

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,  
WJNU-TV 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,

**MEMORANDUM AND  
O R D E R**

10 Civ. 7415 (NRB)

Plaintiffs,

- against -

ivi, Inc. and Todd Weaver,

Defendants.

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**NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE**

On February 22, 2011, this Court granted plaintiffs' motion for a preliminary injunction. Pursuant to that order, defendants were enjoined from infringing plaintiffs' "exclusive rights under Section 106(1)-(5) of the Copyright Act, including but not limited to through the streaming over mobile telephone systems and/or the Internet of any of the broadcast television programming in which any plaintiff owns a copyright." WPIX, Inc. v. ivi, Inc., \_\_\_ F. Supp. 2d \_\_\_, No. 10 Civ. 7415 (NRB), 2011 U.S. Dist. LEXIS 17654 at \*77-78 (S.D.N.Y. Feb 22, 2011). Before the Court is defendants' motion for a stay of the order pending appeal to the Second Circuit. For the following reasons, the motion is denied.

A. Legal Standard

District courts consider four factors in determining whether to issue a stay pending appeal: "(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." McCue v. City of New York (In re World Trade Ctr. Disaster Site Litig.), 503 F.3d 167, 170 (2d Cir. 2007) (internal footnote omitted) (quoting Hilton v. Braunskill, 481 U.S. 770, 776 (1987)). The "degree to which a factor must be present varies with the

strength of the other factors, meaning that 'more of one [factor] excuses less of the other.'" Id. (alteration in original) (quoting Thapa v. Gonzales, 460 F.3d 323, 334 (2d Cir. 2006)). Thus, the "necessary level or degree of possibility of success will vary according to the court's assessment of the other...factors." Mohammed v. Reno, 309 F.3d 95, 101 (2d Cir. 2002) (internal quotation omitted). However, the "first two factors of the traditional standard are the most critical," and "more than a mere possibility of relief [on appeal] is required." Nken v. Holder, 129 S.Ct. 1749, 1761 (2009) (internal quotation and brackets omitted).

A stay is an "exercise of judicial discretion," and the "party requesting a stay bears the burden of showing that the circumstances justify an exercise of [the court's discretion]." Id. at 1760-61 (internal quotation omitted). As the Supreme Court has noted, there is "substantial overlap" between the factors governing the issuance of a stay and those governing the issuance of a preliminary injunction. Id. at 1761. This is "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." Id.

#### B. Likelihood of Success on the Merits

Defendants' discussion of the first factor, likelihood of success on appeal, is largely a reiteration of arguments made during the briefing and oral argument on the preliminary injunction motion. Further, as will be set forth below, defendants have taken the liberty of misstating our decision so as to attack straw men.

Rather than reiterate our extended analysis, we only note that we are not persuaded, even after considering defendants' submission which in some respects mirrors a motion for reargument, that defendants have a likelihood of success on appeal for largely the same reasons that we granted plaintiffs' motion for a preliminary injunction. We write further only to comment for the sake of clarity on a few points that defendants raise in their memoranda of law.

1. Ownership of Wires

Contrary to defendants' contention, the result of our opinion is not to impose a requirement that a cable system own the wires that make the secondary retransmission. Our opinion was explicit in stating that "there is no requirement in Section 111 that a company own the wires in order to be a cable system." WPIX, Inc., 2011 U.S. Dist. LEXIS 17654 at \*53-54 n.28. Defendants can advance this contention only by erroneously claiming that the single meaningful distinction between ivi's architecture and that of entities which the Copyright Office has

endorsed as cable systems, such as AT&T's U-Verse, is that AT&T "purportedly owns its wires." Defs.' Mem. at 7 (emphasis in original). As was articulated at oral argument and referenced in our previous opinion, there are numerous structural differences between AT&T's U-Verse and ivi. See WPIX, Inc., 2011 U.S. Dist. LEXIS 17654 at \*53-54 n.28.

