UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WPIX, INC., WNET.ORG, AMERICAN BROADCASTING COMPANIES, INC., DISNEY ENTERPRISES, INC., CBS BROADCASTING INC., CBS STUDIOS INC., THE CW TELEVISION STATIONS INC., NBC UNIVERSAL INC., NBC STUDIOS, INC., UNIVERSAL NETWORK TELEVISION, LLC, TELEMUNDO NETWORK GROUP LLC, NBC TELEMUNDO LICENSE COMPANY, OFFICE OF THE COMMISSIONER OF BASEBALL, MLB ADVANCED MEDIA, INC, 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.	)	10 Civ. 07415-NRB

***AMICUS* MEMORANDUM OF LAW**
IN OPPOSITION TO MOTION FOR
TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION

Table of Contents

Statement of Interest

Amici Public Knowledge, Electronic Frontier Foundation, Media Access Project, and Open Technology Initiative (a project of the New America Foundation) are public interest organizations concerned with maintaining an open, competitive, and diverse communications infrastructure. As the market for commercial video distribution becomes increasingly consolidated, both horizontally and vertically, the wide variety of online video distributors (OVDs) are rapidly becoming one of the preeminent forces for competition in the marketplace, with the potential to lower consumer costs, spur technological innovation, and even promote the deployment of high-speed Internet access to communities it currently does not reach. However, OVDs must be allowed to operate and innovate in this space if their promise is to be fulfilled. Issuing a temporary restraining order or preliminary injunction against ivi would frustrate this potential by effectively shutting down ivi's business. In the meantime, the competitive benefits of this OVD's continued operation would be absent from the market, while the harms Plaintiffs allege from ivi would persist regardless. Given the circumstances, *amici* respectfully ask that the Court not enjoin ivi's operations pending a full decision on the merits.

Although *amicus* briefs are unusual at the district court level, they are certainly not unprecedented. Some of the present *amici* have participated in a number of leading district court cases that address the proper scope of copyright law as applied to new technologies, including before this Court. *See, e.g., Viacom Int'l Inc. v. YouTube Inc.*, No. 07-CV-02103 LLS, 2010 WL 2532404 (S.D.N.Y. June 23, 2010); *Arista Records LLC v. Lime Wire LLC*, No. 06-CV-5936 GEL (S.D.N.Y. Sept. 30, 2008); *Elektra Enter. Group v. Barker*, 551 F.Supp.2d 234, 237 (S.D.N.Y. 2008). *Amici* have also participated as *amicus curiae* and as parties in numerous appellate cases addressing the intersections between new technologies, copyright and communications issues, including *MGM Studios, Inc. v. Grokster*, Ltd., 545 U.S. 913 (2005); *Cartoon Network LP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008); *Comcast Corp. v. FCC*, No. 08-1291 (D.C. Cir. 2010); and *American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005).

Introduction

The Court should deny Plantiffs' request for a Temporary Restraining Order (TRO).

Since parties filed their briefs in this case, the Department of Justice (DoJ) and the Federal Communications Commission (FCC) have recognized the emergence of a new class of video competitors called "online video distributors" (OVDs). *See* Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion & Order*, MB Docket No. 10-56, FCC 11-4 (released January 20, 2011) (FCC Analysis); Competitive Impact Statement of the Department of Justice, United States v. Comcast Corp., 1:11-cv-00106, (DC Cir. Jan. 18, 2011) (DoJ Analysis).[1] As described by the DoJ, OVDs increasingly provide competition to traditional multichannel video distributors (MVPDs) such as traditional cable systems and direct broadcast satellite (DBS) providers, playing a valuable role in restraining MVPDs from raising prices, and promoting innovation in the distribution of video programming. DoJ Analysis 17-20. Defendant belongs to this emerging class of OVDs, and a decision to grant Plaintiffs a preliminary injunction would deprive the public of the benefits envisioned by the DoJ and FCC.

[1] The FCC Analysis is available at http://bit.ly/erx8Jr (http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf), and the DoJ Analysis is available at http://bit.ly/fP0dPY (http://www.justice.gov/atr/cases/f266100/266158.pdf).

At the same time, Plaintiffs' claims of irreparable harm ignore the numerous products that already stream or otherwise make available Plaintiffs' content over the Internet. Although Plaintiffs' current business arrangements may be affected by the ability of individuals to access Plaintiffs' programming from out of market by way of the Internet, or to view that content at times not proscribed by Plaintiffs, that alteration cannot be traced exclusively to ivi. Thus, a TRO against ivi would not address any of the harms proffered by Plaintiffs. Accordingly, given the high value placed on merging OVDs by the DoJ and the FCC, and the unlikelihood that a restraining order against ivi will impact the Internet distribution of Plaintiffs' programming alleged as their chief irreparable harm, the balance of equities weighs in favor of denying the request for a TRO.

