1476, at 89, *and* 17 U.S.C. §111(f)(3).

The legislative history describes the purpose of the non-profit exemption as follows:

> [The clause] would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.[20]

That history confirms the essential distinction drawn by the statutory text: Congress differentiated between *commercial* television retransmission services such as cable systems and *non-profit* television retransmission services that merely expand access to broadcast signals without charge. It granted the former a statutory license while exempting the latter from liability altogether.

B. *Locast's Non-Profit Retransmission Service*

Locast is a non-profit service that retransmits local New York broadcast television programming over the Internet to New Yorkers free of charge. Locast describes itself as a "public service to New Yorkers that provides over the Internet the local broadcast signals of 14 New York City broadcast stations."[21] From the user's perspective, the service is straightforward: Using a smartphone, laptop, or other computer with a broadband Internet connection, the user simply goes to Locast's website at www.locast.org. The user can then select one of several local broadcast stations to watch, and the service streams the station over the Internet to the user's device.[22]

Locast describes itself as "a 'digital translator' . . . [that] operates just like a traditional broadcast translator service, except instead of using an over-the-air

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[20] H.R. Rep. No. 94-1476, at 92.

[21] Locast, *About*, https://www.locast.org/about.

[22] *Id.*; *see* Locast, *Live TV Guide*, https://www.locast.org.

signal to boost a broadcaster's reach, we stream the signal over the Internet."[23] It explains:

> Ever since the dawn of TV broadcasting in the mid-20th Century, non-profit organizations have provided "translator" TV stations as a public service. Where a primary broadcaster cannot reach a receiver with a strong enough signal, the translator amplifies that signal with another transmitter, allowing consumers who otherwise could not get the over-the-air signal to receive important programming, including local news, weather and of course, sports. Locast.org provides the same public service, except instead of an over-the-air signal transmitter, we provide the local broadcast signal via online streaming.[24]

Locast notes that reception of over-the-air signals is a particularly pressing concern for many New Yorkers in light of the urban geography. "Many New Yorkers . . . cannot receive a free, over-the-air broadcast signal. As in other urban areas, tall buildings often make it difficult to receive an over-the-air signal in an apartment or condo."[25]

Locast is operated by the New York chapter of the Sports Fan Coalition, a 501(c)(4) non-profit advocacy organization founded in 2009.[26] The Sports Fan Coalition is a "grassroots consumer advocacy organization devoted to representing sports fans wherever public policy and sports intersect" and has spearheaded a number of policy initiatives before Congress and the Federal Communications Commission.[27]

Locast does not charge any fees for the retransmission service it provides.[28] It does, however, solicit donations through its website.[29] Locast explains that it

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[23] Locast, *About*, https://www.locast.org/about.

[24] *Id.*

[25] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[26] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[27] *Id.*

[28] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[29] Locast, *Donate*, https://www.locast.org/donate ("Operating such a service to you and your fellow New Yorkers is expensive. Please consider giving us a donation."); *see also*

may decide to charge fees in the future, but that if it does so, the fees will be used only to defray the reasonable costs of operating its service.[30] Locast makes its service available only to users in the New York area. It uses "geo-fencing" technology to confirm that users are in fact logging in from New York.[31]

Locast's service was clearly designed with the Section 111(a)(5) exemption in mind. As Locast observes, the 1976 Copyright Act "ma[de] it a copyright violation to retransmit a local broadcast signal without a copyright license," which is why "cable and satellite operators . . . must operate under a statutory 'compulsory' copyright license, or receive permission from the broadcaster."[32] But "Congress made an exception": "Any 'non-profit organization' could make a 'secondary transmission' of a local broadcast signal, provided the non-profit did not receive any 'direct or indirect commercial advantage' and either offered the signal for free or for a fee 'necessary to defray the actual and reasonable costs' of providing the service."[33] For that reason, Locast "believes it is well within the bounds of copyright law when offering . . . the digital translator service."[34]

Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news ("We are a non-profit organization supported by generous contributions from lots of good folks . . . .").

[30] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news ("Q: Will I ever have to pay for Locast.org? A: Maybe. We are a non-profit organization supported by generous contributions from lots of good folks but might not be able to raise enough money to sustain the service. The copyright statute allows us to charge a nominal fee 'necessary to defray the actual and reasonable costs' in providing the digital translator service and in the event that we need to request a contribution from you to keep the service going, we will do so."); *see also id.* ("Locast.org does not charge viewers for the digital translator service (although we do ask for contributions) and if it does so, will only recover costs as stipulated in the copyright statute."); *cf.* Locast, *Donate*, https://www.locast.org/donate (explaining that the donations Locast currently solicits are used "to maintain this site and to protect the public's interest in the media landscape").

[31] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news; *see also* Locast, *About*, https://www.locast.org/about (stating that Locast's registration process requires users to "certify that [they] live in, and are logging on from, the New York City market"); Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news (stating that Locast uses personal information to "make sure that you are within the New York City local broadcast market and therefore eligible to receive the digital translator service").

[32] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[33] *Id.* (quoting 17 U.S.C. §111(a)(5)).

[34] *Id.*

II. Analysis

We conclude that Locast's assessment of the legality of its service is correct: Locast qualifies for the Section 111(a)(5) exemption of the Copyright Act and therefore need not obtain a license to retransmit broadcast television programming. Locast's non-profit retransmission service falls squarely within the plain language of the exemption and is consistent with the statute's legislative history and broader objectives. The fact that Locast retransmits programming over the Internet, rather than using technology familiar to Congress at the time it enacted the statute, does not alter those conclusions.

