IP/ENTERTAINMENT LAW WEEKLY CASE UPDATE FOR MOTION PICTURE STUDIOS AND TELEVISION NETWORKS

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WPIX, Inc. v. ivi, Inc., USDC S.D. New York, February 22, 2011

Click here for a copy of the full decision.

- In a copyright infringement action, the court preliminarily enjoined defendant from streaming television broadcasts to paying subscribers through the internet, holding that defendant is not a "cable system" under Section 111 of the Copyright Act and does not qualify for a compulsory license to perform copyrighted content.

Plaintiffs are broadcast television networks, television distributors, motion picture studios, television stations, and others that own or create copyrighted programming. Defendant ivi, Inc. captures over-the-air broadcasts of plaintiffs' television content in Seattle, New York, Chicago, and Los Angeles, and distributes those broadcasts over the internet to customers who download ivi's TV player. ivi charges customers for the service, but unlike traditional cable television services, it does not first obtain permission from plaintiffs to distribute plaintiffs' content.

After plaintiffs sent several cease and desist letters to defendant, defendant filed an action for declaratory judgment in federal district court in Washington, arguing that it was entitled to a compulsory license to perform plaintiffs' programming as a "cable system" under Section 111 of the Copyright Act. Plaintiffs then brought this action for copyright infringement in New York, seeking damages and injunctive relief. After the Washington court dismissed ivi's action as an impermissible anticipatory filing, plaintiffs moved for a preliminary injunction against defendant in the New York action.

ivi argued that plaintiffs were unlikely to succeed on the merits because ivi was entitled to a compulsory license as a "cable system" under Section 111 of the Copyright Act. A cable system is a facility that receives transmissions from a broadcast station and makes secondary transmissions to subscribing members of the public by wire, cable, and other channels. Section 111 licenses cable systems to retransmit such content if the cable system complies with the FCC's record-keeping and royalty requirements under the Communications Act. ivi argued that it is a cable system under the Copyright Act because it retransmitts content by wire or cable; ivi also asserted that it is not subject to the Communications Act because the FCC does not regulate the internet. In other words, as the court stated, "defendants argue that ivi is a cable

system for purposes of the Copyright Act, and thus may take advantage of the compulsory license, but that it is not a cable system for purposes of the Communications Act, and thus it need not comply with the requirements of that Act and the rules of the FCC promulgated thereunder."

The court rejected defendant's interpretation of Section 111. First, the court held that the legislative history suggests Congress understood a cable system to be a localized transmission service, not an internet distributor. Second, the court relied on statements of the Copyright Office, which has repeatedly rejected the notion that internet retransmission services qualify for Section 111 licensing, and has issued several public statements that only FCC-regulated entities may be construed as cable systems. Finally, the court held that defendant failed to show that it satisfied the textual definition of a "cable system" under Section 111. Defendant does not own any transmission "facilities," and technically does not "make" the transmissions distributed by an internet service provider.

The court further found that other considerations militated in favor of a preliminary injunction. Plaintiffs had demonstrated irreparable harm by showing that absent an injunction plaintiffs would suffer a variety of financial harms that would be difficult to prove or quantify: loss of sales and revenue, devaluation of programming, and lost bargaining power with advertisers. The balance of hardships also weighed in plaintiffs' favor even though a preliminary injunction would put defendant out of business. The court noted that courts will not recognize the hardship suffered by a defendant who merely loses the ability to continue to offer an infringing product. Finally, the court further found that a preliminary injunction would serve the public interest by ensuring that plaintiffs maintain valuable incentives to create programming and control over how their content is distributed, including through internet retransmissions.

Latimore v. NBC Universal, Inc., USDC S.D. New York, February 22, 2011

Click here for a copy of the full decision.

- In copyright infringement action relating to the reality television show *The Biggest Loser*, court grants defendants' motion for summary judgment after finding no substantial similarity between plaintiff's written treatment and defendants' show.

Plaintiff Sonya Latimore sued NBC Universal and Reveille for copyright infringement, claiming that her written treatment for a weight-loss television show called *Phat Farm* was infringed by defendants' reality television show *The Biggest Loser*. The court granted defendants' motion for summary judgment after finding no substantial similarity between the protectable elements of the two works. In addition, the court *sua sponte* dismissed plaintiff's copyright infringement claim against her former agent Kim Fuller and McCreary & Fuller Public Relations Corp. because plaintiff's copyright infringement claim against Fuller and the public relations firm is based on the same two disputed works as her claim against NBC and Reveille. The court also denied plaintiff's motion for additional discovery and declined to exercise supplemental jurisdiction over plaintiff's state law claims for conversion, unjust enrichment and breach of contract.

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CASES OF INTEREST

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