UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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| WPIX, INC., et al.,<br><br>Plaintiffs,<br><br>v.<br><br>IVI, INC.,<br><br>Defendant. | Civil Action No. 10-cv-7415 (NRB) |

**IVI'S REPLY IN SUPPPORT OF MOTION TO STAY INJUNCTION**

Section 111 of the Copyright Act provides a statutory license to cable systems that make secondary transmissions of primary transmissions received over the air. The language is intentionally broad in an effort to promote widespread access to television programming. Since the passage of Section 111, the advancement of technology has made it easier to secure the wires, cables, microwaves, or other communications channels in order to make the secondary transmissions. While ivi makes such transmissions using the wires of the Internet, it would be almost as simple to make the same transmissions using microwaves—as is expressly authorized by statute—because microwave transmitters are also much cheaper today than they were when the statute was drafted. The language remains the same, however, and ivi's activities do not become illegal simply because they are technologically easier or much less expensive than they might have been when the statute was first passed. If the so-called "kid in the dorm room" should be excluded then there must be a statutory basis to do so; if not, then the concern should be directed to Congress, not the courts. Likewise, if the annual fee for statutory licensing is too small then the Media Companies should direct that complaint to Congress as well.

***A. ivi is likely to succeed on the merits***

On the issue of likelihood of success on the merits, the Media Companies offer nothing new and again cannot point to any textual basis to exclude ivi from the scope of Section 111.

First, they point out that no court has ever held that an Internet service qualifies as a cable system under Section 111. While that may be true, it is also the case that every Internet-based system that has faced judicial scrutiny has failed to follow the requirements of Section 111 in a way that made the case easy to resolve in its favor. There are only two such cases that ivi is aware of—the *FilmOn* case and the *iCraveTV* case. In each instance there were clear statutory transgressions such as the failure to charge a subscriber fee and the transmission from Canada rather than from the U.S. as is literally required by statute. On the other hand, ivi is not aware of any instances in which the Copyright Office has refused to grant a statutory license to any Internet television company, including ivi. In addition, ivi is aware that the Copyright Office regularly receives statutory license fees from companies digitally retransmitting television signals using Internet Protocol (IP).

Second, the Media Companies refer to the ruling of the Copyright Office on the so-called "closely related" issue of whether a satellite carrier is a cable system under Section 111. But the ruling regarding satellite systems was also properly based in the language of Section 111, not vague notions of policy. Specifically, the Copyright Office ruled that a satellite system was not located in a state as required by statute and therefore fell outside the scope of Section 111. Though the Copyright Office may have expressed other policy concerns at the same time, those statements were dicta, were not textual, and cannot carry the force of law.

Third, the Media Companies point to statements by the Copyright Office to Congress. As noted in prior briefing, those statements are not part of a rulemaking process and therefore are not entitled to *Chevron* deference. Even if they might have persuasive appeal from a policy level, they are also not entitled to *Skidmore* deference. 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*, 503 U.S. 249, 253-54 (1992). Indeed, "when the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"*Id*. (citing

*Rubin* v. *United States*, 101 S. Ct. 698 (1981)). Even *Skidmore* deference must follow this basic canon of statutory construction. In the absence of textual ambiguity in the form of terms that are unclear and susceptible of varying interpretations, the language must simply be given its plain meaning. It is legal error to do otherwise. There are no such ambiguities here, nor any statements by the Media Companies proposing any such ambiguity. Thus there is no need to turn to inconsistent statements by the Copyright Office concerning whether Internet television should or should not be granted a statutory license. Without a statutory ambiguity, policy can only be addressed through Congressional legislation.

***B. ivi is suffering irreparable harm***

ivi has also demonstrated irreparable harm, explaining that it has shut down the majority of its business and has lost its subscriber base. ivi also has lost significant goodwill from those subscribers who may never return. Ironically, the Media Companies complain that this is simply monetary and therefore not irreparable. Yet in seeking the preliminary injunction in the first place they urged that the loss of revenue associated with the accused infringement amounted to irreparable harm because it was difficult to quantify. The same is true here in that ivi has lost its subscribers and lost the opportunity to secure an unquantifiable number of subscribers during the pendency of the injunction.

The Media Companies also falsely accuse ivi of changing its position with respect to representations to the Court on the issue of irreparable harm. They point to ivi's website statement to the effect that it will continue to operate, characterizing it as being in "stark" contrast with the prior representations to the Court. Nothing could be farther from the truth and there surely is no change in position. While ivi may still be technically in business and not quite yet "shuttered," the injunction is a crippling blow that has resulted in layoffs and the termination of the vast majority of ivi's revenues. As ivi's Mr. Weaver explains in his contemporaneously filed declaration, promptly with the injunction ivi was forced to lay off 70 percent of its staff and lost 95 percent of its revenues. These are severe hardships that are fully consistent with ivi's prior position to the Court.

The bulk of the argument by the Media Companies on the topic of hardships is simply a repetition of their position on the merits of the copyright infringement issue. They complain about infringement and ill-gotten gains in an effort to diminish the true hardship experienced by ivi. In doing so, they improperly treat the issue of hardship as if it can be ignored once the issue of success on the merits is resolved. It must be evaluated on its own, however, and quite plainly ivi is suffering and will continue to suffer irreparable harm during the pendency of the injunction.

