The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

IVI, INC.,

Plaintiff,

v.

FISHER COMMUNICATIONS, INC., NBC UNIVERSAL, INC., AMERICAN BROADCASTING COMPANIES, INC., CBS BROADCASTING, INC., THE CW TELEVISION STATIONS, INC., DISNEY ENTERPRISES, INC., FOX TELEVISION STATIONS, INC., MAJOR LEAGUE BASEBALL, TWENTIETH CENTURY FOX FILM CORPORATION, WGBH EDUCATIONAL FOUNDATION, and WNET.ORG,

Defendants.

Case No.: 10-cv-1512

MOTION TO DISMISS COMPLAINT AS AN IMPROPER ANTICIPATORY FILING

NOTE ON MOTION CALENDAR: October 22, 2010

The television networks, stations and other content owners, who are the natural complainants in this matter, respectfully move the Court to dismiss the complaint filed by ivi, Inc. ("ivi") as an improper anticipatory filing. ivi's complaint was filed the very next business day after ivi received a cease-and-desist letter sent by movants who made an effort to resolve this matter without the need to burden the parties or the courts with unnecessary litigation. Under well-established law, when such a cease and desist letter is sent with a short and firm

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deadline for compliance, it is improper for the recipient to rush into court and file a declaratory action in an effort to deprive the complainants of their choice of forum.

The natural complainants, including several other parties in addition to the movants in this case, have filed a copyright infringement action in the United States District Court for the Southern District of New York, the center of the United States television broadcast industry which has been harmed by ivi's misconduct, and the merits should be decided there. As this Court recently explained:

> where, as here, **"a declaratory judgment action has been triggered by a cease and desist letter, equity militates in favor of allowing the second-filed action to proceed to judgment rather than the first."**

Topics Entm't, Inc. v. Rosetta Stone Ltd., 2010 WL 55900 (W.D. Wash. Jan. 4, 2010) (*quoting Z-Line Designs, Inc. v. Bell'O Int'l LLC*, 218 F.R.D. 663, 667 (N.D. Cal. 2003)) (emphasis in original).

ivi is a garden variety Internet pirate. It misappropriates the signals of multiple broadcast television stations, and the copyrighted programming on those stations, and peddles them around the world, via the Internet, to paying subscribers for $4.99 per month—all without obtaining the consent of any of the affected parties.

As a matter of federal comity, where two cases that contain similar claims against similar parties are pending in separate districts, the courts have equitable jurisdiction to dismiss, stay, or transfer one of the cases to conserve judicial resources and avoid potential conflicting rulings. Typically, the first filed case (which is this case) receives priority. However, in instances of bad faith, forum shopping, or anticipatory litigation, it is the later filed action that should be given priority. ivi's anticipatory action should be dismissed, and the natural complainants should be permitted to have this matter resolved in their New York forum of choice where the bulk of the movants reside and are injured.

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BACKGROUND

ivi takes broadcasts of television content originated by providers in the New York, New York and Seattle, Washington markets, reformats them, and distributes them over the Internet for a fee to paying subscribers, using peer-to-peer technology similar to the Napster and Grokster systems. *See* http://www.ivi.tv, pages from which are attached hereto as Exhibit 1. ivi began operation on Monday, September 13, 2010, and has since made clear that it intends to continue increasing the number of stations from which it misappropriates signals, and to extend its service to iPhone, iPad, Android, and other mobile devices. *See* Ex. 2. ivi has already started hawking its service in Australia, and has boasted of expanding its operation worldwide. *See* Ex. 3.

The movants own (1) broadcast television stations serving the New York, New York and Seattle, Washington markets ("Stations") and/or (2) copyrighted programming exhibited on one or more of these Stations and on other stations serving New York and Seattle.

