

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WPIX, INC.,
WNET.ORG,
AMERICAN BROADCASTING COMPANIES, INC.,
DISNEY ENTERPRISES, INC.,
CBS BROADCASTING INC.,
CBS STUDIOS INC.,
THE CW TELEVISION STATIONS INC.,
NBCUNIVERSAL MEDIA, LLC,
NBC STUDIOS LLC,
OPEN 4 BUSINESS PRODUCTIONS LLC,
UNIVERSAL NETWORK TELEVISION, LLC,
TELEMUNDO NETWORK GROUP LLC,
WNJU BROADCASTING LLC,
NBC TELEMUNDO LICENSE LLC,
OFFICE OF THE COMMISSIONER OF BASEBALL,
MLB ADVANCED MEDIA, L.P.,
COX MEDIA GROUP, INC.,
FISHER BROADCASTING-SEATTLE TV, L.L.C.,
TWENTIETH CENTURY FOX FILM CORPORATION,
FOX TELEVISION STATIONS, INC.,
TRIBUNE TELEVISION HOLDINGS, INC.,
TRIBUNE TELEVISION NORTHWEST, INC.,
UNIVISION TELEVISION GROUP, INC.,
THE UNIVISION NETWORK LIMITED PARTNERSHIP,
TELEFUTURA NETWORK,
WGBH EDUCATIONAL FOUNDATION,
THIRTEEN,
and PUBLIC BROADCASTING SERVICE,

Plaintiffs,

v.

IVI, INC. and TODD WEAVER,

Defendants.

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10 Civ. 07415-NRB

**MEMORANDUM OF PLAINTIFFS
IN OPPOSITION TO DEFENDANTS' MOTION
TO STAY PRELIMINARY INJUNCTION PENDING APPEAL**

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INTRODUCTION AND SUMMARY

During a period of more than five months, defendants ivi, Inc. (“ivi”) and its founder and chief executive officer, Todd Weaver, streamed over the Internet dozens of broadcast television stations -- twenty-four hours per day, seven days per week -- all without the consent of the affected stations or copyright owners. In doing so, they unlawfully exploited, for their own commercial gain, thousands of plaintiffs’ copyrighted programs. When several of the plaintiffs (within days following ivi’s launch in September 2010) demanded that defendants cease their infringing activities, defendants filed an improper anticipatory action in a Seattle federal court -- one business day after, in the Seattle court’s words, “disingenu[ously]” offering to engage in settlement discussions. When plaintiffs sought a preliminary injunction to maintain the status quo ante, defendants doubled the number of broadcast stations they were streaming (from twenty-eight to fifty-four stations) and announced plans to add even more stations to their lineup notwithstanding that the Court had entered a restraining order against a similar service. Now, in response to the Court’s order granting plaintiffs’ preliminary injunction against defendants, defendants want to resume their infringing activities while they litigate in the Second Circuit Court of Appeals.

The only defense defendants have ever proffered for their massive copyright infringement is that ivi should be deemed a “cable system” under Section 111 of the Copyright Act (but not any other law). In support, defendants and their amici have advanced an interpretation of Section 111 that they unabashedly concede would allow *anyone* with a computer, Internet connection and TV antenna (including the proverbial kid in the dorm room) to be considered a “cable system” -- entitled to stream over the Internet as much copyrighted broadcast programming as they choose, without the need to obtain any consent or to comply with regulation of any sort -- simply by paying an annual \$100 fee to the Copyright Office. *See*

Memorandum and Order in 10 Civ. 7415 (NRB) at 44-45 (S.D.N.Y., Feb. 22, 2011) (“Order”); Memorandum of Amici Public Knowledge *et al.* in Opposition to Motion for Temporary Restraining Order and/or Preliminary Injunction at 5 (allowing anyone with a computer, Internet connection and TV antenna to be a “cable system” “is a compelling argument for amici’s position.”)

For over ten years, the Copyright Office, the government agency Congress charges with the responsibility to administer and to interpret the Section 111 license, has made clear to Congress and the public that Internet services such as ivi cannot rely upon the Section 111 license -- any more than can the so-called “satellite carriers” that the Copyright Office, Eleventh Circuit Court of Appeals and Congress have specifically found to be ineligible for the Section 111 license. *See* Order at 21-32. In a thorough and well-reasoned 59-page opinion, this Court came to the same conclusion. Because ivi does not meet the requirements of Section 111, the Court correctly rejected defendants’ Section 111 defense and preliminarily enjoined defendants from continuing to misappropriate plaintiffs’ copyrighted programming pending a final determination on the merits.