A. *Locast Falls Within the Plain Language of the Exemption*

As the Supreme Court has explained, a "basic and unexceptional rule" of statutory construction is that "courts must give effect to the clear meaning of statutes as written."[35] Where the statutory text is clear, courts "begin and end [their] inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'"[36]

Locast's non-profit retransmission service falls squarely within the plain meaning of the Section 111(a)(5) exemption. That exemption applies to any "secondary transmission" of broadcast television programming by any "nonprofit organization," so long as the transmission is made "without any purpose of direct or indirect commercial advantage" and "without charge to the recipients . . . other than assessments necessary to defray the actual and reasonable costs" of the service, and so long as the operator is not a "cable system."[37] Locast satisfies each of those requirements.

First, Locast's retransmissions of broadcast television are "secondary transmissions." The Copyright Act defines a "secondary transmission" as "the

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[35] *Star Athletica, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) (applying this principle to the Copyright Act).

[36] *Id.*; *see also, e.g.*, *Boyle v. United States*, 556 U.S. 938, 950 (2009) ("Because the statutory language is clear, there is no need to reach petitioner's remaining arguments based on statutory purpose, legislative history, or the rule of lenity.").

[37] 17 U.S.C. §111(a)(5).

further transmitting of a primary transmission simultaneously with the primary transmission."[38] Locast satisfies each element of that definition.

Locast is clearly "transmitting" a performance within the meaning of the statute when it pulls broadcasts down from the air and sends them over the Internet to recipients across New York City. To "transmit" a performance is to "communicate it by ***any device or process*** whereby images or sounds are received beyond the place from which they are sent."[39] That is what Locast does. In the recent *Aereo* case, the Supreme Court held that Aereo—a ***for-profit*** television retransmission service—ran afoul of the Copyright Act by "transmitting" works over the Internet without any license or exemption authorizing it to do so.[40] Locast is "transmitting" for the same reason.

The broadcast signals that Locast pulls down for retransmission constitute "primary transmissions" as required by the statute.[41] And Locast is "further transmitting" those broadcast signals "simultaneously with the primary transmission": Locast allows New Yorkers to watch shows on its system at the same time those shows are airing live; it does not allow them to watch previously aired shows on a time-delayed or on-demand basis.[42] Locast thus satisfies each element of the "secondary transmission" definition.[43]

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[38] 17 U.S.C. §111(f)(2).

[39] 17 U.S.C. §101 (emphasis added).

[40] *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2506 (2014).

[41] 17 U.S.C. §111(f)(1) ("A 'primary transmission' is a transmission made to the public by a transmitting facility whose signals are being received and further transmitted by a secondary transmission service, regardless of where or when the performance or display was first transmitted."). The definition specifically mentions a broadcast from a "television broadcast station" as an example of a primary transmission. *See id.* ("In the case of a television broadcast station, the primary stream and any multicast streams transmitted by the station constitute primary transmissions.").

[42] *See* Locast, *Live TV Guide*, https://www.locast.org.

[43] Even the decisions discussed below that have held that Internet retransmitters are not "cable systems" for purposes of the statutory license have not disputed that the systems were making "secondary transmissions" within the meaning of the statute. *See, e.g.*, *Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1009 (9th Cir. 2017) (discussing whether "Congress meant §111 to sweep in secondary transmission services with indifference to their technological profile" without disputing that FilmOn was, in fact, a secondary transmission service). That issue, if resolved against the service provider, would have made it unnecessary for the courts to decide the "cable system"

Second, Locast satisfies the exemption's various non-profit requirements: Its service is operated by a "nonprofit organization," "without any purpose of direct or indirect commercial advantage," and "without charge to the recipients . . . other than assessments necessary to defray . . . actual and reasonable costs."[44]

Locast is operated by a non-profit organization. It is run by the local New York chapter of a 501(c)(4) non-profit advocacy organization, the Sports Fan Coalition.[45] That organization's status as a bona fide non-profit entity is confirmed by its history of advocating various matters of public interest before Congress and the FCC.[46]

Locast does not seek any commercial advantage from its service or impose any charges beyond the costs necessary to run the service. Locast does not currently charge for its service ***at all***.[47] And Locast has stated that, if it does start charging for the service in the future, the fees will be used only to defray the reasonable costs of operating its service—precisely what the statute permits.[48]

Locast does solicit voluntary donations through its website.[49] But the solicitation of voluntary donations cannot reasonably be considered a "charge" within the meaning of the statute. The term "charge" means a mandatory payment obligation, not a voluntary donation.[50] The statutory exemption's

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issue, because the statutory license applies only to services that make "secondary transmissions." 17 U.S.C. §111(c)(1).

[44] 17 U.S.C. §111(a)(5).

[45] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[46] *Id.*

[47] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

[48] *Id.* (explaining that Locast "might not be able to raise enough money to sustain the service" through voluntary donations in the future and that, if it does start charging a fee, it "will only recover costs as stipulated in the copyright statute").

[49] Locast, *Donate*, https://www.locast.org/donate.

[50] *See* Webster's Third New International Dictionary 377 (2002) ("the price demanded for a thing or service"); Black's Law Dictionary 282 (10th ed. 2014) ("[p]rice, cost, or expense"); *cf. Righthaven, LLC v. Jama*, No. 2:10-CV-1322 , 2011 WL 1541613, at *3 (D. Nev. Apr. 22, 2011) (solicitation of donations on website "immaterial" to question of whether use was for a commercial purpose, where entity had an educational mission and did not sell, license, or publish the work commercially).

express application to non-profit organizations confirms the point: Non-profit organizations typically solicit donations to support their activities. Congress would not have created an exemption for non-profit organizations but then disqualified nearly all of them because they receive donations.

Further, even if the voluntary donations Locast receives could somehow be considered a "charge," they would not be disqualifying. The statutory exemption permits non-profit entities to charge for the retransmission service so long as the fees are limited to amounts "necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service."[51] Locast states that it uses the donations it receives only "to maintain this site and to protect the public's interest in the media landscape."[52] That is what the statute permits.

