

ivi, Inc. Comments on the Proposed Compulsory License Phase-Out

A. Introduction

ivi, Inc. is an IP-based cable television company delivering television channels to its subscribers in an encrypted format that is decrypted and made viewable by an online player which serves as a virtual set-top box. It is as an innovator that has deployed a revolutionary method for delivering televised content to subscribers over the Internet that ivi presents its comments to the Copyright Office. We are a company that has experienced firsthand the anti-competitive behavior of established content distribution companies and have faced the challenge of securing rights to distribute content in a marketplace controlled by these established companies.

Copyright law is supposed to balance the author's rights in a copyrighted work with the public's ability to access the work. The compulsory licenses, as they are currently written, protect the public's interest in accessing copyrighted works by granting access to broadcast television content to new and innovative distribution technologies. Our comments today are to give voice to the future innovators that rely on the compulsory licenses to ensure there is an audience for their new technology. No matter how amazing and revolutionary new television distribution technology may be, without access to content, it cannot reach an audience. Without access to content, the incentive to innovate is lost.

That is the primary reason why ivi is not in favor of phasing out the compulsory licenses. In a television marketplace where content providers are merging with cable companies and the line between broadcast networks and distribution providers is blurring, ivi believes that the compulsory licenses are more important now than ever. The contractual impediments to accessing broadcast content that spurred Congress to enact the Section 111 compulsory license still exist. And with a market trend towards the vertical integration of network and distributor, it is our opinion that the contractual impediments to entering the broadcast television distribution marketplace are worse today than ever before.

While the compulsory licenses, as written, may not currently be in the financial interest of the established content distributors looking to phase them out, the final irony is that most, if not all, of those established content distributors achieved their current strategic marketplace advantages after reaping the benefits of the compulsory licenses for the past 40 years. In the event the compulsory licenses are eliminated, there must be a mechanism for new marketplace entrants to have access to content in order to ensure that the television marketplace remains vibrant and competitive. Without such a mechanism, the entrenched distribution companies can and will keep competitors and innovators permanently at bay by locking up content through mergers, exclusivity arrangements, and by otherwise leveraging their power in the marketplace. For those reasons, ivi does not support a "phase out" of the compulsory licenses.

B. Any Replacement to the Compulsory License Must Account for Marketplace Innovation

As stated in the Introduction above, ivi's biggest concern with the proposals enumerated in the Notice of Inquiry is the omission of any alternative that provides a means for new and distribution technologies to enter the television distribution marketplace. The Section 111 compulsory license, as written, applies to any distribution technology that fits the broad definition of a "cable system" in Section 111(f). The broad definition of "cable system" serves a very important purpose: It ensures that new distribution technologies have access to broadcast content, which encourages innovators to develop new methods of distributing content.

By allowing new distribution technologies access to broadcast content in a public market, the Section 111 compulsory license ensures wider distribution of broadcast content, fosters competition in the television marketplace, empowers viewer choice, and encourages innovation. Elimination of the public market would not only chill innovation, but it will also restrict competition, because the only companies with a market incentive to develop new distribution technologies are the companies that already have content distribution agreements in place.

Traditional cable companies, satellite companies, and recent marketplace entrants like Verizon FIOS and AT&T U-Verse, have used the compulsory license to gain access to broadcast content. From the bedrock content offering of network programming, those companies were then able to add additional content offerings and then grow their businesses. If the compulsory licenses are phased-out, without any legislative protections for new and innovative marketplace entrants, then those established legacy distribution systems will have an impenetrable contractual hold on content distribution. In that scenario, the only marketplace innovation that will occur will be driven by the legacy systems or the networks themselves. Eliminating the Section 111 compulsory license would disincentivize start-up companies and technology companies from outside the television industry from developing new distribution technologies, because there is no way to monetize that technology is to sell or license it to the gatekeepers of content that have every reason to keep their legacy distribution systems in place.