On Friday evening, September 17, 2010, at 7:12 PM EDT, Washington, D.C. counsel for movants American Broadcasting Companies, Inc., CBS Broadcasting Inc., The CW Television Stations Inc., Disney Enterprises, Inc., Fox Television Stations, Inc., Major League Baseball, Twentieth Century Fox Film Corporation, the WGBH Educational Foundation and WNET.ORG sent a cease-and-desist letter to ivi. *See* Ex. 4. That cease-and-desist letter notified ivi that ivi was not authorized to make the content of the Stations available over the Internet, informed ivi that its conduct "willfully infringe[s] the exclusive rights" of the movants and others under section 106 of the Copyright Act, and warned ivi that "a court may increase an award of statutory damages for willful copyright infringement up to $150,000 per work infringed." *Id.*

The letter demanded "that, no later than September 22, 2010, ivi cease and desist from distributing via the website http://www.ivi.tv/, or otherwise, the broadcasts of the following stations: KSTW (Seattle, Washington), WABC (New York, New York), WCBS (New York, New York), WNET (New York, New York), WNYW (New York, New York), WWOR (New

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York, New York)." *Id.* The letter demanded also "that, no later than September 22, 2010, ivi cease and desist from distributing via the website http://www.ivi.tv/, or otherwise, all of the programming (a) in which our Clients own the copyright and (b) that is broadcast by the Stations and by all other broadcast television stations." *Id.* Counsel's cease-and-desist letter ended with the warning that the movants "expressly reserve all rights and remedies under all applicable federal and state laws." *Id.*

On the following Monday morning, September 20, 2010, at 9:08 AM PDT, ivi notified counsel for the movants that it had filed a Complaint for Declaratory Judgment of Copyright Noninfringement with this Court. ivi's complaint makes no secret of the fact that it was filed as a direct and immediate response to the natural claimants' cease-and-desist letter. The complaint begins:

> ivi, Inc. (a Washington corporation, which uses a lowercase "i" for its name and is referred to in this complaint as "ivi") has been accused of copyright infringement by each of the defendants in this action. ivi seeks a declaratory judgment that it has not infringed any copyrights owned by the defendants, and alleges as follows:

On September 27, 2010, the movants, along with Univision Television Group, Inc., The Univision Network Limited Partnership, Telefutura Network**,** Telemundo Network Group LLC, NBC Telemundo License Company, Tribune Television Holdings, Inc., Tribune Television Northwest, Inc., Cox Media Group, Inc., CBS Studios, Inc., NBC Studios, Inc., Universal Network Television, LLC, THIRTEEN, and Public Broadcasting Service, who also own copyrighted content infringed by ivi, sued ivi and Mr. Todd Weaver, ivi's founder and Chief Executive Officer, for copyright infringement in the United States District Court for the Southern District of New York. A copy of the complaint is attached hereto as Exhibit 5.

ARGUMENT

ivi's complaint is an improper anticipatory filing designed to preempt the natural claimants' choice of forum. The Court should exercise its discretion to dismiss this action in favor of the action pending in the Southern District of New York.

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The doctrine of federal comity "permits one district to decline judgment on an issue which is properly before another district." *Church of Scientology of California v. United States Dep't of the Army*, 611 F.2d 738, 749 (9th Cir. 1979) (*citing Kerotest Mfr. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, (1952)). The "doctrine is designed to avoid placing an unnecessary burden on the federal judiciary, and to avoid the embarrassment of conflicting judgments." *Id.* (*citing Great N. Railway Co. v. National R.R. Adjustment Board*, 422 F.2d 1187, 1193 (7th Cir. 1970)).

Typically, courts apply the "first-to-file" rule under which a court may dismiss, transfer, or stay the later filed of two cases involving similar parties and similar issues. *See Topics Entm't, Inc. v. Rosetta Stone Ltd., supra* (*citing Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982)). But "a court may deviate from the rule for reasons of equity, such as when the filing of the first suit was anticipatory," *id.*, or where bad faith or forum shopping is present, *see Alltrade Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 627 (9th Cir. 1991). Additionally, a court may "refuse to apply the first to file rule if the balance of convenience weighs in favor of the later filed action." *Z-Line Designs, Inc. v. Bell'O Int'l LLC*, *supra*, 218 F.R.D. at 665. Decisions in such instances require "(w)ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation," and "an ample degree of discretion, appropriate for disciplined and experienced judges, must be left to the lower courts." *Kerotest Mfr. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84 (1952).

