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Court Orders ivi TV to Stop Retransmitting TV Programming Via the Internet

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In a closely watched case, the U.S. District Court for the Southern District of New York has issued a preliminary injunction ordering ivi, Inc. (pronounced "ivy") to immediately stop retransmitting broadcast television programming over the Internet. The company was sued by the major broadcast networks, a professional sports league, motion picture studios and individual broadcast television stations, all of which claim that ivi TV infringes copyrights in their broadcast content. Although the ruling is not a final decision on the merits, it has forced ivi to suspend retransmission of broadcast channels.

ivi TV is a fee-based service that retransmits broadcast television from the major network affiliates in New York, Los Angeles and Seattle and other providers to a national audience over the Internet. Viewers access the streams from any Internet-capable device. ivi claims that it is legally entitled to retransmit television broadcasts because it qualifies as a virtual "cable system" pursuant to Section 111 of the Copyright Act. Under Section 111, cable systems may retransmit television broadcasts in defined circumstances pursuant to a statutory license. According to ivi, its service differs from the FilmOn service shut down by this same court in November 2010 because ivi has paid the compulsory license fees under Section 111 to the U.S. Copyright Office. (Click here for our discussion of the *FilmOn* decision.) ivi also contends that, unlike FilmOn, its content streams are encrypted and can be accessed only by paying subscribers in the United States; thus, ivi claims that it qualifies as a "cable system" eligible for the Section 111 license. ivi does not, however, obtain retransmission consent from the programming owners or comply with FCC rules and regulations for "cable systems" under the Communications Act, 47 U.S.C. § 325.

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Judge Naomi Buchwald issued a lengthy opinion, noting that the real world consequences of ivi's position would result in ivi paying only approximately $100 per year in licensing fees against the "millions of dollars a year to create copyrighted programming." The court relied heavily on prior decisions and statements by the Copyright Office that Internet retransmission services do not qualify for a Section 111 license.

In the court's view: (1) a service providing Internet retransmissions cannot qualify as a cable system; (2) the compulsory license for cable systems is intended only for localized retransmission services, and cannot be utilized by a service which retransmits broadcast signals nationwide; and (3) the FCC rules and regulations are integral to the statutory licensing scheme established in 1976. In sum, the court found that, although some new technologies have been found to qualify under the Section 111 license, no such new technology both retransmits to a national audience and fails to comply with the rules and regulations of the FCC.

First, the court considered the Copyright Office's view that the Section 111(f) definition of "cable system" refers to "headends," "contiguous communities" and "distant signal equivalent," which apply to local, not nationwide, retransmission services. The court also concluded that ivi is not necessarily a "facility" under Section 111(f) which both "receives" signals and "makes" secondary transmissions. Because ivi operates through Internet-connected software, servers and computers, the court reasoned, ivi does not own any transmission facilities.

Second, the court found that, in the view of the Copyright Office, the Section 111 license was never intended to cover services which enable the retransmission of programming "instantaneously worldwide." Instead, the license covers only very localized services. According to the court, Internet transmissions do not fit this profile.

The court also agreed with the Copyright Office's findings that the FCC rules and regulations are integral to the statutory scheme, because Congress understood that any cable system that would be subject to the license also would be subject to FCC regulation. Notably, the court found that, "[w]hile the Copyright Office . . . does not view the definition of 'cable system' in the Communications Act and the Copyright Act to be coterminous, no company or technology which refuses to abide by the rules of the FCC has ever been deemed a cable system for purposes of the Copyright Act." The court thus distinguished the Copyright Office's endorsement of the Section 111 license for IPTV, finding that, "although AT&T has maintained it is not governed by the Communications Act, as far as this Court is aware it has been complying with the rules and regulations applicable to cable systems under that statute in any event. Most notably, it obtains retransmission consent." In the court's further view, IPTV services do not use the Internet to deliver programming and do not offer a nationwide service; owners own and control the wires entering customers' homes and therefore can prevent infringement.

The court gave short shrift to ivi's argument that its encryption and geographic limitations through IP address blocking are equivalent to a "closed system" like the IPTV services, which own and control the access points to the home. The court noted in a footnote that, "While there is no requirement in Section 111 that a company own the wires in order to be a cable system, surely whether a company has any control over the wires, and thus can prevent piracy, is relevant."

In the end, the court held that the plaintiffs had "easily met" their burden of showing a likelihood of success on the merits. "Allowing ivi to continue its retransmissions would," according to the court, "stretch the compulsory license far beyond the boundaries that the enacting or any later Congress could have ever imagined." In addition, the district court also concluded that the other factors of the preliminary injunction test-irreparable harm, balance of hardships, and public interest-all favored the plaintiffs.

Just one week after the district court's ruling, ivi has appealed the preliminary injunction to the Second Circuit and has asked for a stay of the order pending appeal. According to a statement by ivi CEO Todd Weaver, the company has suspended its broadcast channels, but will "explore Congressional and Administrative solutions."