Finally, Plaintiffs are unlikely to prevail on the merits, because ivi's service fits the Copyright Act's definition of a "cable system," and its actions are permissible under FCC rules. Plaintiffs write that "under ivi's view of section 111, anyone with a computer, an Internet connection and a TV antenna can become a 'cable system'…." Pl. Reply 1. This is a compelling argument for *amici*'s position. America's legal system favors competition, not monopoly, and the law does not grant special privileges to 1970s-era cable operators while discriminating against new entrants that offer a substantially similar service. ivi deserves to make its case, and the preliminary injunction should not be granted.

Argument

The Court must deny Plaintiff's motion for a Temporary Restraining Order, because none of the factors described in *Salinger v. Colting*, 607 F.3d 68, 79-80 (2d Cir. 2010), are met. Such an order would create a chilling effect that would slow the growth of Internet-based video distribution generally, and would be contrary to the public interest.

Online video distributors like ivi serve a vital role in increasing competition and innovation in the video distribution market, and an injunction would not only remove ivi from the market, but also chill further potential entrants. Furthermore, Plaintiffs will not suffer irreparable injury absent injunctive relief. The harms claimed by Plaintiffs are speculative at best, and any actual injury cannot be traced to ivi alone. Each "harm" claimed by Plaintiffs could also be traced to the existence of other legal services and products. As a result, injunctive relief against ivi would do nothing to assuage Plaintiffs' concerns. Because the speculative injuries claimed by Plaintiffs are not uniquely traceable to ivi, the balance of hardships between Plaintiffs and Defendant do not warrant issuing an injunction. An injunction against ivi will not impact the harms claimed by Plaintiffs. Conversely, an injunction against ivi would drastically impact its viability. Finally, Plaintiffs are not likely to succeed on the merits, because ivi is a cable system for copyright purposes, whose actions are "permissible" under applicable law.

I. The Public Interest Would be Disserved by an Injunction

A. The public interest in competition and innovation in the video distribution market would be harmed by an injunction

The creation and development of OVDs serves vital public interests. As both the Department of Justice and the Federal Communications Commission have held, OVDs are one promising source of competition in a video distribution market sorely lacking competition in the face of increasing horizontal and vertical integration. Furthermore, additional small competitors in the form of OVDs or other innovative distributors can provide new networks for both consumers and new programming producers. A preliminary injunction against ivi would not only deprive consumers and the competitive landscape of a new entrant, it also would chill other potential startups and their investors from entering the market.

Both the Justice Department and the FCC have recently affirmed the essential public interest in promoting competition in video distribution, and the critical role that OVDs can play in furthering that competition. The Justice Department recently conditioned the merger of Comcast and NBC upon the joint entity licensing programming to OVD competitors. This condition exists because the Justice Department recognized (1) that OVDs provided beneficial competition to the video distribution market, and (2) that MVPDs and content producers would both have incentives to discriminate against OVDs. DoJ Analysis 11.

In noting the public benefits of OVDs, the Justice Department found that they were meeting increased consumer demand for on-demand viewing, and that the competitive pressure from OVDs was stimulating MVPDs to offer more on-demand choices to compete. DoJ Analysis 15. New OVDs entering the market not only broaden the number of competitors for video distribution, they also expand the field for methods and technologies for providing content to consumers. The Justice Department states that among OVDs, "[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand." DoJ Analysis 15-16. The FCC likewise states that OVDs "can provide and promote more programming choices, viewing flexibility, technological innovation and lower prices." FCC Analysis ¶ 78. Preventing more OVDs from reaching the market would therefore

> have an substantial anticompetitive effect on consumers and the market. Because [an MVPD] would face less competition from other video programming distributors, it would be less constrained in its pricing decisions and have a reduced incentive to innovate. As a result, consumers likely would be forced to

> pay higher prices to obtain their video content or receive fewer benefits of innovation. They would also have fewer choices in the types of content and providers to which they would have access, and there would be lower levels of investment, less experimentation with new models of delivering content, and less diversity in the types and range of product offerings.

DoJ Analysis 27. Despite their currently-small market share, the Justice Department found that the emergence and growth of OVDs, of which ivi is but one example, was extremely significant, saying that OVDs "represent the most likely prospect for successful competitive entry into the existing video programming distribution market." DoJ Analysis 28.