### *C. The Media Companies are not injured*

The Media Companies argue that they are suffering irreparable harm because they own many copyrighted programs that are allegedly at issue in this action. Of course, if there truly are some 4,000 works at issue then it demonstrates the need and purpose for the statutory license in the first place—surely neither ivi nor any other cable system could negotiate individual licenses for so many works.

The notion of irreparable harm to the Media Companies is also inconsistent with their own conduct and is unsupported by any substantial evidence. The Media Companies give away the same content for free, both over the air and on the Internet. They cannot point to any manner in which they have been or will be harmed beyond the mere fact that ivi is retransmitting the same content. There is nothing other than hyperbole to suggest harm, and certainly nothing that is imminent and real. While the Media Companies have submitted listings of programs, they do not provide any evidence establishing that the value of that content, when retransmitted simultaneously with the primary transmission, is anything more than the statutory license amount set by Congress. Based on the statutory license value for the works at issue, the amount is both quantifiable and small.

### *D. A stay is in the public interest*

Both ivi and the *Amici* demonstrated that the availability of the television content through the ivi service is in the public interest. The Media Companies do not challenge that foundation, but contend that the public interest is in transmitting "varied programming" not in retransmitting the "same content" that is already transmitted. This is a nonsensical distinction that twists the cited authority beyond recognition. The Media Companies cite to the same authority cited by ivi, *Eastern Microwave, Inc. v. Doubleday Sports, Inc*., 691 F.2d 125, 132 (2d Cir. 1982), *cert. denied*, 459 U.S. 1223 (1983). In *Eastern Microwave*, the court was specifically addressing the compulsory licensing scheme in stating that the "public interest thus lies in a continuing supply of varied programming to viewers." *Id*. The court was not making a distinction between first-run programming and programming that was already available over the air because there can be no such distinction under the statute. By definition, ***all*** programming that is subject to the compulsory license is content that was already readily available over the air for free. The reason the statutory license exists in the first place is to advance the public interest in making such content widely available so long as the copyright owners are paid under the statutory license structure. That is the case here, as ivi has made its payment to the Copyright Office under the statutory license. A stay of the injunction that would allow ivi to continue to make this content available to others would be in the public interest.

### *E. The Court should not impose a bond*

The Media Companies argue that a bond should be imposed based on the premise that there are about 4,000 copyrighted works at issue. ivi objects to the declarations as lacking foundation concerning what works actually were or were not retransmitted by ivi. While the declarants may well know what works were the subject of primary transmissions, they lack foundation to testify as to secondary transmission by ivi. Even if there are 4,000 potential works that are owned by the Media Companies and that were candidates for retransmission, that surely does not mean that any of those works were actually streamed as secondary transmissions. A fundamental flaw with the Media Companies' approach is the presumption that ivi was streaming every channel continuously around the clock. But in the same manner as with other cable systems, programming content is only transmitted to those consumers who tune in to a particular channel. If consumers do not tune in, it is not played. There is plainly no basis to impose a bond based on the outer bound of about 4,000 works without any evidence related to the works actually watched by consumers.

The Media Companies also fail to submit any evidence of the actual market value for the transmission of the works at issue, even if all 4,000 programs had been retransmitted by ivi. They state that under the statutory license the annual value would be about $100. ivi has likewise submitted evidence that there are some 7,000 entities among the Copyright Office's listings of companies that have submitted statements of account. *See* Court Doc. 24, at ¶8 and Exhibit 8. Each of these entities is paying the same licensing fees under the same statutory licensing scale that the Media Companies now complain about. The Media Companies argue that the magnitude of the value of the works is unquantifiable and significant, but both statements are incorrect. The simple fact is that the value is determinable and small, and that thousands of entities are paying that same small value for the retransmission of the same content that is at issue here.

Notably, the Media Companies go to the trouble of providing listings of programming but do not point to any evidence that the true market value for simultaneous secondary transmission is anything other than the magnitude set by the statutory license. If any companies are paying anything above the statutory levels it would have been easy for the Media Companies to submit such evidence. On the record before the Court, the facts demonstrate that there are potentially thousands of works at issue but that the value for simultaneous secondary retransmission of those works is small.

Because the value is small in the context at issue here—simultaneous secondary retransmissions—the Media Companies instead point to the statutory damages awards instead. While the Court "may" award such amounts as the Media Companies acknowledge, at this stage it is premature to evaluate statutory damages. What is more relevant is the underlying value of the work at issue. On that topic the value is small and the Media Companies have carefully avoided introducing any actual evidence to the contrary. Consequently, in the event a bond is imposed it should be small and should be based on actual market values of the works in the context that ivi has used them.

For the foregoing reasons, ivi respectfully requests that the injunction be stayed pending appeal.

RESPECTFULLY SUBMITTED this 22nd day of March, 2010.


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## CERTIFICATE OF SERVICE

I certify that on March 22, 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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