Finally, Locast does not fall within the exemption's specific exclusion for cable systems. The Copyright Act defines a "cable system" as a "facility . . . that . . . makes secondary transmissions of [broadcast television] signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service."[53] Locast does not fit within that definition for multiple reasons.

For one thing, the cable system definition applies only to services that transmit programming to "members of the public ***who pay for such service***."[54] That limitation reflects Congress's understanding, at the time it enacted the 1976 statute, that "cable systems are commercial enterprises" and should be required to pay royalties to copyright holders for that reason.[55] Locast makes its service available for free. Its users therefore do not "pay for such service" as required by the statute.[56]

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[51] 17 U.S.C. §111(a)(5).

[52] Locast, *Donate*, https://www.locast.org/donate.

[53] 17 U.S.C. §111(f)(3).

[54] 17 U.S.C. §111(f)(3) (emphasis added).

[55] H.R. Rep. No. 94-1476, at 89 (1976).

[56] *See, e.g.*, *Fox Television Stations, Inc. v. Aereokiller*, 115 F. Supp. 3d 1152, 1169 (C.D. Cal. 2015) ("[A] system that operated without receiving fees from subscribers would not meet the plain language of the [cable system definition] . . . ."), *rev'd on other grounds*, 851 F.3d 1002 (9th Cir. 2017). Locast's free service is not a mere temporary promotion that could be viewed as marketing some later, commercial version of the system. Locast is therefore distinguishable from other systems that courts have found to be "cable

In addition, the Copyright Office has long construed the term "cable system" to exclude services that retransmit programming over the Internet for purposes of the statutory license.[57] Courts have repeatedly accepted that construction as reasonable and persuasive, most recently in the context of attempts by the for-profit television retransmission services Aereo and FilmOn to qualify for the statutory license.[58] Just as those for-profit services are not "cable systems" for purposes of the Section 111(c) statutory license, Locast's non-profit

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systems" on that basis. *See San Juan Cable LLC v. Telecomms. Regulatory Bd. of P.R.*, 598 F. Supp. 2d 233, 236 (D.P.R. 2009) (holding that free beta test qualified as a "cable system" because "trial phase is designed to advance [the company's] construction of a cable service for commercial purposes").

[57] *See, e.g.*, U.S. Copyright Office, *Satellite Home Viewer Extension and Reauthorization Act Section 109 Report* 188 (2008) ("The Office continues to oppose an Internet statutory license that would permit any website on the Internet to retransmit television programming without the consent of the copyright owner."); Letter from Marybeth Peters, Register of Copyrights, to Sen. Orrin G. Hatch (Nov. 10, 1999), *reprinted in* 145 Cong. Rec. 30,980 (Nov. 19, 1999) ("[T]he section 111 license does not and should not apply to Internet transmissions."); *Copyrighted Webcast Programming on the Internet: Hearing Before the Subcomm. on Courts and Intellectual Property of the H. Comm. on the Judiciary*, 106th Cong. 9 (June 15, 2000) (statement of Marybeth Peters, Register of Copyrights) (stating that Section 111 "could not reasonably be interpreted to include Internet retransmissions"); U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* 97 (1997) (noting differences between Internet services and "industries now eligible for compulsory licensing"); *cf. Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997) (stating that "a provider of broadcast signals [must] be an inherently localized transmission media of limited availability to qualify as a cable system").

[58] *See Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1015 (9th Cir. 2017) ("The Office's position is longstanding, consistently held, and was arrived at after careful consideration; and it addresses a complex question important to the administration of the Copyright Act. . . . We are persuaded that all of this more than suffices [to warrant deference] under *Skidmore*."); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012) ("In light of the Copyright Office's expertise, the validity of its reasoning, the consistency of its earlier and later pronouncements, and the consistency of its opinions with Congress's purpose in enacting §111, we conclude that the Copyright Office's position is reasonable and persuasive."); *FilmOn X, LLC v. Window to the World Commc'ns, Inc.*, No. 13 C 8451, 2016 WL 1161276, at *12 (N.D. Ill. Mar. 23, 2016); *Fox Television Stations, Inc. v. FilmOn X, LLC*, 150 F. Supp. 3d 1, 29 (D.D.C. 2015); *Am. Broad. Cos. v. Aereo, Inc.*, No. 12-CV-1540, 2014 WL 5393867, at *5 n.3 (S.D.N.Y. Oct. 23, 2014).

service is not a "cable system" for purposes of the exclusion from the Section 111(a)(5) exemption.

Courts presume that "identical words used in different parts of the same act are intended to have the same meaning."[59] The term "cable system" therefore must mean the same thing in both the Section 111(c) statutory license and the Section 111(a)(5) exemption. The presumption is particularly strong here because the statute expressly defines the term "cable system" in a single definition that applies to both sections.[60]

For all those reasons, Locast meets each of the requirements for the non-profit retransmission exemption in Section 111(a)(5) and is entitled to retransmit broadcast programming over the Internet without permission from copyright holders.

B. *Applying the Exemption to Locast Is Consistent with the Legislative History*

Because the statutory text is clear, a court would not need to resort to legislative history to find that Locast qualifies for the non-profit exemption. "When the words of a statute are unambiguous, . . . [the] 'judicial inquiry is complete,'" even if "legislative history points to a different result."[61] "'[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify a departure from [the statutory] language."[62] No such "extraordinary showing" could be made here. To the contrary, Locast's service is entirely consistent with the legislative history.

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[59] *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990).

[60] 17 U.S.C. §117(f)(3).

[61] *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992); *see also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear."); *ACLU v. FCC*, 823 F.2d 1554, 1568 (D.C. Cir. 1987) ("The general interpretive principle—a reluctance to rely upon legislative history in construing an ***unambiguous*** statute—is of especial force where, as here, resort to legislative history is sought to support a result ***contrary*** to the statute's express terms.").

