

No Online Cable Systems – For Now

The court ruling was unequivocal: Online video isn't protected by cable regulations. Of course, satellite service was once in the same situation.

By Carl E. Kandutsch ■ *Attorney*

The Internet has always had the potential to disrupt the broadcast model on which traditional cable television is built. The broadcast model uses a one-to-many paradigm of content distribution, but the Internet's distribution paradigm is characterized by many-to-many connectivity. At least for now, anyone with a computer connected to the Internet can create, distribute and receive online content.

Not surprisingly, the content production and distribution industries, such as broadcast networks and cable operators, are searching for ways to head off the threat posed by alternative distribution models based on Internet connectivity either by controlling innovative distribution systems or by squashing them before they can reach the market. This article examines some legal issues in a recent skirmish of the ongoing struggle.

INTRODUCING IVI TV

Ivi Inc., a Seattle-based start-up online video programming distributor created in 2005, is one of a growing number and variety of online video distributors (OVDs) recently recognized by the Federal Communications Commission as potentially providing competition to traditional multichannel video programming distributors (MVPDs in FCC lingo), such as cable operators and direct broadcast satellite (DBS) providers.¹ Prominent OVDs as of this writing include Hulu, Netflix, Google TV, Amazon.com and iTunes.

Although these companies use varying distribution methods and busi-

The FCC says online video distribution can drive competition and innovation. It can also disrupt standard video delivery models.

ness models, each relies primarily on the Internet to deliver video programming content to users' PCs and other Internet-enabled devices, including television sets. Because the FCC generally classifies Internet-based services as information services rather than cable or telecommunications services, OVDs are for the most part not subject to the regulations that govern MVPDs under the Communications Act.

According to the FCC, the number of Americans who watch video programming online is rapidly growing, and there is every reason to believe that this trend will continue and accelerate. Earlier this year, the FCC said that OVDs could "provide and promote more programming choices, viewing flexibility, technological innovation and lower prices," and that preventing OVDs from reaching the market would

"have a substantial anticompetitive effect on consumers and the market."²

OVDs not only threaten traditional content distribution models but also pose a serious challenge to the intellectual property rights of programming content owners. As proprietary video and audio content migrates online, it becomes more vulnerable to unauthorized reproduction, sometimes called pirating. Thus, the issue of protecting proprietary content becomes increasingly important as more and more video content, including television shows, moves to the Web.

Tensions between the new OVDs and established media production and distribution companies, including concerns over the unauthorized reproduction and distribution of copyrighted content, are exacerbated by vertical integration in the media industries, as illustrated by the recent merger between NBC Universal,

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a global content producer, and Comcast, a major content distributor. In its order approving the merger, the FCC remarked that “OVDs pose a potential competitive threat to Comcast’s MVPD service”³ and imposed several conditions on the merged entity to ensure that unaffiliated OVDs will continue to have nondiscriminatory access to Comcast-NBCU programming.

This rising tension between OVDs and established media interests forms the backdrop for the David and Goliath-like battle between ivi and some of the largest content owners in the world.

Ivi captures and encrypts television stations’ signals and distributes them via a downloaded conditional access system for a \$4.99 monthly fee. Just as cellphones and VoIP services have severed the tie between phone numbers and physical addresses, ivi removes the need for attaching a cable subscription to a street address. Any Internet-connected device, including a mobile smartphone, can function as an ivi TV player anywhere in the United States, at any time. Furthermore, just as iTunes frees consumers from the need to purchase a package of songs bundled together on a CD, ivi allows subscribers to purchase individual television programs on an à la carte basis.

The ivi system offers benefits not only to consumers but also, potentially, to advertisers, who can obtain precise information on the number and demographics of viewers. Television stations can benefit as well because the ivi platform increases the number of eyeballs viewing their programming.

Regardless of ivi’s fate, these features point in a single direction: The future of television is on the Internet.

IVI SUED BY THE BROADCAST INDUSTRY

In September 2010, ivi TV launched an online video pay service that featured signals from television stations in New York City and Seattle, Wash. PBS, CBS, NBC Universal, WGBH and 20 other content owners immediately sued ivi in New York for damages and for an order enjoining the company from distributing their video programming without the owners’ consent.