The FCC recognizes a further public interest in the spread of OVDs. In addition to the benefits to competition and innovation, a robust OVD market would serve an important public interest in establishing a nationwide broadband infrastructure. In its Order on the Comcast/NBC merger, the FCC said that, in addition to enhancing available content, lowering prices, and driving innovation, "[a] robust OVD market also will encourage broadband adoption, consistent with the goals of the Commission's National Broadband Plan." FCC Analysis ¶ 62. By stimulating demand for broadband, OVDs create market incentives for Internet access providers to bring the attendant benefits of broadband connectivity to communities that may currently lack it.

If merely colorable disputes about the complexities of licensing statutes can prevent a business from reaching the market pending lengthy litigation, companies would be disincentivized to stray from "traditional" methods of video distribution, leaving the market in the hands of a limited number of incumbents.

B. The public interest in copyright law would not be served by an injunction

Plaintiffs assert that the public interest would not be harmed by issuing an injunction because the alleged infringement removes incentives for creation. However, this merely recasts the Plaintiffs' interests as the public's, and for several reasons cannot be supported.

First, as noted above, Plaintiffs continue to produce, distribute, and broadcast their creative works to the public unabated. It seems doubtful that ivi's continued operation would spur the cancellation of any programming during the pendency of this litigation. Secondly, Plaintiffs neglect the fact that copyright law operates through a balance between the interests of the author (being compensated for creating the work) and the interests of the public (having the ability to access the work). That balance can be upset by actions that favor too much the public's access (by allowing excessive unauthorized dissemination of a work) or those that favor too much the author's exclusive interests (by preventing legitimate speech). The Second Circuit, in applying this factor in a copyright case, held that the public's interest in free speech must be weighed separately from the plaintiff's interest:

> The public's interest in free expression, however, is significant and is distinct from the parties' speech interests. "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." Every injunction issued before a final adjudication on the merits risks enjoining speech protected by the First Amendment.

Salinger, 607 F.3d at 82(citation omitted). The public interest is not merely in protecting as strenuously as possible the outer boundaries of Plaintiffs' copyrights, nor even in protecting the legitimate interests of Defendant's ability to do business, but in the public's ability to access lawfully licensed content.

The distinctiveness of the parties' interests and the public interest is highlighted by the fact that regarding the two as coterminous would effectively read out the entire public interest prong of the injunction analysis. If the public interest were represented by the interests of the parties, then the balance of hardships prong would be subsumed and rendered unnecessary. Clearly, this cannot be the case. Preventing ivi's operation for the time being would not only harm the interests of ivi's current customers, but also the general public whose access to other new OVDs would also be limited if further OVD models were chilled. Members of the public both current and future have a strong interest in not only a competitive video distribution marketplace, but also broad access to the marketplace of ideas.

II. Plaintiffs Would Not Suffer Irreparable Injury Absent Injunctive Relief

Contrary to Plaintiffs' claims, *see* Pl. Memo at 14-17, they do not face a threat of irreparable injury in the absence of injunctive relief. Plaintiffs currently distribute their content in a free, unprotected format to the general public. A number of legal technologies currently exist to distribute that content via the Internet. As a result, any harms attributed to ivi by Plaintiffs in fact result from legal activity that also occurs even in the absence of ivi from the market.

A. In addition to ivi, many services and products already retransmit content that plaintiffs freely broadcast to the public

As Plaintiffs point out, ivi retransmits signals of local broadcast stations in the New York, New York and Seattle-Tacoma, Washington markets. Pl. Memo 3. These signals are freely distributed to the public without any type of digital protection measures by the stations themselves. *See American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (striking down the so-called "broadcast flag" copy protection scheme for broadcast television). As a result any member of the public can access these signals free of charge, beyond the control of Plaintiffs, and without any requirement to report their habits back to Plaintiffs or advertisers.

Furthermore, the freely available broadcast signal is viewable beyond local television screens. A wide range of consumer devices help bridge the gap between over-the-air broadcast signals and computers and other networked devices. For example, a consumer can legally purchase a TV tuner to view over-the-air broadcast television on her computer. These tuners can come in the form of an internal card that must be installed inside the computer case,[2] or an external device that can be easily inserted into a USB drive.[3] Alternatively, a consumer can purchase a device that will stream over-the-air broadcasts across a local network to any number of networked devices.[4] These devices are critical to the functioning of home media center software from companies such as Microsoft.[5]

Other devices allow consumers to remotely view freely available over-the-air broadcast television outside of a broadcaster's home market. Products such as the Slingbox,[6] MyTV,[7] and EyeTV[8] allow a consumer to watch local broadcast television

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[2] *See, e.g.* Hauppage's WinTV-HVR-2250, which comes with two tuners that allow a consumer to watch one channel and record another, in addition to a remote control to facilitate distance viewing.

[3] *See, e.g.* Hauppage's WinTV-HVR-950Q.