Defendants have requested the Court to stay its preliminary injunction pending appeal. But they have not offered any new arguments or facts to support that request. Their stay motion raises essentially the same erroneous arguments that they made (and the Court rejected) in connection with plaintiffs’ motion for a preliminary injunction. For the reasons discussed below, plaintiffs urge the Court to deny defendants’ motion for stay pending appeal; defendants have failed to satisfy any of the well-established requirements for a stay. If, however, the Court were to grant any stay, defendants should be required to post a bond pursuant to Rule 62 (c) of the Federal Rules of Civil Procedure. Defendants have already incurred significant liability for

damages that may be imposed under Section 504 of the Copyright Act -- damages that likely far exceed the assets of a start-up company. Defendants should not be allowed to inflict any further damages without ensuring that they will in fact be able to pay monetary damages after a final order in this litigation.

ARGUMENT

I. The Court Should Deny Defendants' Motion For Stay Pending Appeal Because None Of The Factors Supporting Such A Stay Is Present In This Case.

“A stay is an ‘intrusion into the ordinary processes of administration and judicial review,’ and accordingly ‘is not a matter of right, even if irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. ----, 129 S. Ct. 1749, 1757 (2009) (citations omitted). A stay involves “‘an exercise of judicial discretion’ and the ‘propriety of its issue is dependent upon the circumstances of the particular case.’” *Id.* at 1760 (citations omitted). “The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion.” *Id.* at 1761. The four factors that a court must consider in deciding whether to issue a stay pending appeal are:

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (quoting *Hilton v. Braunskill*, 481 U. S. 770, 776 (1987)); accord, *In re World Trade Center Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007). “The first two factors of the traditional standard are the most critical.” *Nken*, 129 S. Ct. at 1761.

The four stay factors are comparable to those that the Court already has considered in granting plaintiffs’ motion for a preliminary injunction. *See id.* (“There is substantial overlap between these and the factors governing preliminary injunctions . . . not because the two are one

and the same, but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined”); Order at 9 (setting forth preliminary injunction factors). In large part, therefore, defendants’ stay motion asks this Court to reconsider the findings and conclusions the Court made in its Order. As explained below, each of the four stay factors weighs strongly against the grant of defendants’ stay motion, just as the comparable factors strongly supported the preliminary injunction that the Court entered.

A. Defendants Are Unlikely To Succeed On The Merits Of Their Appeal.

An application for a stay is “not meant as a tool to reargue the merits of the underlying case.” *Silverstein v. Penguin Putnam, Inc.*, 2003 WL 21361734, *1 (S.D.N.Y. 2003) (citation omitted). But that is precisely how defendants use their stay application here. Defendants devote the bulk of their memorandum (15 of 17 pages) to rehashing the same arguments they previously made to the Court as to why they believe *ivi* -- and anyone else “with a computer, Internet connection and TV antenna” (Order at 44-45) -- should be considered a “cable system” entitled to the Section 111 compulsory license. The Court already rejected these arguments, concluding that it is “extraordinarily unlikely that *ivi* will ultimately be deemed a cable system under Section 111.” *Id.* at 58. Defendants provide no basis for reaching a different conclusion in connection with their motion for a stay pending appeal.

Furthermore, defendants seek a stay pending appeal of the Court’s ruling on a motion for preliminary injunction, not a final judgment. The Second Circuit Court of Appeals reviews a district court’s grant of a preliminary injunction only for “abuse of discretion.” *Metropolitan Taxicab Bd. of Trade v. City of New York*, 615 F.3d 152, 155 (2d Cir. 2010). A “district court abuses its discretion when it rests its decision on a clearly erroneous finding of fact or makes an error of law.” *Id.* Nothing in defendants’ stay motion and supporting papers comes close to

demonstrating that the Court abused its discretion in granting plaintiffs' motion for a preliminary injunction.

No court has held or even intimated that an Internet service such as ivi's is a "cable system" that qualifies for the Section 111 cable compulsory license. Defendants' position in this litigation rests upon the contention that the courts should interpret Section 111 in a manner different from and inconsistent with (a) public statements that the Copyright Office made to Congress on this very issue for over a decade; (b) the ruling of the Copyright Office on a closely related issue (whether satellite carriers are "cable systems" entitled to the Section 111 compulsory license); (c) a decision by a federal court of appeals affirming the Copyright Office's ruling on that closely related issue; and (d) congressional ratification of these decisions by the court of appeals and the Copyright Office. Defendants offer nothing on the merits other than their own stilted and myopic reading of one provision in Section 111, divorced entirely from the broader context of Section 111 as a whole -- a reading that ignores several fundamental canons of statutory construction and important aspects of the history and underlying policies of Section 111. Under these circumstances, there simply is no basis for determining, as defendants erroneously maintain, that defendants rather than plaintiffs have a "substantial possibility of success" on appeal.

