Virginia Association of Broadcasters
Legal Review

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IMPORTANT! **IMPORTANT!**

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WHAT THE SECOND CIRCUIT'S DECISION IN THE *IVI* CASE MEANS FOR LOCAL BROADCASTERS

As was previously reported, on August 27, 2012, the U.S. Court of Appeals for the Second Circuit affirmed a federal district court's grant of a preliminary injunction against ivi, Inc. ("ivi"), which streamed local broadcast signals over the Internet without the consent of the local stations or content owners. ivi argued that it was a "cable system" under Section 111 of the Copyright Act and, therefore, in exchange for payment of copyright royalties, it had the legal right to retransmit broadcast programming under the cable television statutory copyright license.

The Second Circuit found the statutory language to be unclear whether the statutory license applied to Internet retransmissions, but it did not believe that it was the intent of Congress to extend the Section 111 statutory copyright license to such Internet retransmissions. Because of this ambiguity, the Court relied on the Copyright Office's repeated and consistent determinations that Internet retransmission services are not "cable systems" and do not qualify for the Section 111 statutory license. Finding the Copyright Office's position to be reasonable and persuasive, the Court concluded that the district court had not abused its discretion in ruling that the broadcasters and content owners were likely to succeed on the merits and, therefore, affirmed grant of a preliminary injunction that required ivi to terminate the retransmission of television broadcast signals pending final resolution of the case.

Thus, the Second Circuit's decision leaves in place the preliminary injunction entered by the district court in February 2011. At this point, ivi could seek either reconsideration by the Second Circuit (either by the panel or by the full court) or review

by the U.S. Supreme Court. If ivi does not seek further appellate review, the case will return to the district court where there will be further proceedings on the request for a permanent injunction. Alternatively, the parties could agree to a settlement and the entry of a judgment which would finally resolve the case.

The Second Circuit's decision is binding law only in New York, Connecticut, and Vermont. However, if other courts follow this precedent, online video distributors will not be able to retransmit local television stations' signals via the Internet in reliance upon the cable statutory copyright license, either locally or in distant markets. This is very important in protecting the rights of local broadcasters and other content owners, especially with respect to preserving programming exclusivity at a time when technological changes are already affecting the exclusivity of local stations' national programming.

Not raised in nor resolved by the *ivi* case is the question whether online video distributors ("OVDs") must obtain retransmission consent from a television station before retransmitting that station's signal. The *ivi* case has been litigated entirely on the issue of whether Internet retransmissions qualify for the cable statutory copyright license and not on whether the retransmission consent requirement of Section 325(b) of the Communications Act also applies. The retransmission consent question for OVDs, however, is under consideration by the FCC in its *Sky Angel* proceeding, as previously reported, where the Commission is seeking comment on the meaning of "multichannel video programming distributor." If OVDs are considered MVPDs, as the ABC, CBS, and NBC Television Affiliate Associations have argued in that proceeding, then OVDs will be required to obtain retransmission consent to retransmit television station signals, and, in addition, under the *ivi* decision in the Second Circuit, have to obtain a private copyright license from the copyright owners of the underlying programming contained in the signal.

Finally, while the *ivi* decision is a significant win for local broadcasters, the legal arguments there differ from the *Aereo* litigation, at least in its current posture. *Aereo*, to date, has been litigated on a different copyright basis—i.e., whether Aereo's discrete retransmissions over the Internet of local television signals it picks up by allegedly "individualized" dime-sized antennas are "public performances" of the works contained in the signals or whether they are "private performances" of those works. In denying a preliminary injunction against Aereo earlier this summer, the district court concluded that the performances were "private" and thus did not violate copyright law. Because ivi's reception and retransmissions were not "individualized" for each subscriber, this line of argument was not open to ivi.

In sum, the Second Circuit's *ivi* decision is an important victory for local broadcasters in establishing that the retransmission of a television signal over the Internet to the public generally does not qualify for the statutory copyright license under current law. Still to be resolved are whether OVDs are MVPDs, and thus require retransmission

consent, and whether Aereo and Aereo-like services (e.g., BarryDriller.com) are legal and can retransmit local television stations and the programming contained in their signals without copyright liability and without the express consent of the originating station.

No doubt, all of these issues will be reviewed by Congress next year as discussions begin over modifications to the Telecommunications Act of 1996 and the Satellite Home Viewer Act.

We will keep you apprised of important developments in these matters.

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If you should have any questions concerning the information discussed in this memorandum, please contact your communications counsel or any of the undersigned.

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