UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WPIX, INC., ET AL., Plaintiffs, v. IVI, INC. and TODD WEAVER, Defendants.	Docket No. 10 Civ. 7415 (NRB)

MEMORANDUM IN SUPPORT OF MOTION TO STAY

PRELIMINARY INJUNCTION PENDING APPEAL

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Defendants ivi and Weaver (collectively referred to as "ivi") request an order staying implementation of the Court's February 22, 2011 preliminary injunction pending their appeal of the entry of that order. ivi respectfully disagrees with the Court's order and contends there is a substantial likelihood that it will be reversed on appeal. The ivi secondary broadcasts are just like those of other cable systems and ivi should not be excluded from the statutory license. Indeed, even "traditional" cable systems today increasingly make television content available on the Internet and other computer media. Congress intended the statutory license to be construed broadly to incorporate new technologies, and there is no reason to exclude the use of the wires of the Internet to exclude the ivi television system from the scope of the license. The language of Section 111 is clear on its face and there is no basis for deference to any Copyright Office statements concerning the scope of the statutory license, which are devoid of rulemaking procedure.

The Court's order states that ivi refuses to comply with FCC rules, but ivi respectfully disagrees. ivi complies fully with every FCC requirement applicable to its conduct. In fact, the Media Companies themselves have no greater permission from the FCC for their Internet television broadcasts than ivi has received for its transmissions.

The comparison of the relative injuries to ivi and the Media Companies also favors a stay of the injunction. ivi will be irreparably harmed, having to cease its service, end its primary means of income, and address dissatisfied subscribers whose service is summarily terminated. Meanwhile, the Media Companies have no demonstrable injury at all. If the injunction is stayed then ivi would continue to transmit the same content that is readily available over the air and through numerous other sources for free. Other than wild speculation having no basis in fact, the Media Companies cannot point to any genuine harm if the injunction is stayed.

ARGUMENT

There are four factors to be evaluated when considering a stay of an injunction pending appeal, including (1) whether the stay applicant has made a strong showing of likelihood of success on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies. *In re World Trade Center Disaster Site Litig*., 503 F.3d 167, 170 (2d Cir. 2007) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). In considering these factors, the degree to which one factor must be present varies with the strength of the other factors, meaning that more of one factor excuses less of the other. *Id*. (citing *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006)).

I. ivi is likely to succeed on appeal

ivi need not demonstrate that it is certain to succeed on appeal; rather, it must demonstrate a "substantial possibility" of success on appeal. *Mohammed v. Reno*, 309 F.3d 95, 101 (2d Cir. 2002) (*quoting Dubose v. Pierce*, 761 F.2d 913, 920 (2d Cir. 1985)). In this case, ivi has at least a substantial possibility of success on appeal, thereby supporting a stay of the injunction.

A. ivi meets the statutory definition of "cable system"

Section 111 of the Copyright Act provides a statutory license for cable systems that receive over-the-air broadcasts and pass them along as secondary transmissions, defining a "cable system" as:

> A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, 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. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.

17 U.S.C. §111(f)(3).

Under the plain meaning of Section 111, ivi meets every aspect of the definition of "cable system" under the Copyright Act, and therefore should be entitled to a statutory license. ivi is a facility located within the U.S. that receives signals transmitted by the broadcast stations operated by the plaintiffs in this action and then makes secondary transmissions of those signals. *See* Weaver Dec., Court Doc. 22, at ¶¶2-5. ivi also makes its secondary transmissions over wires, cables, microwave, or other communications channels to subscribers who pay for the service. *Id*. ivi has submitted payment to the Copyright Office with its Statement of Account in accordance with the statutory license. *See* Supplemental Graham Dec. The only way to exclude ivi from the definition of a cable system is by imposing additional restrictions not found in the text of the statute itself. ivi respectfully contends that the preliminary injunction contains this legal error and therefore the judgment has at least a substantial possibility of being reversed on appeal.