[4] *See* SiliconDust's HDHomeRun, http://www.silicondust.com/products/hdhomerun/atsc.

[5] *See* Windows Media Center Record TV at http://www.microsoft.com/windows/windows-media-center/learn-more/record-tv/default.aspx.

[6] Sling Media, http://www.slingmedia.com/.

[7] Orb MyTV, http://www.orb.com/mytv.

[8] Elgato Eyetv, http://www.elgato.com/elgato/na/mainmenu/products/software/EyeTV-app.en.html

from other television markets and other time zones via the Internet. In fact, the ability to remotely view broadcast content via the Internet is a centerpiece of Microsoft's current high-profile "To the Cloud" advertising campaign.[9]

ivi's impact on Plaintiffs is no different than these existing products and services. Potential licensees are already aware that consumers can obtain Plaintiff's signals for free thanks to over-the-air broadcasting. West coast viewers can watch live content from the east coast, and out of market viewers routinely sit through in-market advertising. There is nothing inherent to ivi's distribution model that makes it impossible to calculate the viewership of an individual program. In fact, from a technical standpoint, it is much easier to calculate ivi viewership than viewership of directly watched free, over-the-air broadcasting. While ivi is certainly an additional way to watch broadcast channels, and can be used to view those channels from beyond their home market, it is by no means the only way to do so.

B. Plaintiffs' actual harms are purely speculative

It is purely speculative that ivi's action will actually result in lost sales and profits for Plaintiffs. Mere speculative harm is not adequate grounds to issue an injunction. "[P]laintiffs must show that, on the facts of their case, the failure to issue an injunction would *actually* cause irreparable harm." *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010) (emphasis added).

Plaintiffs fail to meet this burden of showing *actual* harm. Plaintiffs' broadcasts are retransmitted by ivi in their entirety, including all commercials. ivi makes no attempt

[9] *See, e.g.* Airport – To the Cloud – Windows 7, *available at* http://bit.ly/i93r2A (http://www.microsoft.com/showcase/en/us/details/b95671ee-c3be-411a-8e4f-3ad2f2600f4f).

to edit the broadcast feed by inserting its own commercials. Arguably, ivi helps to increase viewership of Plaintiffs' broadcasts.

Similarly, ivi does nothing to interfere with the tracking of broadcast viewers. Because of the asymmetrical nature of broadcasting, Plaintiffs have no direct way to determine how many viewers are watching their broadcast at any given time. ivi does not alter that fact. Over time indirect methods, such as statistical sampling, have evolved to help broadcasters and advertisers calculate viewership. There is no reason that these methods could not be used for ivi viewers as well.

In fact, ivi is just as likely to help Plaintiffs as do them harm. Plaintiffs reach each ivi viewer at zero additional marginal cost. To the extent ivi expands the number of individuals viewing a broadcast, it may make that broadcast more, not less, attractive to advertisers. ivi expands the reach of broadcasters at no cost.

Finally, the assertion that ivi uniquely exposes Plaintiffs to the threat of piracy is absurd. Pl. Memo 15. Any harm piracy causes Plaintiffs is unchanged by the existence of ivi. Plaintiffs currently distribute high quality, digital broadcasts freely to the public. They have no ability to control who receives those signals, or what is done with the signals once they are received.

As Ronald C. Wheeler, Senior Vice President, Content Protection of Fox Group testified "Fox's TV content is usually made available on the Internet – without the commercials associated with the original broadcast or cable/satellite versions – almost immediately following the initial telecast." Letter from Antoinette Cook Bush and Jared S. Sher, Counsel to MPAA, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 08-82, CSR-7947-Z (Dated November 23, 2009), at

Exhibit C (*MPAA Letter*).[10] This was true in late 2009 before ivi began offering its service to the public, and it will be true in the event that an injunction prevents ivi from operating in the future. Digital copyright infringement requires only a single copy to initiate "viral infringement." Pl. Memo 15. For better or worse, these copies are already available through existing distribution platforms. *See MPAA Letter*. As a result, the addition of a secure, closed distribution channel will have no impact on levels of copyright infringement.

III. The Balance of Hardships between Plaintiffs and Defendant do not Warrant Issuing an Injunction

As noted above, Plaintiffs' alleged harms remain speculative and vague. In contrast, ivi would suffer specific, quantifiable hardships that threaten its very existence should Plaintiffs succeed in preventing ivi's operation.