[62] *United States v. Albertini*, 472 U.S. 675, 680 (1985); *see also United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'").

The House Report accompanying the 1976 Copyright Act describes the non-profit exemption in the following terms:

> [The clause] would exempt the activities of secondary transmitters that operate on a completely nonprofit basis. The operations of nonprofit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no "purpose of direct or indirect commercial advantage," and if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service." This exemption does not apply to a cable television system.[63]

Locast fits comfortably within that description. Most of this passage simply tracks the statutory text and its limitation to "secondary transmitters that operate on a completely nonprofit basis," with no "purpose of direct or indirect commercial advantage," that impose "no charge to the recipients" other than necessary costs, and that are not "a cable television system."[64] As explained above, Locast satisfies each of those requirements.

The only sentence in the passage that even arguably goes beyond the statutory text is the statement that "[t]he operations of nonprofit 'translators' or 'boosters,' which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt" if the statutory requirements were met.[65] But that sentence does not say that "translators" or "boosters" are the ***only*** services that can qualify for the exemption. It merely lists them as ***examples*** of services that qualify. Courts have repeatedly cautioned that a broadly worded statute should not be construed narrowly to cover only the specific problem mentioned in the legislative history.[66] Thus, whether or not

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[63] H.R. Rep. No. 94-1476, at 92 (1976).

[64] *Compare id. with* 17 U.S.C. §111(a)(5).

[65] H.R. Rep. No. 94-1476, at 92.

[66] *See, e.g.*, *New York v. FERC*, 535 U.S. 1, 21 (2002) (specific legislative concern "does not define the outer limits of the statute's coverage" even if it "catalyzed the enactment" of the statute); *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980) ("This Court frequently has observed that a statute is not to be confined to the 'particular application[s] . . . contemplated by the legislators.'"); *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 299 (D.C. Cir. 2003) (fact the legislative history "show[ed] that Congress was most immediately

Locast constitutes precisely the sort of "booster" or "translator" that Congress envisioned when it enacted the statute is beside the point. Nothing in the legislative history limits the exemption to boosters or translators.

In any event, Locast's service does fit comfortably within the legislative history's description. Locast is "a 'digital translator' . . . [that] operates just like a traditional broadcast translator service, except instead of using an over-the-air signal to boost a broadcaster's reach, [it] stream[s] the signal over the Internet."[67] As Locast explains, for decades "non-profit organizations have provided 'translator' TV stations as a public service."[68] "Where a primary broadcaster cannot reach a receiver with a strong enough signal, the translator amplifies that signal with another transmitter, allowing consumers who otherwise could not get the over-the-air signal to receive important programming . . . ."[69] "Locast.org provides the same public service, except instead of an over-the-air signal transmitter, we provide the local broadcast signal via online streaming."[70]

As Locast notes, reception of broadcast signals is a particular concern in New York City, the area in which it operates. "Many New Yorkers . . . cannot receive a free, over-the-air broadcast signal. As in other urban areas, tall buildings often make it difficult to receive an over-the-air signal in an apartment or condo."[71] Even when it might be theoretically possible to install equipment capable of receiving a broadcast signal, individual apartment owners or tenants may not have the practical ability to do so, due to lack of access to areas within the building or on the rooftop; rules imposed by landlords, co-op boards, or condo boards; or other impediments. By expanding the reach of broadcast signals to anyone with an Internet connection, Locast's service helps residents overcome those problems. Locast does not modify the ***content*** of any television programming. Locast merely changes the ***format*** of a signal, and in so doing expands the reach of the signal, just like an old-fashioned over-the-air booster or translator. Locast may use a different technology from the one Congress had in

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concerned with [a specific problem]" "does not demonstrate that Congress meant to limit [the statute's] application to [that problem]").

[67] Locast, *About*, https://www.locast.org/about.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news.

mind. But it is still performing the same basic function of retransmitting broadcast signals in a manner that broadens their reach.

Accordingly, nothing in the legislative history warrants the extreme step of departing from the plain meaning of statutory text that unambiguously covers Locast's system. Had Congress wanted a narrow non-profit exemption that applied only to boosters or translators that used a particular technology in existence at the time, it could have written the statute in those terms. But it did not. "[W]hen narrow language [would] suffice to solve the particular problem at issue, Congress's choice of broad language demonstrates the statute's intended breadth of application."[72] The non-profit exemption's broad, medium-neutral language thus shows that Congress intended the exemption to sweep more broadly than the specific technologies that inspired it. Locast's service fits comfortably within the terms of the statute Congress enacted.

C. *Locast's Use of the Internet Does Not Disqualify It from the Exemption*

Locast retransmits television programming over a medium—the Internet—that did not exist when Congress enacted the non-profit exemption in 1976. Locast's use of that new medium does not disqualify its system from the statutory exemption.

Aside from the specific exclusion for cable systems, the statutory exemption is written in broad, technologically neutral terms. The exemption covers "secondary transmissions" generally and does not specify or limit the means by which the transmissions are made.[73] To the contrary, the Copyright Act defines "transmit" broadly to include communications "by ***any*** device or process," and it defines "device" and "process" to include both ones "now known ***or later developed***."[74] The relevant statutory definitions thus expressly contemplate future technologies. Even absent such explicit language, courts do not normally read a facially broad statute to exclude new technologies merely

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[72] *Consumer Elecs. Ass'n*, 347 F.3d at 299 (citing *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 373 (1986)); *see also Viacom Int'l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 37 (2d Cir. 2012) (rejecting narrow interpretation where "the statute could have accomplished that result in a more direct manner").

[73] 17 U.S.C. §111(a)(5).

[74] *Id.* §101 (emphasis added).

because they did not exist when Congress enacted the statute.[75] Here, Congress expressly told courts to do the opposite.