On February 21, 2011, a United States District Court in New York issued a preliminary injunction against ivi, ruling that its practice of retransmitting broadcast television programming without the copyright owners’ consent violates the U.S. Copyright Act because ivi is not a cable system.⁴

To access and retransmit broadcast content owned by other entities, a distributor must meet two conditions: First, it must comply with federal copyright laws to the extent that the programming content is copyrighted. Second, apart from any copyright interests in the content, it must comply with laws applicable to retransmission of broadcast signals generally.

Section 111 of the Federal Copyright Act allows cable operators, in lieu of negotiating license agreements with copyright owners, to automatically obtain copyright licenses to retransmit broadcast programming to their subscribers. Cable operators submit statements of account and royalty fees to the Licensing Division of the Copyright Office, and the fees are invested in U.S. Treasury securities until royalties are scheduled for distribution. Copyright owners then file claims for royalties and are paid for the use of their proprietary content.

Section 111(c)(1) of the Copyright Act provides, among other things, that

Secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission ... shall be subject to statutory licensing ...⁵

By its terms, a statutory copyright license is available only to a cable system, which the Copyright Act defines as

[A] facility ... 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 by wires, cables, microwave or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.⁶

In addition to their obligations under the Copyright Act, MVPDs are required by the Communications Act to obtain broadcasters’ consent to retransmit their broadcast signals. (Why a copyright license should not itself constitute consent to

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retransmit is not entirely clear, but the laws seem to require two separate processes.) The Communications Act states that no “cable system or other multi-channel video programming distributor shall retransmit the signal of a broadcasting station ... with[out] the express authority of the originating station,”⁷ defining a cable system as “a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community ...”⁸

Ivi argued both that it has a right to distribute proprietary content by way of the automatic copyright license available to cable operators under the Copyright Act and also that, as an OVD providing an unregulated Internet service, it can retransmit broadcast signals without obtaining the broadcaster’s consent.

In other words, *ivi*’s position in the lawsuit was that it is a cable system under the Copyright Act, and thus entitled to take advantage of the statutory license, but not a cable system under the Communications Act, and therefore not required to obtain the content owners’ consent to retransmit broadcast signals to subscribers.

The District Court issued a preliminary injunction against *ivi*, based on a ruling that *ivi* is not a cable system under Section 111 of the Copyright Act, and therefore that *ivi*’s secondary transmission of proprietary programming content violates the broadcasters’ copyrights. Because its interpretation of the Copyright Act disposed of the case, the court did not rule on the question of whether *ivi* is a cable system required under the Communications Act to negotiate retransmission consent agreements with broadcasters.

THE COPYRIGHT ACT AND CABLE SYSTEMS

Section 111 of the Copyright Act was enacted in 1976 in the wake of two Supreme Court decisions that held that cable systems were not “performing” broadcast programming merely by retransmitting broadcast signals.⁹ Conse-

Ivi argued that it is a cable system for copyright purposes but that it is not a cable system for the purpose of obtaining retransmission consent.

quently, the court held, cable operators could retransmit broadcast television programming without paying royalties to copyright owners.

In response, Congress attempted to balance competing interests and societal benefits. On the one hand, by allowing viewers out of the range of over-the-air broadcast signals to enjoy broadcast programming, the nascent cable television industry provided a clear benefit to American society, so the nationwide deployment of cable systems nationally merited encouragement. On the other hand, allowing cable operators to retransmit proprietary content without compensating content owners would remove the incentives needed for investment in content production.

The solution was Section 111, which, by virtue of the automatic license, ensures compensation to copyright owners and at the same time encourages investment in the building of cable systems by removing the prohibitive transaction costs associated with negotiation of individual license agreements for each television program.

The situation of OVDs today is somewhat analogous to that of the cable companies in the 1970s. If extending automatic copyright licensing to OVDs can further the same social goals served by extending automatic licensing to cable systems under Section 111 – namely, facilitating remote viewers’ access to broadcast television programming while ensuring that copyright owners are fairly compensated – then why not include *ivi* in the class of providers to which the statutory license is available?

The court’s answer to this question, while perhaps legally correct, is disappointing. Essentially, the court’s answer is that *ivi* cannot be a cable system because, first, the distribution system that *ivi* uses – that is, the Internet – allows

it to retransmit programming nationally rather than locally and second, *ivi* is not regulated as a cable system by the FCC. Neither of these rationales tells why *ivi should* not be considered a cable system, assuming that the statutory definition does not clearly exclude *ivi* as a matter of law. The court’s ruling leaves this public policy question to be resolved by Congress.