B. Defendants Will Not Be Irreparably Injured Absent A Stay.

Defendants claim that "ivi will be injured in the absence of a stay" because the preliminary injunction "shuts down the majority of ivi's business," "forecloses any meaningful ability to generate any revenue," and results in a "closure of ivi's primary source of revenue." Memorandum in Support of Motion for Stay ("Mem.") at 16. This claim does not support a finding of "irreparable injury." See *Ford v. Reynolds*, 316 F.3d 351, 355 (2d Cir. 2003) ("To

establish irreparable harm, the injury alleged ‘must be one requiring a remedy of more than mere money damages.’”)

Defendants’ injury argument is perhaps most remarkable for its departure from the position that defendants strenuously advocated when opposing plaintiffs’ motion for preliminary injunction. As the Court recognized, defendants previously claimed that “an injunction would be ‘catastrophic’ and would ‘effectively put ivi out of business, most likely permanently.’” Order at 55 (*quoting* Defs.’ Opp. at 5). *See also* Declaration Of Todd Weaver In Opposition To Motion For Preliminary Injunction, at ¶ 16 (a preliminary injunction would “likely shut down [ivi’s] business”). Now defendants say they will remain in business but will lose the majority of their ill-gotten revenues.

The apparent reason for defendants’ changed position is that the Court’s preliminary injunction has not forced defendants out of business. The preliminary injunction has simply required defendants to obtain consent before they stream copyrighted programming over the Internet -- something defendants apparently have been able to do with respect to the fourteen channels of non-broadcast programming they continue to offer. *See* <http://www.ivitv.com/guide/index> (last visited March 15, 2011) (Declaration of Scott Morrow (“Morrow Decl.”), Ex. 1). In stark contrast to defendants’ prior representations to this Court, defendants now proclaim on their website that:

During the pendency of the appeal, ivi will continue to operate. . . .
We will continue to carry a number of channels and will be adding
channels from broadcasters and content providers as we grow.

<http://blog.ivitv.com/> (last visited March 8, 2011) (Morrow Decl., Ex. 2).

In granting plaintiffs’ motion for a preliminary injunction, the Court concluded that the balance of hardships favored plaintiffs, not defendants. *See* Order at 55-56. Defendants have not

even acknowledged, let alone refuted, any of the points the Court made in support of that conclusion. Furthermore, this is not a case where defendants have engaged in a longstanding business that plaintiffs suddenly and unexpectedly seek to enjoin. Defendants launched their infringing service six months ago (without any advance public notice) in full recognition that their sole defense to infringement (the Section 111 license) was inconsistent with the pronouncements of the government agency that administers and interprets that license -- and without ever seeking any relief from the Copyright Office or Congress. Plaintiffs, some of whom immediately demanded that defendants cease operation, promptly filed a copyright infringement action against defendants, requesting a preliminary injunction. Only by disregarding the Copyright Office pronouncements, ignoring plaintiffs' cease and desist notices, filing a "disingenuous" declaratory action and expanding the scope of their infringing conduct in the face of a pending motion for preliminary injunction, have defendants been able to manufacture their baseless claims of injury. Under such circumstances, a stay pending appeal is plainly inappropriate.

C. Staying the Injunction Would Substantially Injure the Plaintiffs.

Defendants contend that plaintiffs will not suffer "any harm" whatsoever if defendants are allowed to stream plaintiffs' copyrighted works over the Internet without obtaining consent and without complying with any of the rules (adopted by Congress and the Federal Communications Commission) that govern broadcast retransmission services. *See* Mem. at 15-16. The Court has already concluded, based upon the several sworn declarations plaintiffs provided in support of their motion for a preliminary injunction, that plaintiffs are not only injured but irreparably injured by such conduct. *See* Order at 46-55. Defendants have failed to provide any proper basis for the Court now to conclude that a stay -- permitting defendants to

once again stream plaintiffs' copyrighted programming over the Internet without authorization and without complying with any rules -- would not substantially and irreparably injure plaintiffs.

Moreover, the fact that defendants have not provided any evidence whatsoever to establish that they are financially able to pay the substantial damages to which plaintiffs will be entitled also supports a finding that the stay would not only injure but irreparably injure plaintiffs. *See Omega Importing Corp. v. Petri-Kine Camera Co.*, 451 F.2d 1190, 1195 (2d Cir. 1971) (considering the "unlikelihood that defendant . . . would, in any event, be able to satisfy a substantial damage award" to support a finding of irreparable harm).