I. IVI'S COMPLAINT WAS FILED IN ANTICIPATION OF IMMINENT LITIGATION AND SHOULD THEREFORE BE DISMISSED

ivi's declaratory action should be dismissed as forum shopping. "The anticipatory suit exception is rooted in a concern that a plaintiff should not be deprived of its traditional choice of forum because a defendant with notice of an impending suit first files a declaratory relief action over the same issue in another forum." *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006) (declining to dismiss later-filed action on the grounds

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that the first filed case was anticipatory litigation); *see Topics, supra*, 2010 WL 55900 at *3 (holding that courts disfavor such anticipatory suits because they "are examples of forum shopping") (*quoting Z-Line Design, supra*, 218 F.R.D. at 665). An action is anticipatory "when the plaintiff filed upon receipt of specific, concrete indications that a suit by defendant was imminent." *Z-Line Design*, 218 F.R.D. at 665.

Sound policy supports dismissal of anticipatory suits such as this one. "Application of the first to file rule in such situations would thwart settlement negotiations, encouraging intellectual property holders to file suit rather than communicate with an alleged infringer." *Id.* at 665. The "Declaratory Judgment Act is not to be invoked to deprive a plaintiff of his conventional choice of forum and timing, precipitating a disorderly race to the courthouse." *DeFeo v. Procter & Gamble Co.*, 831 F.Supp. 776, 778 (N.D. Cal. 1993).

A. Plaintiff Filed This Action as a Result of Concrete and Specific Indications That a Lawsuit Was Imminent

ivi rushed to file this declaratory action immediately after receiving a letter warning that ivi's conduct "willfully infringe[s] the exclusive rights" of the movants and others under section 106 of the Copyright Act. *Id.* The movants demanded that ivi cease and desist further violations of the Copyright Act by September 22, 2010 and reserved "all rights and remedies under all applicable federal and state laws." ivi responded by rushing to its forum of choice and filing suit for declaratory judgment of non-infringement.

Plaintiff's conduct mirrors the conduct found to constitute anticipatory litigation by this Court earlier this year. In *Topics, supra*, plaintiff filed a declaratory action against defendant after receiving a cease-and-desist letter from defendant demanding that plaintiff discontinue its product packaging because the packaging violated defendant's copyrights and constituted unfair competition. 2010 WL 55900 at *1. That letter stated that defendant "would pursue alterative measures to resolve the matter" if plaintiff did not comply with defendant's demands. After discussions among the parties, including assertions by both parties that they were prepared to file suit, plaintiff filed its action with this Court two hours before defendant filed its

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action in a separate forum. *Id.* The Court held that defendant's threats to pursue "alternative measures" and its threatened litigation during telephone conversations along with plaintiff's filing suit during ongoing settlement negotiations rendered plaintiff's declaratory action an anticipatory suit. *Id.* at *4. The court correctly dismissed the declaratory judgment action in favor of the action filed by defendant in a separate forum.

The same scenario presented here—an action for declaratory relief filed soon after receipt of a cease-and-desist letter—was found to constitute anticipatory litigation by a sister court in this Circuit a few years ago. In *Z-Line Designs, supra*, plaintiffs filed an action in the Northern District of California after receiving a cease-and-desist letter from defendant alleging that plaintiff's products infringed defendant's copyrights and trade dress rights. That letter stated that defendant was "willing to take all steps necessary to fully protect its intellectual properties, including commencing an action in an appropriate United States District Court if [plaintiff] does not comply." *Z-Line Design*, 218 F.R.D. at 666. Plaintiff filed a declaratory action the day before a negotiated deadline for responding to defendant's demand, and defendant filed a subsequent infringement action in another forum. The court held that plaintiff filed the action "in anticipation of specific concrete indications that a suit by [defendant] was imminent" and dismissed the action in favor of the later-filed case brought by the defendant. *Id.*

In both *Topics* and *Z-Line Designs*, the respective courts held that "where, as here, a declaratory judgment action has been triggered by a cease-and-desist letter, equity militates in favor of allowing the second-filed action to proceed to judgment rather than the first." *Topics*, 2010 WL 55900 at *4 (*quoting Z-Line Designs*, 218 F.R.D. at 667) (internal quotations omitted). The logic followed by those courts applies to the case at bar. The Court should exercise its equitable authority to dismiss this action in favor of the nearly identical action filed by movants and additional plaintiffs, many of which are New York-based, in the Southern District of New York.