LOCAL VERSUS NATIONAL

Ironically, the court’s ruling that *ivi* is not a cable system relies on conclusions reached by the Copyright Office (the Federal agency charged with administering Section 111) in an extended rulemaking proceeding initiated in 1986. In that rulemaking, the Copyright Office decided that satellite television carriers are not cable systems, and are therefore excluded from the statutory license scheme, because satellite systems retransmit broadcast signals beyond the local geographical areas in which the broadcasts initiate.

The *ivi* court’s reliance on this interpretation of Section 111 is ironic because, during the course of the rulemaking proceeding, Congress enacted a new law (Section 119¹⁰) that implicitly rejected the Copyright Office’s reasoning and extended to satellite providers the same right to statutory copyright licensing available to cable systems under Section 111. The congressional action was presumably based on a judgment that the wide geographic reach of satellite transmissions ought not to limit the scope of the automatic copyright license as a matter of public policy. Why should the virtually unlimited reach of *ivi*’s Internet-based transmissions deny the company the benefits of the statutory license available to cable and satellite providers under the Copyright Act?

In any event, the court relied on the Copyright Office conclusion that Section 111’s somewhat peripheral references

to “headends” and “contiguous areas” meant that the statutory license is “clearly directed at localized transmission services,”¹¹ implying that satellite providers were excluded by virtue of their national reach. If satellite providers were excluded, then *ivi* must be excluded as well.

Ultimately, the court simply deferred to the Copyright Office’s interpretation of Section 111, which in turn hinged on the contingent fact that in making the statutory license available to cable systems, Congress addressed the issue before it in 1976 – namely, how to encourage the deployment of a wide-reaching but still geographically limited content distribution system while guaranteeing compensation for copyright owners. In that sense, the court is surely correct that Section 111 was not *intended* to encompass Internet-based distribution systems, which had not yet appeared on planet Earth.

However, the court did not present a compelling reason why a distribution

system without comparable geographic limitations ought not to benefit from the statutory license available to cable systems under Section 111 and to satellite systems under Section 119. Perhaps that refusal can be seen as an invitation for Congress to address the issue.

NOT REGULATED BY THE FCC

This brings us to the second prong of the analysis, wherein the court concluded, following the Copyright Office’s view, that *ivi* is not a cable system within the meaning of Section 111 because *ivi* is not regulated as a cable system by the FCC. As mentioned earlier, *ivi* is an OVD and, like other Internet services, online video distribution is classified by the FCC as a mostly unregulated information service rather than a cable service.

One obvious objection to the court’s reasoning is that if Congress had intended to limit the class of cable systems to which the statutory license is available to those regulated by the FCC, it could easily have made this limita-

tion explicit,¹² but it did not. The court steered around this potential pitfall by citing the Copyright Office’s opinion that “the legislative history and statutory text made clear that Congress intended the compulsory license and FCC regulations to go hand-in-hand ...”¹³

A second possible objection is that Internet Protocol Television, or IPTV, – for example, AT&T’s IPTV service, U-verse – *does* qualify for an automatic copyright license under Section 111 although AT&T insists that U-verse is not a cable system for FCC purposes. The FCC has not officially decided how to classify U-verse for regulatory purposes. If U-verse can be a cable system under the Copyright Act without also being a cable system under the Communications Act, why can’t *ivi*?

The court distinguished *ivi* from U-verse on the grounds that the latter is provided using facilities (wires and routers) owned by AT&T, whereas *ivi* merely hosts and distributes video pro-

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Not all rules and regulations burden new and innovative services. Some are intended to liberate enterprises from market-restricting limitations.

gramming through software, services and computers connected to the Internet.¹⁴ However, Section 111 does not define “facilities,” and the common use of the word can encompass the kind of equipment *ivi* uses in retransmitting broadcast signals over the Internet.

Furthermore, although AT&T’s use of its own wires and routers (rather than the Internet) to deliver U-verse to customers minimizes concerns over piracy and is comparable to traditional cable delivery systems, why ownership of certain kind of facilities rather than others ought to be dispositive from a legal perspective is not entirely clear.

Of more significance, perhaps, is the fact that AT&T, while not conceding that U-verse is a cable service according to the FCC’s definition, does in fact negotiate retransmission consent agreements with broadcast stations in full compliance with laws and regulations applicable to cable operators. *Ivi*, on the other hand, refuses to seek broadcasters’ consent for retransmission.¹⁵ Although AT&T is seen as prudently reserving its regulatory options while complying with the law, *ivi* was viewed as wanting to have its cake and eat it, too.