Even if their concerns are warranted, what Plaintiffs describe as harms flowing from ivi's actions are in fact their position regardless of ivi's entrance into the market. The combination of free, over-the-air broadcasting and legal, widely used technologies such as TV tuner cards, Digital Video Recorders (DVRs), antennas, computers, and the Internet already exposed them to the harms cited. Viewers can already access out of market broadcasts (even access domestic broadcasts internationally), watch content at a time not proscribed by the broadcaster, make personal copies of broadcasts, and alter modes of distribution, all without requesting permission from Plaintiffs or even alerting Plaintiffs of their intentions. All of this is already known by advertisers and taken into account in negotiations. An injunction against ivi does not change this reality.

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[10] Available at http://bit.ly/hbdkCf (http://fjallfoss.fcc.gov/ecfs/document/view?id=7020349875).

In stark contrast, an injunction would radically alter the position of ivi. Plaintiffs correctly describe ivi as a "startup operation." Pl. Memo 17. An injunction preventing them from continuing to operate as a business would effectively destroy them as a company.

Admittedly, ivi harnesses the power of the Internet in innovative and potentially disruptive ways. Although this use might strike some as novel, companies such as Netflix and Hulu (a company in which many plaintiff companies are significant investors) have embraced it. Furthermore, both the Department of Justice and the Federal Communications Commission recently identified Internet based video distribution – precisely what ivi is doing – as critical to increasing competition among video programming providers. *See* DoJ Analysis 11-30; FCC Analysis ¶ 60-109. An injunction against ivi would have little to no real impact on Plaintiffs, but would be devastating for ivi.

The law does not favor larger or better-funded entities over new or smaller ones. Nor is it a bludgeon to be used by large, entrenched interests to eliminate nascent competitors. The balance of harms cannot always come out in favor of the larger company (or companies), on the basis that they are larger. In the name of preventing speculative harm, an injunction would effectively destroy a company with the potential to revolutionize an entire industry.

IV. Plaintiffs Are Not Likely to Succeed on the Merits

Plaintiffs are unlikely to succeed on the merits of their case, because both the law and sound policy are in ivi's favor. First, ivi meets the definition of a "cable system" under the Copyright Act, and complies with the obligations of a cable system that law provides. Bierman Dec. at ¶6. Second, the FCC has so far declined to subject OVDs to its rules governing the conduct of MVPDs. The law only requires certain entities, as defined by the FCC, to seek consent for retransmission. Thus, provided ivi meets the requirements of copyright law, its retransmission of Plaintiffs' signals is permissible. Third, legislative history and current federal policy support the creation of alternative video distribution platforms, like ivi's.

A. ivi is a "cable system" under Copyright Act.

1. ivi fits the plain meaning of a "cable system"

ivi's service falls neatly within Section 111's definition of a "cable system":

> A "cable system" is a facility, located in any State, Territory, Trust Territory, or Possession, 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.

17 U.S.C. § 111(f). ivi's system consists of a facility (its servers and other equipment), located in the United States, that receives broadcast signals and retransmits them to subscribers over the various communication channels of the Internet. This is determinative. It is foundational law that "the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Furthermore, it is apparent that this reading of the definition of "cable system" accords with legislative intent. *See Griffin v. Oceanic Contractors, Inc.*, 458 US 564, 571 (1982). The legislative history of the 1976 Copyright Act defines "cable system" very broadly—as "commercial subscription services that pick up broadcasts of programs originated by others and retransmit them to paying

subscribers." H.R. Rep. No. 94-1476, at 88 (1976).[11] Indeed, the House Report stresses that it was not, by defining a "cable system" for copyright purposes, attempting to set "communications policy," leaving that to the FCC and the appropriate Congressional committees.[12] It is thus logical that the Copyright Act would define "cable system" broadly—to do otherwise would interfere with the operation of communications law (for instance, if an FCC-recognized cable system did not qualify for the statutory license).[13]

Finally, the House Report "urge[es] the Federal Communications Commission to understand that it was not the intent of this bill to touch on issues such as pay cable regulation." *Id.* at 89. Thus, it is within the jurisdiction of the FCC to determine whether or not certain cable systems are behaving "permissibly." Under current law, ivi is, and it therefore does not violate copyright law.

2. The 109 Report's analysis favors classifying a service like ivi's as a cable service

In the *109 Report*, the Copyright Office explains why it would define certain kinds of systems as "cable systems" for copyright purposes, and not others. *See* COPYRIGHT OFFICE, REGISTER OF COPYRIGHTS, SATELLITE HOME VIEWER EXTENSION AND REAUTHORIZATION ACT SECTION 109 REPORT (2008) (*109 Report*), at 199. Both sides in this dispute have claimed the *109 Report* supports their cause. But the bulk of the Report's discussion of next-generation subscription TV services focuses on the difference between "IPTV" services offered on closed networks, such as AT&T's U-Verse, and

[11] Available at http://bit.ly/f8FTJC (http://en.wikisource.org/wiki/Index:H.R._Rep._No._94-1476).

