
A Look at the Decision Enjoining ivi TV From Streaming Broadcast Content on the Internet

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Internet TV must secure copyright owners' consent or a legislative solution to be able to carry the content it seeks.

On February 22, 2011, US District Court Judge Naomi Reice Buchwald of the Southern District of New York issued a 59-page decision enjoining ivi TV, Inc. from streaming the programming of various network-affiliated television stations on the Internet without their permission. The judge's opinion articulates a basic principle of copyright law -- that the creator of the content holds a bundle of rights which, with very few exceptions, it alone controls. Therefore, even in this age of proliferating distribution platforms, the fact that the copyright owner has made its content available via a number of different technologies does not diminish its ability to control whether and how to make it available on a new platform. The case will likely yield more examination of this issue, as ivi TV has sought a stay of the injunction.

Background

ivi TV began Internet streaming of the signals of several network affiliated television stations located in Seattle and New York in September 2010, and thereafter announced plans to add stations from Chicago, Los Angeles and San Francisco in the future. It offered subscribers located throughout the United States the ability to receive these television signals via an Internet connection for a monthly fee. Subscribers downloaded a player, chose the signals to watch, and the signals were delivered in an encrypted form. In anticipation of the content owners' lawsuit, ivi TV sought a Declaratory Ruling from a US District Court in Seattle that the company was not infringing the copyrights in the programming, but the court dismissed that case as an anticipatory filing. A consortium of television stations, the producers of programming shown on the stations, and Major League Baseball commenced a lawsuit for copyright infringement in New York, seeking an injunction to prevent any further retransmissions of their content by ivi TV.

ivi TV's Claims

In its arguments to the court, ivi TV claimed that its operation meets the definition of a "cable system" contained in the Copyright Act. As a "cable system," ivi TV stated it was carrying the stations' signals

pursuant to the statutory license contained in the Copyright Act, which is an exception to copyright owners' exclusive rights. The statutory license allows cable operators to carry the signals of television stations so long as they (1) pay a copyright fee to the Copyright Office, which later divides the fees up among copyright owners, and (2) comply with the Communications Act and FCC rules applicable to cable systems. The Communications Act effectively sets limits on the use of the statutory license, giving broadcasters the option to choose between guaranteed carriage without additional compensation for the use of their copyrighted material ("must carry"), and the ability to negotiate compensation for carriage ("retransmission consent") with the understanding that their programming will not be carried if a retransmission consent agreement is not reached.

The restrictions in the Communications Act would seem to have required iVi TV to secure broadcasters' consent to use their signals. However, the definition of what constitutes a "cable system" differs between the Communications Act and the Copyright Act. Reading both definitions very literally, iVi TV argued that it was a cable system under the Copyright Act, but not a cable system under the Communications Act. Based on this argument, iVi TV's position was that it was entitled under the Copyright Act to retransmit broadcast programming, but it was not subject to the Communications Act's requirement that it secure retransmission consent from the affected broadcasters.

The court rejected that argument, and found that iVi TV is not a cable system under either statute's definition, and is therefore not entitled to use the statutory license to transmit copyrighted content without the copyright owners' consent.

The Court's Decision

The court examined the four factors that must be considered when a preliminary injunction is requested: the plaintiffs' likelihood of success on the merits, the likelihood of irreparable harm to the plaintiffs in the absence of an injunction, the balance of hardships between the parties, and the public interest.

With respect to whether the copyright owners are likely to succeed in demonstrating that iVi TV is infringing their copyrights, the court first reviewed the history of the statutory license for cable operators to see if it provides iVi TV with any defense to the infringement claims. The court noted that Congress created the statutory license for cable operators in response to a specific need to assure (1) that cable systems could continue to serve the public by bringing local television signals to areas of stations' markets that could not receive them over the air, and (2) that program producers and stations receive compensation for the use of their copyrights. The court noted that when Congress revised the Copyright Act to provide for the compulsory license for cable systems, it did so with the knowledge that cable systems were already heavily regulated by the Communications Act and that it intended for the Copyright Act to work in conjunction with the Communications Act to strike the balance it sought.