B. Congressional intent and Copyright Office actions do not exclude ivi

A fundamental component of the preliminary injunction order is that ivi's cable system does not fit with Congressional intent and would not be approved by the Copyright Office. ivi appreciates general principles of statutory construction in which the Court must look to a statute's objectives and policy as aids in interpreting its wording. *See Langhorne v. Ashcroft,* 377 F.3d 175, 180 (2d Cir. 2004). As discussed more fully below, that process must interpret the language of the statute and cannot impose additional limitations not found within the statute itself. Because the statute is unambiguous and further because there are no Copyright Office rules addressing the question at issue here, the statute should not be interpreted to exclude a system such as ivi's.

To the extent Congressional intent is relevant, it supports a broad reading of Section 111. The Supreme Court has recognized the broad intent of Section 111, noting that it advances the public purposes of rewarding the creators of copyrighted works while promoting broad public availability of those works. *Capital Cities Cable v. Crisp,* 467 U.S. 691, 710, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Prior to *Capital Cities* and the enactment of Section 111, the retransmission of either local or distant signals was not an act of copyright infringement at all, and required no compensation whatsoever to the copyright owners. *Fortnightly Corp. v. United Artists*

Television, 392 U.S. 390 (1968); *Teleprompter Corp. v. Columbia Broad. Sys., Inc*., 415 U.S. 394 (1974). Thus, the Supreme Court has recognized the competing goals of protecting the author's rights while promoting broad access, tipping the balance in favor of broad access.

With the passage of Section 111, the definition of "cable system" was intended to be very broad and to anticipate new technologies that might be used as a means of transmission. While Congress may have intended other statutory licensing provisions to be construed more narrowly, *see Fame Publ'g Co. v. Alabama Custom Tape, Inc*., 507 F.2d 667, 670 (5th Cir. 1975), the legislative history related to Section 111 supports the "conclusion that Congress intended to paint with a broad brush." *Nat'l Broad. Co., Inc. v. Satellite Broad. Networks, Inc.*, 940 F.2d 1467, 1470 n.5 (11th Cir. 1991). For its part, the Copyright Office also concedes that Section 111(f) defines a cable system quite broadly. SHVERA Report, at p. 199; Bierman Dec., Court Doc. 24, at ¶15. Likewise, the Copyright Office acknowledges that Internet Protocol television fits within this very broad definition of a cable system. *Id.*

The Copyright Office, and the Court's order, states that Congress intended for secondary transmissions by cable systems to be an inherently localized media of limited availability. This conclusion by the Copyright Office is used by the Court as evidence of Congressional intent because there is no parallel statement by Congress that is contemporaneous with the passage of Section 111 itself. Yet even the Copyright Office acknowledges that at the time Section 111 was passed there were few local media outlets and instead most broadcast television was in the form of the three major national television networks of ABC, NBC, and CBS. *See* SHVERA Report, Ex. 10 to Morrow Dec., at p. 3. Furthermore, the pricing structure of the statutory license varies depending on whether the secondary transmissions are "local" or "distant," thereby confirming that Congress intended to, and did, allow for distant transmissions. Consequently, there is scant support for the proposition that Congress drafted Section 111 with the intent that it would not apply to cable systems making secondary transmissions beyond a region that was local to the primary transmissions.

Moreover, in its Report, the Copyright Office found that secondary transmissions similarly made over the Internet by AT&T U-Verse TV were not foreclosed by application of the Section 111 statutory license by its terms. SHVERA Report, at p. 199. The Office acknowledged that AT&T's system met "each of the elements of the cable system definition." *Id*. Just like the AT&T U-Verse system, ivi's facilities are terrestrial and closed, receive signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC, and make secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for the service. *See* Weaver Dec., Court Doc. 22, at ¶¶2-5.

Given this foundation, there is no basis to exclude ivi's technology as one that would not have been approved on the basis that it uses wires in the form of the Internet instead of other types of wires that might have been in use at the time. Indeed, the Copyright Office concluded that it would be "patently unfair" and would "thwart Congressional intent" to deny the benefits of statutory licensing to such new technologies when they are enjoyed by "traditional" cable companies, satellite carriers, and others. SHVERA Report, at p. 198. The reliance on Congressional intent erroneously introduces new restrictions into the definition of a cable system rather than interpreting the language actually approved by Congress.

