

11-788-cv  
WPIX v. ivi

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

August Term 2011

(Argued: May 30, 2012      Decided: August 27, 2012)

Docket No. 11-788-cv

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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., 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, 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,

*Plaintiffs-Appellees,*

v.

IVI, INC., AND TODD WEAVER,

*Defendants-Appellants.*

Before:

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WINTER, CHIN, and DRONEY, *Circuit Judges.*

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Appeal from a judgment of the United States District Court for the Southern District of New York (Buchwald, J.) granting plaintiffs-appellees' motion for a preliminary injunction and holding that defendant-appellant ivi, Inc. -- a company that streams television programming live and over the Internet -- is not a "cable system" under § 111 of the Copyright Act of 1976, 17 U.S.C. § 111.

AFFIRMED.

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ROBERT ALAN GARRETT (Peter L. Zimroth, Hadrian R. Katz, Lisa S. Blatt, C. Scott Morrow, R. Reeves Anderson, *on the brief*), Arnold & Porter LLP, New York, New York, and Washington, D.C., *for Plaintiffs-Appellees*.

LAWRENCE D. GRAHAM (Ellen M. Bierman, *on the brief*), Black Lowe & Graham PLLC, Seattle, Washington, *for Defendants-Appellants*.

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CHIN, *Circuit Judge*:

In this case, plaintiffs-appellees -- producers and owners of copyrighted television programming -- sued defendants-appellants ivi, Inc. ("ivi") and its Chief

Executive Officer, Todd Weaver, for streaming plaintiffs' copyrighted television programming over the Internet live and without their consent. The district court granted a preliminary injunction for plaintiffs, holding that:

(1) plaintiffs were likely to succeed on the merits of the case because ivi was not a "cable system" entitled to a compulsory license under § 111 of the Copyright Act, 17 U.S.C. § 111; (2) plaintiffs would suffer irreparable harm without injunctive relief; (3) the balance of hardships favored the grant of a preliminary injunction; and (4) the issuance of a preliminary injunction did not disserve the public interest. Defendants appeal. For the reasons that follow, we affirm.

### ***STATEMENT OF THE CASE***

#### **1. *The Facts***

The following facts are undisputed.

On September 13, 2010, ivi began streaming plaintiffs' copyrighted programming over the Internet, live,

for profit, and without plaintiffs' consent.<sup>1</sup> ivi began by retransmitting signals from approximately thirty New York and Seattle broadcast television stations; by February 2, 2011, ivi was also retransmitting signals from stations in Chicago and Los Angeles.<sup>2</sup> Within five months of its launch, ivi had offered more than 4,000 of plaintiffs' copyrighted television programs to its subscribers.

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<sup>1</sup> "Streaming" generally involves compressing a file to a size small enough to be transmitted over the Internet and then allowing the receiving computer to start playing packets of the file while the remaining packets are being transmitted. Preston Gralla, *How The Internet Works* 229-31 (7th ed. 2004). ivi's technology further "encrypts" the transmitted content -- that is, ivi encodes the content so that it cannot be viewed as it is transmitted over the Internet; ivi then "decrypts" or decodes the content back into a viewable format in small increments or packets shortly before it appears on a given subscriber's screen. See *id.* at 98-99.

ivi can also transmit data "peer-to-peer." "Peer-to-peer" configurations allow people to share files between computers over the Internet. *Id.* at 225. ivi's subscriber license agreement includes a section permitting ivi to use subscriber computers and bandwidth to enable peer-to-peer viewing. According to Weaver, however, ivi has not used a peer-to-peer configuration as of October, 2010.

<sup>2</sup> "Broadcast" television programming generally refers to programs "originally propagated by traditional over-the-air television signals for receipt by antenna." *Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am., Inc.*, 836 F.2d 599, 601 n.1 (D.C. Cir. 1988) ("MPAA"). "Cable" television programming or "non-broadcast" programming refers to programs "produced solely for cable systems and disseminated only through them." *Id.*

Specifically, ivi captured and retransmitted plaintiffs' copyrighted television programming live and over the Internet to paying ivi subscribers who had downloaded ivi's "TV player" on their computers for a monthly subscription fee of \$4.99 (following a 30-day free trial). For an additional fee of \$0.99 per month, subscribers were able to record, pause, fast-forward, and rewind ivi's streams.

Almost immediately after ivi's launch, several affected program owners and broadcast stations sent cease-and-desist letters to ivi. ivi responded to these letters on or about September 17, 2010, purporting to justify its operations on the ground that it was a cable system entitled to a compulsory license under § 111 of the Copyright Act, 17 U.S.C. § 111.

## **2. Proceedings Below**

On September 20, 2010, ivi filed a declaratory action in the United States District Court for the Western District of Washington. On September 28, 2010, plaintiffs sued defendants for copyright infringement in the Southern

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