[12] Similarly, Congress avoids affecting copyright law with communications law provisions. *See, e.g.*, Report on the Cable Television Consumer Protection and Competition Act Of 1992, H.R. Rep. No. 102-628 (1992), at 92 ("Nothing in this provision, however, is intended to affect federal copyright law….")

[13] *See infra*, Part IV(B)(3), for a partial listing of the various technological platforms that would be considered to meet the Section 111 definition of "cable system".

"openly distributing video programming, including broadcast content, over the Internet," *109 Report* at 181, in systems such as iCrave's. *See 109 Report* at 186. Because ivi's service fits neither category (it distributes content over the Internet, but not openly and only to paid subscribers), it is more instructive to apply the Report's reasoning to the present case, rather than adopting one of its inapposite conclusions.[14]

a. ivi's system is similar to other cable systems

ivi's service is functionally identical to other cable systems, such as Comcast's or AT&T's U-Verse. The Copyright Office cites AT&T's summary of the five criteria[15] used to determine whether a system fits into Section 111's definition of a cable system. *109 Report* at 195. ivi meets all five: (1) it uses "facilities" (the servers and equipment that it owns, as well as the infrastructure of the Internet), (2) that are "located in any state," (3) to "receive[] signals transmitted or programs broadcast by one or more television broadcast stations licensed by the FCC," (4) with which it makes "secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels," and (5) it "offers its product "to subscribing members of the public who pay for [the] service."

Furthermore, like other cable systems, ivi uses security mechanisms to prevent unauthorized access. Weaver Dec. at ¶ 9. Like other cable systems, it retransmits streams of broadcast programming (not disaggregated, on-demand programs, as in services like

[14] The various trade agreements cited by the Copyright Office, *see* 109 Report 188-189, similarly are concerned with "open" Internet retransmissions and not secure online cable systems such as ivi's.

[15] Plaintiffs make much of a 1992 report from the Copyright Office, THE CABLE AND SATELLITE CARRIER COMPULSORY LICENSES: AN OVERVIEW AND ANALYSIS, which indicates that a cable system cannot be "nationwide." This analysis, which should be read in the context of the passage of satellite-specific statutory licenses which moot the need for Section 111 applicability, was not central to the analysis of "New Distribution Technologies" in chapter five of the more recent *109 Report*.

Hulu or Netflix). Indeed, the only significant difference between ivi and some other cable systems is that while ivi owns some of its facilities (its servers and equipment), it does not own all of them—the wires that run to its customers' houses. But this is an irrelevant detail. Interpreting Section 111(a)(3), one court has held that who has the title to the "wires, cables, or other communications channels" mentioned in that subsection does not affect whether an entity qualifies for a statutory license. *NFL v. Insight Telecommunications Corp.*, 158 F. Supp. 2d 124, 131 (D. Mass 2001). The court's reading is correct: Other areas of the law that discuss physical communications facilities, but do not expressly require ownership by a given entity, have not been interpreted to impose this requirement. *See AT&T Corp. v. Iowa Utilities Bd.*, 525 US 366, 376 (1999). Plaintiffs attempt to distinguish this by arguing that the phrase "wires, cables, microwave, or other communications channels" in Section 111(f) should be interpreted differently than "wires, cables, or other communications channels" in 111(a). Pl. Reply at 5. But as the Supreme Court has held, "there is a presumption that a given term is used to mean the same thing throughout a statute." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Plaintiffs have not overcome this presumption.

b. ivi's system is "secure"

At one point, the Copyright Office does consider a service that is similar to ivi's: CBC's. The *only* reason it gives to extend licenses to a system similar to ivi's, is that once a "secure system [such as ivi's or CBC's] is 'cracked,' content leakage will ensue and massive unauthorized redistribution will occur." *109 Report* at 193. But as explained *supra*, this is true for current MVPDs. Being on "the Internet" does not make a system any more or less secure. Of course, this line of reasoning can be taken too far. If perfect security were a criterion for being a "cable system," nothing would qualify. It may be arguable that delivering programming "openly" on the Internet is less "secure" than ivi's, Comcast's, and AT&T's method of using a secure communications channel. But for present purposes, because ivi's system is as secure as any other cable system, the Copyright Office's "security" policy supports classifying it as one for Section 111 purposes.