C. The bases for excluding ivi are inconsistent with the statute and precedent

A key problem with the heavy reliance on the perceived Congressional intent is that it leads to inconsistent results because the interpretation of the statute is divorced from the language itself. The grounds for excluding ivi have nothing to do with the definition of a cable system expressed by the statute, and instead are based on attenuated concepts of whether ivi is the kind of company that looked like a cable system when the statute was first drafted. ivi respectfully contends that this process departs from statutory interpretation and instead is an exercise in legislation itself.

When "interpreting a statute a court should always turn to one cardinal canon before all others. . . .[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146, 1149 (1992). Indeed, "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" 503 U.S. 249, 254. If a statute is ambiguous in some respect, then the Courts may give deference to the reasonable interpretations of an agency implementing the statute. *Chevron U.S.A v Natural Resources Defense Council, et al.*, 104 S. Ct. 2778, 2781-2 (1984).

In this case, the statute is unambiguous. As noted above, there is no portion of the statute that does not readily apply to ivi, which has a terrestrial facility that makes secondary transmissions over wires, cables, or other communications channels to subscribers who pay. These and every other aspect of the statute are readily met by ivi.

If there were some ambiguity in the statute, then the Court could proceed to consider whether deference should be afforded to any interpretations made by the Copyright Office. Such deference should be afforded to agency rules, where "an agency rule sets forth important individual rights and duties, where the agency focuses fully and directly upon the issue, where the agency uses full notice-and-comment procedures to promulgate a rule, [and] where the resulting rule falls within the statutory grant of authority." *Mayo Found. For Med. Educ. & Research v. United States*, 131 S.Ct. 704, 714 (2011). In this case, there is no applicable agency rule that has been promulgated and that would focus fully and directly upon the issue of whether an Internet television system can qualify as a cable system.

The Court's order notes that *Skidmore* deference may apply even where the applicable rule is not entitled to *Chevron* deference. Under the Supreme Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), an agency's statutory interpretations are "not controlling upon the courts," and the weight accorded an agency interpretation "in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade." Thus, the Court may give persuasive deference to agency interpretations in rules promulgated by the agency. But even *Skidmore* deference requires an initial statutory ambiguity, and none exists here. While the Court may turn to Copyright Office statements for their persuasive value, none should be entitled to deference.

The Court's preliminary injunction order points to several aspects of ivi's system as grounds for excluding it from the definition of a cable system. These aspects include whether ivi owns its wires, the use of the "open" Internet, the nationwide transmission, the headend location, and FCC authorization. None of them are found in the Section 111, none relate to any statutory ambiguities allowing for *Chevron* or *Skidmore* deference, and none are proper grounds for excluding ivi from the availability of a statutory license.

1. There is no requirement to own wires or facilities

A first point of distinction is that ivi does not own its transmission wires, but rather uses wires and components connected to the Internet that may be owned by others. Order at p. 45. The physical structure of the hardware and wires used, separate from the question of who owns them, cannot be a reasonable point of distinction because the ivi system is structurally the same as the Internet Protocol systems of AT&T and U-Verse. Weaver Dec., Court Doc. 22, at ¶8. Moreover, as the Court noted, the Copyright Office endorsed the notion that distribution services using Internet Protocol could qualify as a cable system. Order at p. 38.

While AT&T and ivi both use the same types of wires, servers, routers, and other equipment, the central differences are that AT&T purportedly *owns* its wires, and therefore the AT&T system is a private system rather than a public one. With regard to ownership, there plainly is nothing in the statute requiring a cable system to own the wires that carry its signals instead of renting, leasing, or otherwise using a system of wires that are owned by another entity. Section 111 simply states that the secondary transmissions are made *using* wires, without any additional requirement concerning who owns them. Nor is there any ambiguity in the statute regarding the question of ownership, and no wording that could be susceptible of varying interpretations related to ownership of wires. Without any such ambiguity, there is no reason to turn to Copyright Office statements or other grounds for inserting an ownership requirement.