MARKET-BASED SOLUTIONS

According to *ivi*’s website, the company will appeal the District Court’s ruling to the Second Circuit Court of Appeals and explore congressional and administrative solutions. In the meantime, it has suspended most operations. Absent a judicial turnaround or congressional intervention, how *ivi* can survive in its current form is difficult to see.

However, congressional and administrative solutions may actually be on the horizon. The Copyright Office recently issued a Notice of Inquiry seeking comment on “marketplace solutions to replace the use of the statutory licenses

for the retransmission of over-the-air broadcast signals, suggestions for ways to implement market-based licensing practices, and legislative and regulatory actions that would be needed to bring about these changes.”¹⁶

The Notice of Inquiry was mandated as part of Congress’ reauthorization of the statutory licenses in the Satellite Television Extension and Localism Act (STELA), which was passed in May 2010 and requires the Office to submit a report to Congress within 18 months after enactment of STELA. The Copyright Office plans to offer several alternative options, including sublicensing, private licensing and collective licensing.

With sublicensing, a broadcaster would receive permission from a network to sublicense all of its programming to cable or satellite carriers. Private licensing would require carriers to negotiate individually with each copyright owner. Collective licensing would involve appointment of a third party to negotiate on behalf of copyright owners collectively, similar to the way that ASCAP or BMI negotiates on behalf of audio copyright owners in the music business. The Notice also seeks comments on possible licensing models for online video content, based on the assumption that because all broadcast content is becoming available online, statutory licenses may no longer be needed. *Ivi* submitted comments in response to this invitation.

CONCLUSION

The Commission’s reluctance to regulate Internet-based services, including online video distributors, is based on a considered judgment that by forcing new and innovative online services into regulatory pigeonholes constructed for yesterday’s technology, the government could inadvertently stifle investment in those evolving services and nip creative initiative in the bud.

However, not all rules and regulations burden new and innovative services. Some rules – such as the rule allowing cable systems to obtain automatic copyright license to distribute proprietary content across a wide geographical range – are intended not to shackle, but to *liberate* commercial enterprises from market-restricting limitations. To deny entrepreneurs the ability to leverage these rules is to force new wine into old bottles via the back door.

The court’s decision in the *ivi* case – which says, in effect, that *ivi* is not sufficiently similar to a traditional cable operator to take advantage of the Copyright Act’s automatic license – demonstrates an alternative way in which government action can stifle innovation, not by burdening industry with outmoded regulations, but by preventing innovative enterprises from leveraging forward-looking rules intended to facilitate the competitive access of new technologies to existing markets. ♦

ENDNOTES

- 1 In the Matter of Applications of Comcast Corp. and General Electric Company and NBC Universal for Consent to Transfer Licenses, MB Docket No. 10-56, *Memorandum Opinion and Order* (rel. Jan. 20, 2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf.
- 2 *Id.* at ¶ 78.
- 3 *Id.* at ¶ 86.
- 4 *WPIX, Inc., et al. v. ivi, Inc., et al.*, 10-cv-07415-NRB (S.D.N.Y. Feb. 22, 2011) (the Memorandum and Order will be cited hereinafter as “WPIX,” followed by the relevant page number in the slip opinion).
- 5 17 U.S.C. § 111(c)(1).
- 6 17 U.S.C. § 111(f).
- 7 47 U.S.C. § 325(b)(1)(A).
- 8 47 U.S.C. § 522(7).
- 9 *Teleprompter Corp. v. Columbia Broad. Sys., Inc.*, 415 U.S. 394 (1974); *Fortnightly Corp. v. United Artists Television*, 392 U.S. 390 (1968).
- 10 17 U.S.C. § 119 (1988).
- 11 57 Fed. Reg. 3284 (Jan. 29, 1992), quoted in WPIX at 25.
- 12 The principle of statutory construction known as “*casus omissus pro omisso habendus est*” states that a thing omitted from an enumeration in a statute must be held to have been intentionally omitted.
- 13 WPIX at 26.
- 14 *Id.* at 34, 39.
- 15 *Id.* at 39.
- 16 76 Fed. Reg. 11816 (Mar. 3, 2011).