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B. Movants Should Not Be Penalized for Attempting To Resolve Their Dispute with ivi Without Litigation

One of the reasons for the anticipatory filing exception to the first-to-file rule is to encourage parties to attempt to resolve matters among themselves without burdening the courts with unnecessary litigation. "Potential plaintiffs should be encouraged to attempt settlement discussions (in good faith and with dispatch) prior to filing lawsuits without fear that the defendant will be permitted to take advantage of the opportunity to institute litigation in a district of its own choosing." *Columbia Pictures Indus., Inc. v. Schneider,* 435 F. Supp. 742 (S.D.N.Y. 1977), *aff'd*, 573 F.2d 1288 (2d Cir. 1978).

As this Court has characterized the point:

> where a party is prepared to pursue a lawsuit, but first desires to attempt settlement discussions, that party should not be deprived of the first-filed rule's benefit simply because its adversary used the resulting delay in filing to proceed with the mirror image of the anticipated suit. Otherwise, potential plaintiffs would be discouraged from first attempting to resolve their claims without resorting to litigation.

Topics, supra, 2010 WL 55900 at *4 (quoting *Ontel Prods., Inc. v. Project Strategies Corp.*, 899 F. Supp. 1144, 1153 (S.D.N.Y. 1995)). Permitting ivi to preempt the natural claimants' case would discourage parties from pre-litigation settlement discussions and would "encourage parties interested in protecting their intellectual property rights to file a complaint prior to attempting settlements." *Z-Line Designs, supra*, 218 F.R.D. at 666. Such incentives would not result in judicial economy or efficiency. Rather, the federal courts would become further clogged with pre-emptive complaints filed by intellectual property owners to ensure that their choice of forum was not disturbed by anticipatory declaratory actions by infringing parties. Equity and sound policy support dismissal of the instant action in favor of the action filed by the movants and additional affected parties in the Southern District of New York.

II. THE BALANCE OF CONVENIENCE WEIGHS IN FAVOR OF NEW YORK

The Court should refuse to apply the first-to-file rule also because the "balance of convenience weighs in favor of the later filed action." *Z-Line Designs,* 218 F.R.D. at 665. The "balance of convenience" standard is "analogous to the 'convenience of parties and witnesses'

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on a transfer of venue motion pursuant to 28 U.S.C. § 1404 (a)." *Callaway Golf Co. v. Corporate Trade Inc.*, 2010 WL 743829 (S.D. Cal. 2010). The purpose of section 1404 (a) is to "prevent the waste 'of time, energy and money' and to 'protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (*quoting Continental Grain Co. v. Barge F.B.L.*-585, 364 U.S. 19, 26-27 (1960)).

The bulk of the infringing conduct and the injury suffered therefrom occurred and is currently occurring in New York. Most of the movants in this action (plaintiffs in the New York action) reside in New York. Witnesses and evidence developed by movants are located in New York, subscribers to ivi and recipients of the unauthorized content at issue reside in New York. The broadcasts for five of the Stations at issue in this litigation originate from New York television stations.

Indeed, New York is, by any measure, the center of the United States television broadcast industry. By contrast, no major television networks, sports leagues, motion picture companies, or other content industries are based in Washington state. We realize that Seattle is a convenient forum for ivi because the computer that it uses to misappropriate, reformat, and peddle movants' content around the world may be located here, but that hardly provides a basis for forcing the bulk of the station and content owners subject to ivi's infringement to cross the continent to seek relief.

Furthermore, there are parties and issues in the New York action that go beyond those involved in this case and that accordingly cannot be resolved here. Univision Television Group, Inc., The Univision Network Limited Partnership, Telefutura Network**,** Tribune Television Holdings, Inc., Tribune Television Northwest, Inc., Cox Media Group, Inc., CBS Studios, Inc., NBC Studios, Inc., Universal Network Television, LLC, THIRTEEN, and Public Broadcasting Service are plaintiffs in the New York action but are not parties here.

For all of these reasons, the balance of convenience weighs in favor of the New York action and this case should be dismissed to allow that action to proceed.

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CONCLUSION

For the foregoing reasons, the Court should dismiss this action in favor of the action pending in the United States District Court for the Southern District of New York.

Dated: September 28, 2010.

s/ Warren J. Rheaume
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CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2010, I electronically filed the foregoing MOTION TO DISMISS COMPLAINT AS AN IMPROPER ANTICIPATORY FILING 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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DATED this 28th day of September, 2010.

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