B. ivi's actions are "permissible" by the FCC.

1. Retransmission consent laws only obligate certain parties

Plaintiffs argue that "Defendants refuse to obtain retransmission consent." Pl. Memo 9. But Plaintiffs have not pursued their Section 325 claims before the FCC or in court. Rather, Plaintiffs pursue a copyright claim, alleging that Defendant is not entitled to a license under Section 111 due to the nature of its system. Under this theory, even if ivi *had* obtained some form of "retransmission consent," it would still not qualify for a Section 111 license, and would still violate copyrights in any underlying content.[16]

Plaintiffs' illogical theory conflates two issues that must be kept distinct. First, and most at issue in this case, is whether the retransmission of a broadcast signal violates the copyrights in the underlying material being broadcast. Prior to 1976, the answer was "no." *See Fortnightly Corp. v. United Artists Television, Inc.*, 392 US 390 (1968). But Congress amended the Copyright Act to define retransmissions as public performances, while simultaneously creating the Section 111 statutory license for cable systems and similar entities. Post-1976, the only ways to lawfully make a secondary transmission of

[16] Despite this, ivi has provided both sufficient evidence of efforts to engage in good faith negotiation as required by law, and legal theory as to why it is not required to discontinue transmission pending grant of retransmission consent. The court should therefore draw no imputation of bad faith on the part of Defendant ivi at this stage of the litigation sufficient to warrant grant of a TRO.

the content contained within a broadcast signal are (1) with permission of each content owner involved, (2) under a limitation or exception to copyright law, such as fair use, and (3) subject to a Section 111 statutory license.

The second issue is whether it is permissible to retransmit a broadcast signal *per se*, apart from any copyright interests. But unlike copyright, the various statutes and regulations governing "retransmission consent" only govern the behavior of certain entities, such as broadcast stations and MVPDs. Broadcasters have no quasi-IP right to their signals; in fact, the United States has declined to enter into the Rome Convention, an instrument that would have created such a right.[17] Thus, when Plaintiffs point out that Section 111 "does not afford cable systems or any one else the right to retransmit the *signals* of broadcast stations (as opposed to the programming on those stations) without the stations' consent," Pl. Memo at 8, they are right—but only because no such right is needed. No one has any obligation to get the consent of broadcast stations to retransmit their signals, except insofar as they are specifically required to under the law. Even FCC-recognized cable operators did not need to seek such permission prior to 1992. *See 109 Report* at 64 ("Prior to 1992, cable operators were not required to seek the permission of a local broadcast station before carrying its signal nor were they required to compensate the broadcaster for the value of its signal.") Not being a cable operator in the view of the FCC, at this time, ivi is under no obligation to comply with the FCC's cable rules.

The statute that creates an obligation for certain parties to seek retransmission consent is 47 U.S.C. § 325, which states no "broadcasting station [shall] rebroadcast the

[17] *See* Summary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (1961), http://www.wipo.int/treaties/en/ip/rome/summary_rome.html.

program or any part thereof of another broadcasting station without the express authority of the originating station," and that no "cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station … with[out] the express authority of the originating station." The FCC's rules implementing this provision apply to "multichannel video programming distributor[s]," which are defined to be entities "such as, but not limited to, a cable operator, a BRS/ EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, or a satellite master antenna television system operator, that makes available for purchase, by subscribers or customers, multiple channels of video programming." 47 C.F.R. § 76.64. The relevant question, therefore, is whether, for Communications Act purposes, ivi is a multichannel video program distributor or a cable system. As demonstrated below, while the FCC has the authority to categorize ivi as an MVPD, it has so far declined to do so.

2. While ivi is a cable system under the Copyright Act, the FCC has not recognized them as such under the Communications Act

As argued above, *see supra* Part IV(A)(2)(a), when the same terms are used in different places in the same statute, it is presumed they mean the same thing each time. But there is no such presumption when similar terms are used in different statutes—particularly not when different agencies, motivated by different concerns, may give them a different construction. This is the case here, where ivi offers a service that fits the definition of "cable service" in the Copyright Act and meets the various tests the Copyright Office has applied to determine what services qualify as a cable service, but where the FCC has thus far not chosen to categorize services similar to ivi's as either MVPDs or cable services. Indeed, the FCC recently stated that the question of whether online video distributors such as ivi should be considered "MVPDs" for its purposes is "open." *See* FCC Analysis at 26 n.131; *cf.* Sky Angel U.S., LLC, *Order*, 25 FCC Rcd 3879 (2010) (staff action denying a service similar to ivi's certain MVPD rights; application for review by the full Commission pending). By itself, this acknowledgement by the FCC defeats a key part of Plaintiffs' argument: that "defendants fail to satisfy the permissibility condition in Section 111." Pl. Memo 13 n.6.