D. A Stay Of The Court's Preliminary Injunction Would Not Serve The Public Interest.

Defendants devote a brief paragraph to their contention that a stay of the Court's preliminary injunction would serve the public interest. *See Mem.* at 16-17. That contention is contrary to the Court's ruling that the preliminary injunction is consistent with the public interest, *see Order* at 56-58, and inconsistent with the arguments defendants made in seeking a stay. As *ivi* has observed, "[i]f 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." *Mem.* at 1 (emphasis added). But the court of appeals has determined, as *ivi* notes, that the "public interest...lies in the continuing supply of varied programming to viewers." *Eastern Microwave, Inc. v. Doubleday Sports, Inc.*, 691 F.2d 125, 132 (2d Cir. 1982), *cert. denied*, 459 U.S. 1223 (1983). The public interest does not lie in allowing an infringing service to provide (in *ivi*'s own words) the "same content that is readily available over the air and through numerous other sources for free."

II. If The Court Were To Grant Defendants' Motion To Stay, The Court Should Impose A Bond Pursuant to Rule 62 (c).

Until it was enjoined, ivi's unabated streaming continued every day for over five months. Plaintiffs have not yet been able to identify all of the individual programs (owned by plaintiffs) that defendants streamed without authorization during that five-month period; nor have they sought to identify all of the instances in which defendants streamed the same program multiple times. However, based upon the information contained in the attached declarations, it appears that defendants already have infringed the copyrights in at least 4,000 individual works. *See* Declarations of Martin P. Messinger, Marsha L. Reed, Jaime Rodriguez, Carly Seabrook, Stephen Segaller, and Jane Sunderland.

This admittedly incomplete list provides some indication of the enormous magnitude of the infringing activities in which defendants have already engaged. If a stay were granted and defendants resumed the same service that they provided prior to the preliminary injunction, defendants would likely infringe the copyrights in thousands of additional programs pending appeal. That fact provides an additional compelling reason for denial of the requested stay.

Defendants application for a stay was brought under Rule 62 of the Federal Rules of Civil Procedure. That rule provides that a court may grant a motion for stay on "terms for bond or other terms that secure the opposing party's rights." *See also* Fed. R. App. P. 8 (a) (2) (E) ("The court may condition relief on a party's filing a bond or other appropriate security in the district court"). The purpose of such a bond is to provide compensation for those injuries caused by the stay. *See Carolina Shipping Ltd. v. Renaissance Ins. Group Ltd.*, 2009 WL 256001, *1 (S.D.N.Y. 2009). As the Court has concluded, the injury plaintiffs suffer from defendants' unauthorized streaming of their programming over the Internet is "unquantifiable, and thus irreparable." Order at 55. It is not possible to quantify the impact of allowing ivi to resume its

exploitation of that programming pending appeal. In determining the appropriate size of a bond, the Court should take account of at least the amount of statutory damages to which plaintiffs would be entitled as a result of defendants' unlawful activities. *See* 17 U.S.C. § 504 (c) (court may award statutory damages of between \$750 and \$30,000 per work, up to \$150,000 per work if the infringement is willful); *NFL v. Primetime 24 Joint Venture*, 131 F. Supp. 2d 458, 482 (S.D.N.Y. 2001) (district court awarded \$10,000 per program broadcast that the satellite carrier retransmitted without authorization during the period (a) beginning with the Second Circuit's stay of the district court's permanent injunction and (b) ending with the Second Circuit's affirming that injunction).

Under all the circumstances, plaintiffs urge the Court to deny the stay. However, if the Court considers granting such a stay, plaintiffs request that it do so together with plaintiffs' request to issue an appropriate bond. That bond would need to be substantial and at least commensurate with the statutory damages plaintiffs would receive if they prevail on appeal and if defendants were allowed to resume streaming plaintiffs programming over the Internet during the pendency of defendants' appeal.¹

¹ Defendants did not ask the Court to impose any bond in connection with the preliminary injunction entered by the Court; nor did they provide the Court with any basis for determining the amount of such a bond. Plaintiffs submit that, under these circumstances, the Court properly determined not to require any bond. However, there appears to be some uncertainty in the Second Circuit over whether a court may dispense with the security requirement under Rule 65 (c) of the Federal Rules of Civil Procedure when the affected party does not request a bond. *See IDG USA, LLC v. Schupp*, 2010 WL 3749068, *1 (W.D.N.Y. 2010) (citing authority). To avoid any possible issue, plaintiffs recommend that the Court take the same action as it did in the *FilmOn* litigation when it entered a temporary restraining order and imposed a \$10,000 bond.

CONCLUSION

For the reasons stated above, defendants' motion to stay the preliminary injunction pending appeal should be denied. If, however, the Court grants that motion, the Court should require defendants to post an appropriate bond.

Respectfully submitted,

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