C. Access to Televised Content

The cable industry's fight to gain access to televised content resulted in landmark Supreme Court decisions in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) and *Teleprompter Corp. v. Columbia Broad. Sys. Inc.*, 415 U.S. 394 (1974). The genesis of these lawsuits came from the cable industry's inability to secure licensing contracts from networks, due to complications related to network exclusivity contracts with their local television affiliates.

After the cable industry won the right to retransmit broadcast television in the courts, Congress enacted the compulsory license system to ensure that new distribution technologies could access televised content thereby increasing competition and viewer access to content.

The network exclusivity contracts with local television affiliates have not disappeared. They still exist today. Therefore, the elimination of the Section 111 compulsory license would foreclose new market entrants from the access to network television enjoyed by established cable systems since 1976. Without a legitimate policy reason why new market entrants should be discriminated against in favor of legacy systems, the Section 111 public market for broadcast television should remain available for new market entrants now and in the future.

D. Supporting Innovation

Without the Section 111 compulsory license (and the Section 119 license), there would be no market reward for technological advances like satellite television, microwave television, Verizon FIOS television, AT&T's U-Verse television, and ivi TV. Without the guarantee of content to transmit to subscribers, companies have no profit incentive to develop new distribution methodologies. The guarantees afforded to innovators by the compulsory licenses have provided consumers with the ability to choose between antenna, cable, satellite, microwave, fiber-optic, and IP-based methods to receive televised content offerings.

These technological advances benefit consumers in the short term and they ultimately benefit network broadcasters in the long term. Every new distribution method for delivering televised content allows new users to access that content. Added competition keeps the access costs to consumers in check, while the broader access provided by multiple distribution methods expands the ability for networks and content providers to monetize by advertising to a broader viewer base. The compulsory license system strikes a balance between the monetary interests of networks and copyright holders in the content being aired and the public interest in providing the broadest possible access to a viewing public.

The Notice of Inquiry specifically lists the Syncbak online distribution system as a conceptual innovation that would enable secure online distribution of local television in local markets. It is important to note that, like Comcast's Xfinity, and Hulu.com, Syncbak is a technology developed by the established "broadcast industry." ivi TV is already capable of delivering online local television to local markets in a secure format. However, because ivi TV is a new marketplace entrant that developed its technology from outside the "broadcast industry", ivi is unable to secure broadcast distribution agreements in the private marketplace and is sued for copyright infringement even though it falls squarely within the Section 111(f) "cable system" definition.

E. Competitive Environment

Access to content by innovators is, if anything, more difficult today than it was when Teleprompter was decided. Affiliate agreements between broadcast networks and local broadcast stations still exist and still act as a contractual inhibitor Gordian knot that keeps new distributors from securing retransmission rights.

There is also a trend towards the vertical integration of content producers and distribution platforms. Whether by merger, in the case of NBC Universal and Comcast, or by content producers developing their own distribution methods like Hulu, the line between television content producers and distribution companies is being blurred.

In such an environment, the risks of monopoly, oligopoly, or collusion are ever-present. It is also disingenuous to point to the proliferation of video-on-demand (VOD) options in the marketplace as a reason to phase-out the compulsory licenses. The compulsory licenses, as written, have nothing to do with the VOD marketplace. The compulsory licenses provide a public market for secondary transmissions of broadcast content. If the compulsory licenses are phased out, then the access to that market for new entrants closes.

F. Piracy Protection

If the compulsory licenses are eliminated, the legislation that replaces it should require some assurance by distributors that the content be protected from unauthorized copying or piracy.

G. ivi's Answers to Specific Questions Posed in the Notice of Inquiry

In the Notice of Inquiry, the Copyright Office asks a series of specific questions. ivi's comments in response to those queries are as follows:

1. Sublicensing as an alternative to the statutory licenses in the current environment.

Sublicensing will not work in an environment where broadcasters have disincentives to be a content reseller. The first disincentive is the sheer number of parties implicated by a broadcast sublicensing scheme. Network broadcast television channels distribute content owned by thousands of separate copyright owners. Network broadcast channels then have local affiliate agreements providing exclusive rights to rebroadcast to certain localities. Those local affiliates then add their own local programming, adding additional copyrighted works to each local affiliate broadcast. A workable sublicensing scheme would have to navigate the ever-changing rights of every national and local copyright owner, as well as the contracts between networks and local affiliates. It is difficult to envision such a system working in an

unregulated marketplace. However, that impracticability is currently solved by the compulsory licenses.