There is also no legislative intent or purpose that would be advanced by imposing an ownership requirement. Fundamentally, such a requirement would be anti-competitive, ensuring that large companies with the resources to build a large infrastructure are in a position to qualify as cable systems but smaller companies with fewer resources cannot. If anything, Congress would have intended to facilitate the growth of cable systems and would not have intended a peripheral issue such as wire ownership to serve as a qualifier.

At least one court has also considered and rejected the notion that Section 111 requires a cable system to build and own the wires that carry the secondary transmissions. *NFL v. Insight Communs. Corp.,* 158 F.Supp.2d 124 (D. Mass. 2001) (interpreting Section 111(a)(3) in holding that ownership of the wires is irrelevant because "Nothing in the authorities or legislative history, however, suggest that Congress intended that section to be read in such a crabbed fashion."). Consequently, ivi should not be excluded as a cable system on the grounds that it does not own the wires used to carry its secondary transmissions.

2. There is no exclusion related to "open" systems

A second and related point of distinction in the Court's order is that ivi uses the "open" Internet, and that makes ivi's system one of "Internet television" rather than "Internet Protocol television." In this regard, the Court's order acknowledges that there is nothing in Section 111 requiring a company to own its wires, but the Court stated that *control* over the wires was relevant to the issue of piracy. Order at p. 39, n.28. Regardless of whether piracy is a legitimate concern, there is simply nothing in the statute that limits the wires to systems that are "closed" or controlled by the cable system rather than systems that are in some sense "open." Further, there is nothing ambiguous about the very broad language related to "wires, cables, microwave, or other communications channels." The term is exceedingly broad and does not raise ambiguities regarding control.

Even if piracy issues may differ between open and closed systems, the issue of piracy was not one that was voiced by Congress and there is no original Congressional intent or purpose behind it. Rather, this issue is one that has arisen much later, long after the enactment of Section 111, in an effort to argue why an Internet-based system should not be allowed. With no textual requirement, textual ambiguity or Congressional intent, the Court should resist the urge to read into the statute a requirement to control the wires or that the wires must somehow be a "closed" system.

If piracy is a concern with respect to secondary transmissions, that concern should be addressed directly rather than indirectly. Even with closed systems in which cable systems own and control the wires, piracy is absurdly easy using today's technology. As ivi's Mr. Weaver explained, consumers can—and do—readily copy original television content and pass it along to others. Weaver Dec., Court Doc. 22, at ¶13. Plainly the ability to control the wires has nothing at all to do with whether the content can be copied, passed along, or otherwise pirated. Moreover, the content itself is given away for free in the first instance and then offered for free again—on the Internet—by the same Media Companies now disingenuously claiming to be concerned with piracy. *Id*. at ¶¶10-12.

Furthermore, ivi's system is not prone to piracy. The content is encrypted before transmission and directed exclusively to paying subscribers. It is decrypted in small increments shortly before viewing and then rendered unusable thereafter. It cannot be readily captured or passed along by consumers. *Id*. at ¶5. If piracy is the genuine concern (and assuming there is a statutory basis to address it) then a proposed cable system should be evaluated regarding whether its system is prone to piracy, not whether it controls or owns the wires. In this case, the ivi system is not susceptible to piracy and the evidence before the Court is to the effect that ivi's transmissions are less susceptible to piracy than those of other current closed cable systems.

Consequently, there is no reason to impose a requirement to control the wires under the guise of piracy concerns.

In addition, Congress revised Section 111 to add the use of microwaves as an approved form of communication channel. Microwaves are indisputably over the open air, making them more open than the Internet. There is no accompanying requirement that the microwave transmissions must be encrypted or otherwise encoded to prevent piracy. The absence of any such requirement, together with the absence of any statutory ambiguity, forecloses any interpretation that a cable system must own or control the wires or other communication channels it uses.

3. There is no geographic limitation

A further concern expressed in the Order is that ivi makes its secondary transmissions available nationwide. Yet again, there is no statutory language that can be construed to impose a distance limitation. Section 111 simply refers to secondary transmissions, with no language that can be reasonably construed to limit the distance those transmissions may travel.