We did mention, in the same footnote 28, that it is relevant whether a company has any *control* over the wires it uses, and thus can prevent piracy. In identifying the issues of control and piracy as potentially significant, we were merely considering "the common sense of the statute...[and] the practical consequences of the suggested interpretations," as is our duty in "divin[ing] and apply[ing] the intent of Congress" in a "statute enacted in the technological milieu of an earlier time." Eastern Microwave, Inc. v. Doubleday Sports, Inc., 691 F.2d 125, 127 (2d Cir. 1982) (internal quotations omitted).

While we in no way retreat from our view that control over the wires is relevant,<sup>1</sup> that is not the same as an ownership requirement.<sup>2</sup>

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<sup>1</sup> We do not believe that Congress intended Section 111 to apply to a company, such as ivi, which has no control over the wires or legal relationship with the companies that operate the wires making the secondary transmissions. Significantly, in the case that defendants cite for the proposition that ownership of the wires is not necessary in order to qualify as a cable system, the entity in question had subcontracted with another company which owned and operated the wires. Nat'l Football League v. Insight Communs. Corp., 158 F.Supp.2d 124 (D. Mass. 2001). The Court noted that preventing a company from taking advantage of Section 111 simply because it did not actually own the wires would not be consistent with "practical business

## 2. Headends

Defendants also challenge our reliance on the second sentence of Section 111(f)(3) as part of the textual analysis of the statute.<sup>3</sup> Once again, defendants distort our decision. Presumably, defendants take issue with our reference to a Copyright Office rulemaking proceeding wherein the Office stated that the second sentence of Section 111(f)(3) refers to concepts such as "headends" and "contiguous communities" which "do not have any application to a nationwide retransmission service." 57

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practices" since "'outsourcing' is an accepted method of doing business" in the "real business world." Id. at 132. In addition, we should note that this case dealt with the passive carrier exception of Section 111, and did not discuss cable systems.

<sup>2</sup> We note that, separate from the question of ownership, *ivi* does not appear to meet the statutory requirement that a cable system be a facility which both "receives" signals and "makes" secondary transmissions. Rather, it could well be that the viewer's Internet service provider makes the secondary transmission. WPIX, Inc., 2011 U.S. Dist. LEXIS 17654 at \*61-62. AT&T does not face a similar issue, in part because it owns the wires that make the secondary transmissions.

Notably, defendants do not even attempt to address this issue, even as they maintain that 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" and that there is "no portion of the statute that does not readily apply to *ivi*." Defs.' Mem. at 3, 6.

<sup>3</sup> To review, Section 111(f)(3) sets forth the definition of "cable system":

"[A] facility, located in any State, territory, trust territory, or possession of the United States, 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).

Fed. Reg. 3284 (Jan 29, 1992). Defendants assert that the second sentence of Section 111(f)(3) is not part of the definition of a cable system since 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)." Defs.' Mem. at 12. Defendants thus contend that the statute does not specifically require a cable system to have a headend. This argument does not advance the discussion of what constitutes a cable system as there is little doubt that the drafters of Section 111 understood that cable systems, by definition, had headends. Nor did our decision turn on or even speculate as to whether ivi can be said to have a headend, as defendants suggest that it did.

Moreover, there can be no serious dispute, regardless of the Copyright Office's observation, that the language used in the second sentence of Section 111(f)(3) is useful in determining the scope of the first sentence. See, e.g., ASM Capital, LP v. Ames Dep't Stores, Inc. (In re Ames Dep't Stores, Inc.), 582 F.3d 422, 427 (2d Cir. 2009) ("Statutory interpretation always begins with the plain language of the statute, which we consider in the specific context in which that language is used, and the broader context of the statute as a whole.") (internal quotations and citations omitted). The

Copyright Office determined that it was relevant that Congress used the terms "headend" and "contiguous communities" in Section 111(f)(3), and that it was unlikely such terms would have been used in the statute if the Section was meant to encompass a nationwide retransmission service. Our reference to the Copyright Office's statement was simply intended to demonstrate that it is hardly clear that ivi fits "neatly" within the definition of a cable system.