As already noted, the Supreme Court held that Aereo "transmitted" programs within the meaning of the Copyright Act even though Aereo used an Internet streaming technology that did not exist in 1976.[76] The Court relied on the same "device or process" language that applies here.[77] All four major broadcast networks have argued that Internet-based television retransmission systems "transmit" programming within the meaning of the statute despite their use of new technology.[78] While those authorities were construing the scope of the public performance right rather than the scope of the non-profit exemption, that difference is immaterial here: Both provisions ultimately depend on the same statutory term "transmit."[79] Either Congress meant to include Internet-

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[75] *See, e.g.*, *Diamond v. Chakrabarty*, 447 U.S. 303, 316 (1980) ("Congress employed broad general language in drafting §101 [of the Patent Act] precisely because . . . inventions are often unforeseeable."); *E. Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 127-34 (2d Cir. 1982) (applying Copyright Act's passive carrier exemption to microwave retransmitter even though technology did not exist when statute was enacted); *Infinity Broad. Corp. v. Kirkwood*, 63 F. Supp. 2d 420, 422-23 (S.D.N.Y. 1999) (by "framing a statute in more general language," Congress "declined to lock itself in to the technology of the day," and "the fact that [a] defendant employs technology that could not have been foreseen with specificity is not sufficient to deprive it of the benefit of the exemption"); *cf. PGA Tour, Inc. v. Martin*, 532 U.S. 661, 689 (2001) ("[T]he fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.").

[76] *Am. Broad. Cos. v. Aereo, Inc.*, 134 S. Ct. 2498, 2508 (2014).

[77] *See id.* ("When an Aereo subscriber selects a program to watch, Aereo streams the program over the Internet to that subscriber. Aereo thereby 'communicate[s]' to the subscriber, by means of a 'device or process,' the work's images and sounds." (quoting 17 U.S.C. §101)).

[78] *See, e.g.*, *Fox Television Stations, Inc. v. FilmOn X, LLC*, 966 F. Supp. 2d 30, 43 (D.D.C. 2013) (noting argument by four broadcast networks that FilmOn "falls squarely within the Transmit Clause").

[79] *Compare* 17 U.S.C. §106(4) (granting exclusive right "to perform the copyrighted work publicly"), *and id.* §101 (defining this phrase to include "***transmit[ting]*** or otherwise communicat[ing] a performance . . . of the work . . . to the public" (emphasis added)), *with id.* §111(a)(5) (exempting a "secondary transmission . . . made by a governmental body, or other nonprofit organization"), *and id.* §111(f)(2) (defining "secondary transmission" to include "the further ***transmitting*** of a primary transmission simultaneously with the primary transmission" (emphasis added)).

based transmissions within the scope of that term or it did not. Content owners cannot have it both ways.

Moreover, the very fact that the Section 111(a)(5) exemption ***excludes*** "secondary transmission[s] . . . made by a cable system" shows that it does not ***also*** exclude transmissions made over the Internet. The cable system exclusion shows that Congress consciously focused on what sorts of transmission media should be included or excluded from the statutory exemption. Congress decided to exclude only one specific medium: cable systems. Engrafting additional exclusions, even for technologies that did not exist at the time, would be inconsistent with the provision's structure, which covers all transmission media ***other than*** one specifically identified exclusion.[80]

To be sure, the Copyright Office and the courts have construed a ***different*** provision of Section 111 not to apply to the Internet: They have repeatedly refused to extend the statutory license for "cable systems" to Internet-based television retransmission systems.[81] But for several reasons, the rationales justifying that interpretation do not apply here and actually cut in Locast's favor.

First, those authorities were construing specific statutory text, namely the definition of the term "cable system" in Section 111(f)(3). The courts relied on various features of that ambiguous text, as well as the Copyright Office's longstanding interpretation, to conclude that the statutory license for "cable systems" does not cover Internet-based retransmission services.[82] Here, by contrast, there is no ambiguous text in Section 111(a)(5)'s non-profit exemption that could plausibly be read to exclude Internet-based retransmission services. Nothing in the courts' construction of the specific term "cable system" supports a free-floating "Internet exception" to copyright exemptions in the absence of statutory text that could plausibly support that result. As already noted, the non-profit exemption's only medium-based exclusion is for cable systems, which the Copyright Office and the courts have construed ***not*** to include Internet-based systems. Locast's position that it is not a cable system is thus the ***opposite*** of the

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[80] *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980) ("Where [a law] explicitly enumerates certain exceptions . . . , additional exceptions are not to be implied, in the absence of evidence of a contrary . . . intent.").

[81] *See Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1015 (9th Cir. 2017); *WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 284 (2d Cir. 2012); and other authorities cited *supra* notes 57-58.

[82] *See, e.g.*, *Aereokiller*, 851 F.3d at 1011-12; *ivi*, 691 F.3d at 280.

position that the Copyright Office and the courts rejected in the statutory license context. Locast seeks a result that is ***supported*** by those prior rulings.

The specific features of the "cable system" definition that the courts and the Copyright Office have relied on are also absent here. For example, courts have pointed to language in the "cable system" definition and related statutory license provisions that refer to "headends" and "contiguous communities"—terms that exclude inherently decentralized distribution media like the Internet.[83] Section 111(a)(5)'s non-profit exemption contains no comparable language on which one could base an "inherently localized" requirement. In any event, Locast ***is*** inherently localized: It distributes New York broadcast programming only within the local New York City market.[84]

The courts and the Copyright Office have also relied on Congress's history of creating new statutory licenses as new technologies emerged.[85] For example, after initially creating a statutory license for cable systems in 1976, Congress later created a ***separate*** statutory license for satellite carriers like Dish and DirecTV—a statutory license that would be unnecessary if the original cable system license applied to all retransmission services regardless of their medium.[86] Again, there is no similar history with respect to the non-profit exemption. Congress has not expanded that exemption or created new non-profit exemptions as new technologies have emerged. That history suggests that Congress understands the non-profit exemption to be a broad, technologically neutral provision.