While Congress imposed no distance limitation on cable transmissions generally, it surely knew how to impose such limits if it wanted to. Indeed, Section 111(c)(4) provides that the transmissions of signals originating in Canada may not be sent more than 150 miles from the United-States-Canadian border. That same paragraph contains restrictions on signals originating in Mexico, but does not include a distance limit. Certainly if Congress had intended to restrict the distance that secondary transmissions may travel it could have easily drafted Section 111 to provide a mileage limitation as it did with Canada. Without such an express provision, nor anything close to it, the definition of cable system cannot be construed to impose one.

The statutory licensing scheme also provides payment terms for “distant” transmissions, thereby contemplating that the secondary transmissions will include content that was not originally local. 17 USC § 111(d)(1)(C); Copyright Law Revision, H. R. Rep. No. 94-1476 p. 90-91 (1976); Bierman Dec., Court Doc. 24, at ¶2. Under this scheme, in accordance with original Congressional intent, the retransmission of network programming to a distant location was considered not to be worthy of any compensation because the copyright owner had already been compensated by the network under a presumption that the content would be distributed nationwide. The retransmission of non-network (localized) content to a distant location, however, was considered worthy of compensation because the copyright owner would not have likely exploited the work in that distant location and the cable system would likely acquire a benefit by attracting additional subscribers. Copyright Law Revision, H. R. Rep. No. 94-1476 p. 90 (1976); Bierman Dec., Court Doc. 24, at ¶2. Thus, the entirety of the statutory license structure is one that is premised on making secondary transmissions to locations that are distant from the source of the primary transmissions. Within that broad framework there is no restriction on the distance the secondary transmissions may travel.

While the Media Companies may be able to articulate reasons why they would prefer the statutory license did not allow nationwide transmissions, that does not mean Section 111 does not allow it. The statute has no such limitation, nor any language that can be reasonably construed to provide such a limitation.

Even if Section 111 could be interpreted to impose such a distance limitation, the preliminary injunction is too broad in that it prevents ivi from making any transmissions whatsoever, including those that could be considered local. To the extent the geographic reach of its secondary transmissions are a basis for the injunction, the order should be modified or stayed to allow for localized transmissions.

4. ivi meets any headend requirement

In addressing ivi's textual arguments, the Court's order states that the second sentence of Section 111(f)(3) contains concepts such as "headends" and "contiguous communities" which bear no relationship to technologies such as ivi's. Order at p. 44. ivi respectfully contends that ivi was erroneously excluded on this basis as well.

As an initial matter, the second sentence of Section 111(f)(3) is not part of the definition of a cable system. Indeed, it literally begins by stating that the headend and contiguous community aspects are for purposes of determining whether there is one system or more than one system for calculating the fee under subsection (d)(1). Moreover, the sentence is stated in the alternative: "two or more cable systems in contiguous communities under common ownership or control *or* operating from one headend shall be considered as one system." 17 U.S.C. 111 (2010) (emphasis added). It does not follow that a cable system must have a headend at all, nor does it impose any requirement regarding how such a headend must be configured in order to qualify as a cable system.

The term "headend" simply refers to the location from which the secondary signals emanate. Supplemental Bierman Dec. at ¶¶2-3. It is understood to apply to the IPTV context such as ivi's cable system. *Id*. It would be illogical to contend that ivi has no headend at all, because its signals surely most originate from someplace. In ivi's case, the primary signals are received and aggregated so that they are transmitted to consumers from one or more primary server locations that operate as a headend. The Copyright Office has similarly concluded that AT&T and U-Verse meet all of the requirements of a cable system, and to the extent they have a headend, ivi must have one as well.

The only applicable ruling by the Copyright Office is one that addressed satellite transmissions, rather than Internet cable systems. In that ruling, the Copyright Office concluded that that there was no facility *located in a state* as Section 111 requires because the headend of a satellite was not physically in any state. 57 Fed. Reg. 3284 (1992); Bierman Dec., Court Doc. 24, at ¶4. The Court acknowledges this distinction, but concludes that the Copyright Office pointed to additional issues, beyond the location of the headend in any state. Order at p. 24, n.17. While those additional points were articulated by the Copyright Office, they are surely dictum, do not address any statutory ambiguity, and depart from an exercise of statutory construction that should be entitled to any form of deference.

