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VIA EMAIL
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Re: ivi TV
Our Reference: IVII-5-1002

Dear Mr. Kushner:

We represent ivi, Inc. in intellectual property matters. We have received your letter regarding the retransmission of broadcast signals originating with Fisher's television station KOMO-TV and respond to your concerns in this letter.

Your letter recognizes that a cable system can retransmit content originally broadcast as an over-the-air transmission. You contend, however, that the U.S. Copyright Office has declared that the cable statutory license does not apply to Internet distribution of broadcast television transmissions. The Copyright Office report on Section 109, however, is only a report to Congress. It does not carry force of law and is not a precedential interpretation of the statutory licensing requirements.

We further note that Section 111 defines "cable system" very broadly. It encompasses secondary transmissions "by wires, cables, microwave, or other communications channels." We are not aware of any court decision holding that a retransmission over the Internet does not fall within the definition of a cable system under Section 111.

Your letter refers to the *iCraveTV* litigation, but that dispute did not produce a final judgment on the merits and is hardly precedential. In addition, *iCraveTV* involved a factually different transmission, including the incorporation of advertising that was not in the original transmission. Again, the Copyright Act expressly allows for such transmissions "by wires, cables, microwave, or other communications channels," and there are no court decisions holding that a transmission over the Internet cannot meet this definition.

Your letter next contends that even if ivi is a cable system under the Copyright Act it still would be subject to the Communications Act. As such, you contend that ivi would be required to obtain the express permission of the originating station before retransmitting the content. We disagree

with the initial premise that a "cable system" under the Copyright Act is necessarily a cable provider under the Communications Act. In this regard, we note that the Copyright Office and the legislative history relating to the relevant portions of the Copyright Act have urged that the two laws are to be treated independently. Characterization as a cable system under one statute has no bearing on treatment under the other statute. For example, the Copyright Office's instructions regarding statutory licenses provide that a company that meets the definition of a "cable system" under Section 111 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." *See* http://www.copyright.gov/forms/SA1-2-2010.pdf. (General Instructions, p. 14). Despite the Copyright Office report you cite in your letter, the Copyright Office has subsequently taken a more inclusive view on the nature of companies that can qualify as a "cable system" for statutory licensing purposes, and specifically stated that they need not be within the governance of the FCC.

We further disagree that ivi is subject to the Communications Act. Nothing in your letter explains how the Act would apply, and we are confident that it does not. Indeed, even the FCC has declared quite succinctly that "the FCC does not regulate the Internet or Internet Service Providers (ISPs)." *See* http://www.fcc.gov/cgb/internet.html. More recently, the FCC issued a bureau decision analyzing whether an Internet Protocol television entity was a multichannel video programming distributor (MVPD) and therefore subject to FCC rules. The FCC concluded that it was not because, among other things, an essential element of an MVPD is the provision of a transmission path for delivery of television programming. It is the internet service provider, not the internet television entity, that provides the transmission path. *See in re Sky Angel US, LLC*, 25 FCC Rcd 3879 (Media Bur. 2010). This same analysis applies to ivi, and would mean that ivi is not an MVPD. We do not believe there have been any decisions to the contrary ruling that an internet television company is an MVPD.

Your letter next refers to a published report stating that ivi has secured the rights to deliver content. As you can imagine, reporters sometimes incorrectly describe the facts as conveyed to them and that appears to be the case here. We note that other sources who published reports about the ivi launch did not make the same error, confirming that the report you referenced was a mistake not attributable to ivi. Since you called it to our attention, we promptly reached out to the author of the report and asked for a correction to indicate that ivi does not have contracts with content providers under which it pays them directly for the transmission.

Finally, ivi TV would much rather work together with Fisher to reach an amicable conclusion to this issue. Its technology provides a very high quality video stream that is on a par with current digital programming over traditional cable or satellite media. ivi seeks to generate revenue by the distribution of television content over the Internet, and would be eager to negotiate an arrangement with Fisher in which both sides can profitably protect the content under all applicable laws while taking advantage of the Internet as a new channel of distribution. ivi can, for example, technologically restrict distribution of local channels to local areas and take advantage of other such features that may be desired by Fisher. While we remain confident that

we have adopted a model that is allowed under all applicable laws, we are also open to engaging in discussions with Fisher to explore more direct contractual agreements under which ivi would distribute content originating with Fisher. We look forward to your response, and can arrange a meeting with ivi principals at your convenience.

Very truly yours,

BLACK LOWE & GRAHAM[PLLC]

Lawrence D. Graham

cc: ivi, Inc.