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[83] *See, e.g.*, *Aereokiller*, 851 F.3d at 1013-14 (noting "§111's many instances of location-sensitive language, including 'headends,' 'contiguous communities,' and 'distant signal equivalent'" (citing 17 U.S.C. §111(d)(1), (f)(3), (f)(5))); *Cable Compulsory Licenses: Definition of Cable Systems*, 62 Fed. Reg. 18,705, 18,707 (Apr. 17, 1997) (opining that "a provider of broadcast signals [must] be an inherently localized transmission media of limited availability to qualify as a cable system").

[84] *See* Locast, *News: FAQs* (Feb. 9, 2018), https://www.locast.org/news ("Q: Can I get Locast.org outside the New York City Designated Market Area? A: No. We use geo-fencing technology to make sure that if you are outside the local market boundary (the 'Designated Market Area' as defined by Nielsen), you cannot receive the programming stream.").

[85] *See, e.g.*, *Aereokiller*, 851 F.3d at 1009; *ivi*, 691 F.3d at 281-82.

[86] *See* 17 U.S.C. §§119, 122.

Courts have also relied on the Copyright Office's longstanding interpretation of the statutory license to exclude Internet-based services.[87] The Copyright Office has not expressed any comparable opinion with respect to the non-profit exemption. Of course, an agency's unreasonably narrow construction of an exemption cannot overcome express statutory text to the contrary, so even a Copyright Office opinion adverse to Locast would not justify excluding it from the non-profit exemption.[88] But the fact that the Copyright Office has not even attempted to adopt such an interpretation is yet another reason the case law construing the statutory license is inapposite.

Content owners may argue that the non-profit exemption in Section 111(a)(5) should be construed narrowly for the simple reason that it is an exception to the copyright holder's exclusive rights. But as the Second Circuit observed in another recent copyright case, "[t]here is simply no reason to assume as a general proposition that a legislature intended all exceptions to all general principles to be construed narrowly—or broadly for that matter."[89] "[T]he proposition . . . that exceptions must in all circumstances be construed narrowly, 'and any doubts must be resolved against the one asserting the exception' . . . is arbitrary and without logical foundation."[90] How broadly to construe a statutory provision depends on the breadth of the statutory language itself, and "the Supreme Court has consistently instructed that statutes written in broad, sweeping language should be given broad, sweeping application."[91] The broad, technologically neutral terms of Section 111(a)(5) call for its broad, technologically neutral application.[92]

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[87] *See, e.g.*, *Aereokiller*, 851 F.3d at 1015; *ivi*, 691 F.3d at 283-85.

[88] *See, e.g.*, *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

[89] *Capitol Records, LLC v. Vimeo, LLC*, 826 F.3d 78, 91 (2d Cir. 2016).

[90] *Id.*; *see also Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) (absent a "textual indication" that exemptions should be construed narrowly, "there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation").

[91] *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 298 (D.C. Cir. 2003).

[92] A narrow construction rule makes particularly little sense for Section 111(a)(5). As explained below, Congress enacted that provision after balancing competing objectives, recognizing that non-profit retransmission services promote the public interest by increasing access to broadcast television while generating no profits that should rightfully be shared with content owners. Construing the exemption narrowly to promote copyright holder interests would ignore the fact that Congress consciously

Moreover, the reasons that may exist for construing a ***compulsory license*** narrowly in the face of new technology do not apply to the non-profit exemption. The cable system compulsory license is a comprehensive and finely tuned regime applicable to a specific retransmission medium.[93] Courts are rightly hesitant to presume that Congress would want them to bring new and different technologies within the scope of that carefully calibrated structure. By contrast, Section 111(a)(5) is a straightforward exemption from copyright liability for non-profit retransmission systems that, apart from its exclusion of cable systems, is technologically neutral. The same considerations of upsetting detailed regulatory structures do not apply.

In any event, whether the exemption is construed narrowly or not, Locast's Internet-based service falls squarely within the plain language of the provision. Courts resort to canons of construction such as narrow construction rules only when the statutory text is ambiguous.[94] Locast is precisely the sort of non-profit retransmission service that Congress sought to exempt. It is thus entitled to invoke the statutory exemption.[95]

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subordinated those interests in this context, choosing to pursue a different and no less pressing objective instead—an objective that Locast directly advances by increasing access to broadcast television.

[93] *See, e.g.*, 17 U.S.C. §111(c)-(f); 37 C.F.R. §201.17; H.R. Rep. No. 94-1476, at 89 (referring to the "series of detailed and complex provisions which attempt to resolve the question of the copyright liability of cable television systems").

[94] *See, e.g.*, *ivi*, 691 F.3d at 279 ("If the statutory language is ambiguous, we look to the canons of statutory construction . . . .").

[95] Content owners may argue that construing Section 111(a)(5) to cover Internet-based services would put the United States in violation of its treaty obligations—specifically, certain bilateral free trade agreements in which the United States agreed not to permit Internet retransmission of content without the owner's consent. *See Aereokiller*, 851 F.3d at 1011 ("[A]s Fox points out, interpreting §111 so as to include Internet-based retransmission services would risk putting the United States in violation of certain of its treaty obligations. An age-old canon of construction instructs that 'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804))). But the *Charming Betsy* canon applies only where the statutory text is ambiguous, and there is no ambiguity here. Moreover, the relevant free trade agreements were entered into decades after Congress enacted the Copyright Act in 1976. Those agreements shed no light on Congress's intent at the time it enacted the statutory exemption.