Finally, as noted above, the Copyright Office has accepted payment from ivi and has neither stated nor suggested that there is any particularized headend requirement. To the extent there is some particularized headend requirement, which ivi disputes, there is no statutory basis or applicable ruling that supports an interpretation that ivi does not satisfy it.

5. ivi's transmissions are permissible by the FCC

The injunction further states that ivi refuses to comply with FCC rules and that Section 111 was not intended to apply to cable systems that were not of the type regulated by the FCC in 1976. With respect to the first point, ivi has taken every possible step to ensure that it is fully in compliance with every FCC regulation applicable. There is simply no restriction for television broadcasts on the Internet, making ivi's transmissions unquestionably permissible by the FCC. Tellingly, there has been no complaint to the FCC by any of the plaintiffs in this action to the effect that ivi is in violation with any FCC rules. Likewise, many of the plaintiffs themselves are broadcasting television over the Internet with no greater licensing or permission than has been obtained by ivi. As such, ivi strenuously disagrees that it is in any way not in compliance with FCC regulations.

The Order states that ivi "refused" to obtain retransmission consent, but ivi respectfully disagrees. Although ivi was well aware that the FCC does not regulate the Internet, ivi nonetheless approached many media companies before it began commercial secondary transmissions. Thus, long before invoking the benefits of the statutory license ivi approached many companies to seek consent in the form of specific agreements rather than the statutory license. Weaver Dec., Court Doc. 22, at ¶14. Consistent with the Media Companies' desire to restrict competition, ivi was turned away. *Id*. Accordingly, if there has been any "refusal" it is in the form of the Media Companies refusing to deal with ivi rather than ivi refusing to discuss the issue of consent.

As noted at oral argument, ivi also met with numerous FCC officials to ensure that it was fully in compliance with all FCC guidelines. There has never been any response from the FCC to the effect that ivi's transmissions are not permitted or are not permissible by the FCC. The FCC has also concluded that an Internet television company like ivi is ***not*** governed by the FCC. *In re Sky Angel*, 25 FCC Rcd 3879 (Media Bur. 2010).

The second point above in the Court's order is that ivi should not be a cable system because it is not subject to the same regulations that applied to other cable systems when Section 111 was enacted. There is no reason for an interpretation under which "permissible" is construed to mean permission has been obtained in exactly the fashion as was available or required when Section 111 was passed in 1976. Indeed, a construction limiting "permissible" to mean obtaining the permission that was available in 1976 would be unworkable in view of the many revisions to the Communications Act since 1976. As the Copyright Office has observed, shortly after passage of Section 111 the FCC began loosening many of its cable carriage requirements. SHVERA Report at p. 6. Some of those regulations specifically allowed for broader distribution of distant signals. *Id*. In general, the many FCC changes in the late 1970s and early 1980s amounted to a deregulation of distant signal transmissions. *Id*., at p. 6-8. While these changes have made more acts "permissible" because they are no longer regulated, Section 111 remains unchanged.

The *NBC* court expressly held that a rebroadcast is "permissible" so long as no rule or regulation forbids it. *NBC v. Satellite Broadcast Networks, Inc.*, 940 F.2d 1467, 1471 (11^{th} Cir. 1991). The court rejected the argument that "permissible" requires the FCC to affirmatively approve the transmissions. Thus, because existing FCC rules, regulations, and authorizations did not preclude the satellite distribution at issue, it was deemed permissible. *Id*. Although the ultimate conclusion of whether satellite systems qualify as cable systems was reversed on other grounds, the same conclusion with respect to "permissible" by the FCC applies here: ivi's transmissions are within the scope of Section 111 of the Copyright Act so long as nothing in the FCC's regulations preclude them.

In addition, the text of Section 111 supports the interpretation of "permissible" as meaning anything that is permitted, or not forbidden, by the FCC. Within Section 111, the original primary transmissions are ones that emanate from "television broadcast stations *licensed* by the Federal Communications Commission." If Congress had intended cable systems to be limited to those entities that the FCC has decided to regulate through a system requiring licensing, it could readily have required the secondary transmissions to be "licensed" rather than "permissible." The use of these different words in the same sentence unmistakably requires a different interpretation for each of them.