The FCC has broad authority to categorize communications services. It can decide one day that broadband is a telecommunications service, like telephones, and the next day that it is an "information service," like Amazon.com. *See National Cable & Telecommunications Assn. v. Brand X Internet Services*, 545 US 967 (2005). It is even permitted to determine that a given service is a "telecommunications service" under one law (Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§ 1001-1010, which gives law enforcement the authority to wiretap certain communications), but not under another (the Telecommunications Act of 1996, 47 U.S.C. §§ 251-276). *See American Council on Education v. FCC*, 451 F.3d 226, 230 (2006). Until the FCC categorizes a new kind of service, its legal status is undetermined. *See* In-Sung Yoo, *The Regulatory Classification of Internet Protocol Television*, 18 COMMLAW CONSPECTUS 199 (2009). Nationwide, this is the current status of the U-Verse IPTV system (though locally, some courts have stepped in, see *Consumer Counsel v. Southern New England Telephone*, 515 F. Supp. 2d 269, 271 (D. Conn. 2007)). While the Copyright Office has held it to be a "cable system" for copyright purposes, the FCC has not been so clear. As such, it is currently undetermined whether AT&T must comply with all of the FCC requirements for cable systems. *See* Comments of AT&T Opposing

Petitions for Declaratory Ruling, CSR-8127, MB Docket No. 09-13 (March 9, 2009), at 14.[18]

For these reasons, ivi does not violate any retransmission consent laws, and its actions are permissible—which further means that they do not violate copyright law, per the terms of Section 111.

C. Plaintiff's reading of the law is contrary to Congressional policy

Plaintiffs' cramped reading of the law would cement in place the video marketplace of the 1970s, denying consumers the benefit of technological and business evolution. Congress never intended to use Section 111 to *limit* entry into the video marketplace. *See supra*, Part IV(A)(2)(a) (discussion of the legislative history of the 1976 Copyright Act).

Like ivi, both traditional cable operators and satellite television companies have been accused of being lawbreakers. *See CBS Broadcasting v. Primetime 24,* 48 F. Supp.2d 1342 (1998) (DBS accused of copyright infringement); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 US 390 (1968) (cable operators accused of copyright infringement). But for decades, both Congress and the FCC have enabled the emergence of new video distributors. For example, the legislative history of the 1992 Cable Act, H.R. Rep. No. 102-628,[19] at 27, states that "[a] principal goal of [this Act] is to encourage competition from alternative and new technologies, including competing cable system [sic], wireless cable, direct broadcast satellites, and satellite master antenna television services." (Congress has passed specific provisions for DBS, but the rest of these technologies would qualify as "cable systems" under Section 111.) The House Report for

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[18] These comments are available at http://bit.ly/fFXJpV (http://www.att.com/Common/about_us/public_policy/FCC_PEG_Comments.pdf).

[19] Available at http://bit.ly/eylGlU (http://www.publicknowledge.org/files/docs/1992.cable.act.leg.history.pdf).

the 1984 Cable Act similarly notes that "[n]ational communications policy has promoted the growth and development of alternative delivery systems for these services, such as DBS, SMATV, and subscription television. The public interest is served by this competition, and it should continue." H.R. Rep. No. 98-934 at 22-23 (1984).[20] Current federal policy is enshrined in statute: to "encourage increasing competition and diversity in the multichannel video programming market, … and to spur the development of communications technologies." 47 U.S.C. § 548. Motivated by similar concerns, and balancing the interests of content owners with the public's interest in innovative and competitive video delivery platforms, Congress adopted Section 111 to ensure that cable operators could continue operating. Consistent with principles of statutory interpretation advanced by the Supreme Court, which makes it clear that it is necessary to read "statutory language … in the light of drastic technological change," *Fortnightly Corp. v. United Artists Television, Inc.*, 392 US 390, 396 (1968), the Copyright Office has found this provision flexible enough to accommodate new forms of subscription television, such as IPTV, which were unknown to its drafters. *109 Report* at 199. Similarly, after monitoring the rise of online video for years, *see* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Third Annual Report*, 12 FCC Rcd. 4358, at ¶ 99 (noting nascence of online video) (1997), the FCC now recognizes that it part of the same marketplace as traditional cable TV. *See* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, *Thirteenth Annual Report*, 24 FCC Rcd. 542, ¶ 150 (2009). *See also supra* Part II (discussing recent FCC and DoJ statements on online video). This Court should

[20] Available at http://bit.ly/gmvUbc (http://www.publicknowledge.org/files/docs/1984.cable.act.leg.history.pdf).

not take away the ability of the Copyright Office and the FCC to adapt their regulations to a changing marketplace, and should decline the invitation to use copyright law as a tool to limit the competition that policymakers have strove to foster.

Conclusion

For the foregoing reasons, the TRO should not be granted.

Respectfully submitted,

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