D. *Locast's Service Is Consistent with Congress's Broader Objectives in the Copyright Act*

Finally, applying the non-profit exemption to Locast is consistent with Congress's broader purposes in Section 111. When Congress enacted that provision in 1976, it faced competing objectives. On the one hand, Congress recognized that broadcast television had long been available for free over the airwaves and that there was a public interest in expanding the availability of that programming.[96] On the other hand, Congress believed that commercial services that profited from the carriage of copyrighted content should, in fairness, share those fruits with the programs' creators.[97] Congress thus struck a balance in Section 111 "between the public's interest in ever-improved access to broadcast television and the property rights of copyright holders."[98]

Congress struck that balance differently for different types of systems. For cable systems, Congress recognized that operators served an important public interest by expanding access to broadcast television programs.[99] But Congress

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[96] *See* H.R. Rep. No. 94-1476, at 361 (1976) (concurring views) ("[The] capability to broaden our horizons and to bring education, information and entertainment to people everywhere . . . is in the public interest and for the public benefit."); H.R. Rep. No. 90-83, at 52 (1967) (supporting copyright exemption for services that "improve reception of subscribers who cannot get good reception from stations in their area because of mountains, buildings, or the like"); Dale N. Hatfield & Robert Alan Garrett, *A Reexamination of Cable Television's Compulsory Licensing Royalty Rates*, 5 Hastings Comm. & Ent. L.J. 681, 688 n.23 (1983) (quoting unpublished Senate subcommittee report discussing "'the public interest in securing access to a larger number of television channels and a greater variety of programming'" and the importance of ensuring "the public would obtain 'the benefit[s] of the advances in communication technology'"); *WPIX, Inc. v. ivi, Inc.*, 765 F. Supp. 2d 594, 615 (S.D.N.Y. 2011) ("When Congress enacted Section 111 it wanted everyone to have access to the network television provided by their local broadcast stations.").

[97] *See* H.R. Rep. No. 94-1476, at 89 (stating that "commercial enterprises whose basic retransmission operations are based on the carriage of copyrighted program material" should compensate "the creators of such programs").

[98] *Fox Television Stations, Inc. v. Aereokiller, LLC*, 851 F.3d 1002, 1014 (9th Cir. 2017).

[99] *See Aereokiller*, 851 F.3d at 1010 ("Congress recognized that cable systems served an important public good, by enabling geographically distant and isolated communities to receive over-the-air broadcasts that would otherwise not reach them.").

also viewed cable systems as "commercial enterprises" and believed that "copyright royalties should be paid by cable operators to the creators of such programs."[100] At the same time, Congress recognized that it would be impractical to require cable systems to obtain consent from individual content owners for every program they carry.[101] A consent requirement would thus undermine cable systems' ability to deliver programming, thwarting the strong public interest in expanding access to broadcast television. Congress therefore adopted a middle ground, enacting a statutory license that would allow cable operators to retransmit programs without obtaining consent.[102] By doing so, Congress "[b]alanc[ed] two societal benefits, . . . enabl[ing] cable systems to continue providing greater geographical access to television programming while offering some protection to broadcasters to incentivize the continued creation of broadcast television programming."[103]

Congress struck a very different balance for ***non-profit*** retransmission services. Non-profit services, like cable systems, promote the public interest by retransmitting broadcast television and thus increasing public access to it. But unlike cable systems, non-profit services earn no profits from copyrighted works and thus do not implicate Congress's concern that such profits should, in fairness, be shared with their creators. Accordingly, while granting a statutory license to cable systems, Congress granted a complete exemption from liability to

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[100] H.R. Rep. No. 94-1476, at 89; *see also* 17 U.S.C. §111(f)(3) (defining cable systems to include only systems where subscribers "pay for such service").

[101] H.R. Rep. No. 94-1476, at 89 (recognizing that "it would be impractical and unduly burdensome to require every cable system to negotiate with every copyright owner whose work was retransmitted by a cable system").

[102] *See* 17 U.S.C. §111(c), (d).

[103] *ivi*, 691 F.3d at 281; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 710-11 (1984) ("Compulsory licensing not only protects the commercial value of copyrighted works but also enhances the ability of cable systems to retransmit such programs carried on distant broadcast signals, thereby allowing the public to benefit by the wider dissemination of works carried on television broadcast signals."); *Aereokiller*, 851 F.3d at 1010 (compulsory license was "Congress's attempt to balance the socially useful role cable systems had come to play, on the one hand, against the property interests and creative incentives of copyright holders, on the other"); *E. Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982) ("Congress drew a careful balance between the rights of copyright owners and those of CATV systems, providing for payments to the former and a compulsory licensing program to insure that the latter could continue bringing a diversity of broadcasted signals to their subscribers.").

non-profit retransmission services.[104] The fundamental distinction between the Section 111(c) statutory license and the Section 111(a)(5) exemption thus had nothing to do with the mechanism for retransmission. It turned instead on the fact that cable systems were for-profit commercial enterprises while non-profit entities were not.[105]

That distinction between for-profit and non-profit uses of a work pervades both Section 111 and the Copyright Act generally. Section 111(a)(1), for example, exempts retransmissions by a "hotel, apartment house, or similar establishment" for which "no direct charge is made to see or hear the secondary transmission," while excluding transmission made by a (fee-based) "cable system."[106] Section 111(a)(2) exempts certain retransmissions made in connection with "instructional activities of a governmental body or an accredited nonprofit educational institution."[107] Other examples appear elsewhere throughout the Copyright Act.[108] By drawing that distinction in Section 111, Congress immunized and thus encouraged retransmissions that increase access to broadcast programming, so long as they were not done for private financial gain that should in fairness be shared with copyright owners.

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[104] 17 U.S.C. §111(a)(5).

[105] *See* H. Comm. on the Judiciary, 89th Cong., *Supplementary Register's Report on the General Revision of the U.S. Copyright Law* 42 (Comm. Print May 1965) (distinguishing between cable systems that produce "a profit which in fairness the copyright owner should share" and the "activities of those who install or operate a nonprofit 'translator,' 'booster,' or similar equipment which merely amplifies broadcast signals and retransmits them to everyone in an area for free reception").