In administering the statutory license program, the Copyright Office has also recognized that in some situations an entity may be a "cable system" under Section 111 even if not regulated by the FCC. Thus, in the Copyright Office General Instructions for completing statutory license Statements of Account, the Copyright Office explains that "a system that meets the definition of a cable system is considered a cable system for copyright purposes, *even if the FCC excludes it from being considered a cable system because of the number or nature of its subscribers or the nature of its secondary transmissions*." Bierman Dec., Court Doc. 24, at ¶14 (emphasis added). AT&T likewise has commented to the Copyright Office that there is no linkage between satisfying the eligibility requirements for a cable system under the statutory license of Section 111 and its non-status as a cable system under the Communications Act. Bierman Dec., Court Doc. 24, at ¶15, SHVERA Report at p. 197.

Indisputably, ivi's transmissions are permissible by the FCC. Indeed, beyond being permissible by the FCC, they are quite clearly permitted by the FCC. As such, ivi meets every condition of a cable system under Section 111 and should be allowed a statutory license.

II. The Media Companies will not suffer injury by the stay

A preliminary injunction requires proof that the plaintiff will suffer an injury that is "neither remote nor speculative, but actual and imminent." *Grand River Enter. Six nations, Ltd.*

v. Pryor, 481 F.3d 60, 66 (2d. Cir. 2007). If the stay is granted, the plaintiffs will not suffer any harm that is actual and imminent.

Primarily, the asserted harm is in the inability to sell the same content to others if ivi proceeds in making its secondary transmissions. But the plaintiffs have been selling the same content to numerous others for decades, including at the same statutory licensing fees that would be paid by ivi. The content is also available for free, both on the Internet and over the air, thereby greatly diminishing its value.

More importantly, even if there is some theoretical possibility of injury here, it is utterly speculative and hypothetical rather than actual and imminent. The plaintiffs have never pointed to any actual sale that may be lost or any other form of injury that is imminent and real. The reason they have not done so is obvious: there is no such injury that is anywhere on the horizon.

III. ivi will be injured in the absence of a stay

In the absence of a stay, the preliminary injunction effectively shuts down the majority of ivi's business, foreclosing any meaningful ability to generate any revenue during the pendency of the litigation. Weaver Dec., Court Doc. 22, at ¶16. It is not merely a disruption, but rather a closure of ivi's primary source of revenue. Customers will leave for other alternatives and likely will not return after ivi prevails at trial. In view of this severe harm, the injunction should be stayed pending appeal.

IV. A stay would be in the public interest

The Second Circuit has previously recognized that the "public interest thus lies in a continuing supply of varied programming to viewers." *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982), *cert. den*., 459 U.S. 1226 (1983). The Supreme Court has likewise taken a broad view of the statutory licensing provisions, noting that the statutory license of Section 111 advances the public purposes of rewarding the creators of copyrighted works while promoting broad public availability of those works. *Capital Cities Cable v. Crisp*, 467 U.S. 691, 710, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984). Similarly, the *amici* to the Court have demonstrated the strong public interest in gaining widespread access to television programming. The very purpose of the statutory license of Section 111 was to advance this same public interest. Through the enactment of Section 111, Congress recognized that it would be impossible for companies like ivi to secure permission from each of the copyright owners in advance, and that the public interest of broad dissemination could only be advanced by a statutory license. Copyright Law Revision, H. R. Rep. No. 94-1476 p. 89 (1976); Bierman Dec., Court Doc. 24, at ¶2. Though the Media Companies may not like the statutory license, and may be able to articulate reasons why they individually do not benefit from it, Congress adopted the statute to strike a balance between compensating authors for their works while ensuring that they are available as broadly as possible. An injunction that would prevent ivi from making secondary transmissions in accordance with the statutory license of Section 111 would be decidedly against the public interest and should be denied.

V. Conclusion

For the foregoing reasons, the preliminary injunction should be stayed or modified pending appeal.

RESPECTFULLY SUBMITTED this 1st day of March, 2011.

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Certificate of Service

I certify that on March 1, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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