### 3. The Communications Act

Defendants dedicate several pages in their memorandum of law to the proposition that ivi's transmissions are permissible under the Communications Act and the rules and regulations of the FCC. This discussion ignores the fact that our decision did not reach (because it did not need to) the question of whether defendants were in violation of the Communications Act. Nor did we rest our decision that ivi did not qualify for a compulsory license on the fact that their retransmissions were "impermissible" under the rules of the FCC. To be clear: ivi is not a cable system because it does not meet the statutory requirements of Section 111, as understood by a reading of the text, administrative record, and congressional intent. Whether or not ivi is a cable system for purposes of the Communications Act, and thus is retransmitting programming in violation thereof, has not been addressed by this Court.



C. Irreparable Injury Absent a Stay

Defendants' argument that they are being irreparably injured by the preliminary injunction and that they will continue to suffer injury absent a stay is identical to the hardship argument made in opposition to plaintiffs' motion. As noted in our previous order, while "it is a practical hardship for ivi to go out of business, it is not a legally recognized harm." WPIX, Inc., 2011 U.S. Dist. LEXIS 17654 at \*74. This is because an "infringer of copyright cannot complain about the loss of ability to offer its infringing product." Id.

D. Injury to Plaintiffs

Defendants' argument that plaintiffs are not actually injured by ivi's service again mirrors the argument made in the context of the preliminary injunction, which we considered in detail and unequivocally rejected. WPIX, Inc., 2011 U.S. Dist. LEXIS 17654 at \*63-73. That 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" and that the "content is also available for free, both on the Internet and over the air," Defs.' Mem. at 16, is not in any way relevant to whether plaintiffs are injured by ivi's illegal use of their content. It is absurd to suggest that since plaintiffs' copyrighted works are made available in a variety of legal ways, adding an illegal method does not cause them harm. It is equally

misguided to argue that the existence of a statutory rate means that plaintiffs do not suffer harm in an amount greater than that rate when their works are used by entities which do not fit within the applicable statute.

E. The Public Interest

The public interest does not support a stay. Defendants argue that Section 111 "advances the public purposes of rewarding the creators of copyrighted works while promoting broad public availability of those works" and that the "enactment of Section 111" was Congress' determination 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." Defs.' Mem. at 16-17.

While these contentions are indisputable, they are only available to entities which qualify as a cable system. As ivi does not, defendants may not rely on these arguments.

Defendants offer no theory as to why this Court, having found that they are in violation of plaintiffs' copyrights, should discount the object of copyright law to "promote the store of knowledge available to the public" by "providing individuals a financial incentive to contribute to the store of knowledge." Salinger v. Colting, 607 F.3d 68, 82 (2d Cir. 2010). The programming that defendants wish to make available to the

public is not a natural resource that may be exploited by whomever obtains access. It is proprietary material that plaintiffs spend millions of dollars to develop and protect. The public is served by enjoining those who seek to illegally exploit the statutory rights of copyright holders.

F. Bond Pursuant to Rule 65(c)

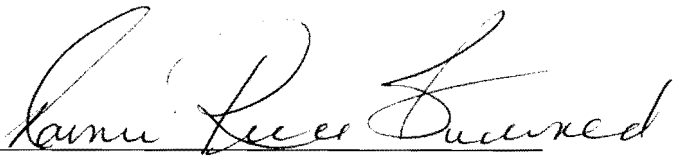
When this Court granted plaintiffs' motion for a preliminary injunction, it did not impose a bond pursuant to Rule 65(c) of the Federal Rules of Civil Procedure. As plaintiffs point out, while defendants did not request that a bond be imposed or provide any basis for this Court to determine the appropriate amount of such a bond, it is unclear whether we have the authority to eliminate the security requirement. See Eyewonder, Inc. v. Abraham, 293 Fed. Appx. 818, 821 (2d Cir. 2008). Thus, plaintiffs are hereby ordered to provide a \$10,000 bond.

**CONCLUSION**

For the aforementioned reasons, defendants' motion for a stay pending appeal is denied. Plaintiffs are hereby ordered to post a bond in accordance with this opinion within one week.

**SO ORDERED.**

Dated: New York, New York  
April 18, 2011

  
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NAOMI REICE BUCHWALD  
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

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