[106] 17 U.S.C. §111(a)(1).

[107] *Id.* §111(a)(2) (exempting secondary transmissions "made solely for the purpose and under the conditions specified by paragraph (2) of section 110," which addresses instructional activities of governmental bodies and nonprofit educational institutions).

[108] *See, e.g.*, 17 U.S.C. §110(1) (exempting performances or displays "in the course of face-to-face teaching activities of a nonprofit educational institution"); *id.* §110(2) (exempting certain transmissions by "a governmental body or accredited nonprofit educational institution"); *id.* §110(4) (exempting certain performances of nondramatic literary or musical works if made "without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers," if "there is no direct or indirect admission charge" or the net proceeds are "used exclusively for educational, religious, or charitable purposes and not for private financial gain"); *id.* §112 (exempting various conduct in connection with ephemeral recordings by "a governmental body or other nonprofit organization").

That same distinction between for-profit and non-profit services also appears in other statutes that govern the retransmission of broadcast television. The Communications Act, for example, imposes a number of obligations on "multichannel video programming distributors" or "MVPDs," including a "retransmission consent" obligation to obtain permission from a broadcaster before retransmitting its signal.[109] The statute, however, defines MVPDs to include only entities that make programming "available for purchase" and thus excludes entities like Locast that retransmit programming free of charge.[110] The Communications Act, like the Copyright Act, thus recognizes that the public interest in expanding access to broadcast television outweighs broadcasters' interest in control over their programs where the retransmission service provider is not profiting from the programs.[111]

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[109] 47 U.S.C. §325(b)(1) ("No cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station, or any part thereof, except . . . with the express authority of the originating station.").

[110] 47 U.S.C. §522(13) (defining MVPD as "a person such as, but not limited to, a cable operator . . . who makes available for purchase, by subscribers or customers, multiple channels of video programming"). The FCC has interpreted the phrase "available for purchase" to require an "exchange . . . for money"—a definition that excludes voluntary donations of the sort Locast receives. *See In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Services*, 29 FCC Rcd. 15,995, ¶27 (Dec. 19, 2014) ("We tentatively conclude that the term means making an offer to consumers to exchange video service for money.").

[111] Locast is exempt from the retransmission consent requirement for other reasons as well. The Federal Communications Commission has construed the MVPD definition to apply only to services that transmit programming over a dedicated transmission path, not to services that use a public network such as the Internet. *See In re Sky Angel U.S., LLC*, 25 FCC Rcd. 3879, 3883 (Apr. 21, 2010). That is why Internet-based television services such as Hulu, Sling TV, and PlayStation Vue need not comply with the rules applicable to MVPDs. In 2014, the FCC issued a notice of proposed rulemaking addressing whether it should reconsider its position. *See In re Promoting Innovation & Competition in the Provision of Multichannel Video Programming Distribution Services*, 29 FCC Rcd. 15,995, ¶18 (Dec. 19, 2014). But the proposed rule was controversial, and the FCC has not acted on it. *See* Mario Trujillo & David McCabe, *Overnight Tech: FCC Puts Online Video Regs on Hold*, The Hill, Nov. 17, 2015 (quoting statement of FCC Chairman during a House Energy and Commerce hearing that, in light of opposition to the proposed rule, "we have not moved forward on that notice of proposed rulemaking and don't see, until situations change, we would").

Applying the non-profit exemption to Locast is thus fully consistent with Congress's broader goals. Locast retransmits television broadcasts over the Internet to members of the public who may be unable to receive over-the-air signals. That service directly advances Congress's goal of expanding access to free broadcast programming. At the same time, Locast is run by a non-profit entity without any charge to subscribers and without any purpose of commercial advantage. Locast thus does not implicate Congress's concerns about ensuring that profits derived from copyrighted works be shared with their creators.

Broadcasters may claim that Locast nonetheless impacts their economic interests by diverting viewers from other mediums such as cable—a medium from which broadcasters derive substantial profits in the form of retransmission consent fees. But that is not a basis for excluding Locast from the non-profit exemption. Congress did not enact the retransmission consent regime until 1992, decades after the exemption.[112] Locast does not undermine any legitimate investment-backed expectations broadcasters could have had in 1976. At that time, the vast majority of consumers still received broadcast television free of charge over the airwaves, and broadcasters supported their operations through advertising. Locast does not undermine that model any more than an over-the-air booster or translator would.[113] In any event, Congress considered the economic impacts of television retransmission and concluded that, in light of the strong public interest in expanding access to broadcast programming, retransmission services should not have to pay for the content unless they profit from it. Locast's non-profit retransmission service is thus fully consistent with Congress's goals.

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[112] *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, §6, 106 Stat. 1460, 1482. Even after Congress enacted that provision, it was many years before broadcasters began routinely demanding large payments as a condition for retransmission consent.

[113] That is particularly true given that Locast retransmits broadcast programming only within the broadcasters' local New York service area. *Cf.* H.R. Rep. No. 94-1476, at 90 (concluding that royalty payments under the statutory license "should be limited to the retransmission of distant non-network programming" because "there was no evidence that the retransmission of 'local' broadcast signals by a cable operator threatens the existing market for copyright program owners" and "[t]he copyright owner contracts with the network on the basis of his programming reaching all markets served by the network and is compensated accordingly").

III. Conclusion

Locast offers an innovative retransmission service that expands the availability of free television broadcast programming in the New York market. We find nothing in the Copyright Act that prohibits Locast from offering that service. Locast may use a technology different from the boosters and translators with which Congress was familiar. But Locast falls squarely within the terms of the statute and provides the same sort of non-profit retransmission service that Congress sought to protect and encourage.