The court next looked at the expansion of compulsory licensing to include satellite systems. When direct to home satellite technology became widely available, the court noted that the Copyright Office repeatedly stated its position that satellite systems did not qualify as cable systems and could not avail themselves of the cable compulsory license, in large part because satellite systems could distribute signals nationally, while cable systems were local. Ultimately, Congress had to create a different compulsory license for the direct to home satellite industry, which, through the Communications Act, contains a number of provisions favoring distribution of local television signals to viewers in stations' own markets.

With respect to the next major advance in television distribution, the court noted that the Copyright Office has consistently held that a "virtual" cable system cannot qualify to use the existing cable compulsory

license. One element of the Copyright Office's position is that Internet television distribution is not equivalent to cable system distribution because it is national, rather than local. In addition, the Copyright Office is concerned that permitting such a compulsory license might violate international copyright treaties to which the United States is a party. The court deemed the positions and arguments of the Copyright Office to be highly persuasive, as the Copyright Office is the agency most directly responsible for the administration of the Copyright Act. The court noted that the Internet distribution framework iVi TV uses is not regulated in the same way that cable and satellite systems are, does not limit distribution of stations' signals to their local areas, and does not otherwise comply with the requirements of the Communications Act. It concluded that the definition of a cable system for purposes of the Copyright Act incorporates these requirements and that iVi TV does not meet the definition of a "cable system" under either statute.

Having concluded that the copyright owners are likely to succeed in demonstrating that iVi TV is not entitled to use the compulsory license and therefore is infringing their copyrights, the court turned to the arguments regarding the harm that would occur to the plaintiffs if iVi TV were permitted to continue operations pending a full trial in the matter. Here, the court was clear that the effect of iVi TV's operation is to devalue the copyright owners' programming and their ability to negotiate with advertisers to profit from their copyrights. iVi TV argued that there would be no such devaluation because it would compensate the copyright holders through the compulsory license mechanism in the same manner that cable and satellite providers do, and that its operations are so small, and the programming available on so many platforms already, that iVi TV's operations could not do any real damage to the copyright holders. In this regard, iVi TV noted that the copyright owners did not demonstrate any financial losses and characterized them as being speculative.

The court rejected all of iVi TV's arguments. It found that iVi TV cannot claim that its payment of the compulsory license fee established for other industries, such as the cable and satellite industries, fairly compensates copyright owners for infringement of their copyrights on the Internet. It also forcefully stated that iVi TV cannot rely on the existence of numerous outlets that legitimately retransmit the copyright owners' programming and compensate the copyright owners for that use to justify illegal and uncompensated use. Finally, it noted that the absence of any demonstrated losses supports the finding that the losses are unquantifiable, and therefore irreparable, rather than that they are speculative or nonexistent.

With respect to the last two elements of the preliminary injunction analysis, the court found that any damage to iVi TV's business was due to the fact that the business was based on infringement and therefore not entitled to any consideration. Moreover, the court found that the public interest would be served by enjoining iVi TV so that copyright owners can retain control of their programming and the revenue it generates, providing the incentive for them to continue to produce it.

Conclusion

In various press reports at the time of iVi TV's launch, its founder Todd Weaver is quoted as saying that, since iVi TV serves the same role as cable and satellite systems, it is only fair that it should be able to retransmit television programming pursuant to the compulsory license in the same manner that cable and satellite providers do. In addition, he has stated that the broadcast networks will be compelled to make their content available via iVi TV because consumers want the services that iVi TV provides, such as the ability to view television on various devices and see programming from different time zones.

In the court's view, however, iVi TV's new technology does more than reach an ever larger audience and potentially provide a service that audiences desire. The new technology has the potential to undermine the

system of incentives that rewards those who create content, which would ultimately undercut the business plan supporting development of a new distribution technology in the first instance. Thus, it is likely that iVi TV and those following in its footsteps will have to convince Congress and copyright owners of the need for a compulsory license for Internet television. In so doing, they must demonstrate that such a license is crafted to support the incentive structure for content owners to continue to create attractive programming. Failing this, copyright law grants the copyright owner the right to refuse to make the content available, no matter how compelling another party's business case may be.

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