A second disincentive to a workable sublicensing scheme is that broadcast channels are no longer solely in the content wholesaling business. They are now also in the distribution business. There are anti-competitive reasons for broadcasters to withhold content from certain distributors in favor of a preferred distribution method. As long as broadcast channels are available on the public airwaves, the government should ensure that other distribution platforms have equal access to that publicly available content. Again, the compulsory licenses accomplish this important end.

Cable and satellite channels are in the business of reselling and sublicensing their entire linear channel offering. Broadcast channels are different in that they provide content for free over-the-air in an ad supported model. Phasing out the compulsory licenses in the hope that broadcast channels will sublicense all the copyrighted works they distribute to competing forms of distribution in an environment where there are disincentives to grant access to content is an ill-advised policy.

2. Sublicensing in the basic cable network marketplace.

Cable networks own the right to distribute their entire 24/7 linear channel on any distribution platform. They are often content owners only, not distributors, which incentivizes them to distribute on as many platforms as possible. When cable networks are both content owners and distributors, the FCC provides “competitive access” to competing forms of distribution through regulations that allow for competing distribution to have access to the channel.

3. Broadcast stations are truly different from cable networks.

The NAB is correct in its assertion that broadcast stations are truly different from cable networks. Cable networks are mostly nationwide linear channels that have secured rights to sublicense their programming that are distributed to the public exclusively in a subscription model. Broadcast stations are mostly regionalized linear channels without such sublicenses that carried over-the-air for free to the public. The compulsory license is the mechanism allowing those broadcast stations to deliver their channels to the public in subscription delivery formats.

4. Methods by which the public views broadcast stations.

According to OECD Communications Outlook 2004, 67% of television reception is through cable[1], and 12% is through satellite[2].

[1] http://www.nationmaster.com/graph/med_tel_rec_thr_cab-media-television-reception-through-cable

[2] http://www.nationmaster.com/graph/med_tel_rec_thr_sat-media-television-reception-through-satellite

5. Incentives for broadcasters to sublicense content.

Eliminating the compulsory license and requiring broadcasters to sublicense content would force them to change their business model. Broadcasters who currently distribute over-the-air for free, currently receive licensing revenue through the compulsory licenses, and because of that licensing scheme, they can negotiate specific retransmission contracts for carriage on multichannel video programming distributors. This model works and should not be eliminated without a viable alternative in place.

6. Private licensing.

Many of the same obstacles facing any workable sublicensing system will also impede a market based on private licensing. Again, few broadcast stations own all the rights to the programming carried on their signals. Requiring broadcast stations to obtain those rights would alter their current business model and would also require them to renegotiate the thousands of affiliate agreements between networks and affiliates. Finally, it is a marketplace rife with anti-competitive behavior and self-dealing. Private licensing is not the ideal method to ensure competitive access to content or a marketplace that would provide viewers with meaningful choice in their television service options.

7. Collective licensing.

Collective licensing would, in theory, alleviate many of the contractual impediments facing the sublicensing or private licensing models. However, the details of a collective licensing model must be better articulated before such a system is implemented in lieu of the working statutory licenses currently in place. Some tangible benefit to all interested parties in the marketplace must be identified and agreed-upon before undertaking the transplant of the currently-functioning licensing system with another collective licensing program.

8. Video-on-Demand.

The Office seeks comment on how copyright owners license content for Video-on-Demand (VOD) distribution, and the extent to which it might obviate the need for continued operation of the section 111, 119 and 122 statutory licenses.

VOD licensing deals are negotiated between copyright owner and distributor for the rights to distribute individual programs. VOD licensing deals can be negotiated

privately without having to navigate the complexity of thousands of copyrighted works in a linear broadcast channel.

VOD deals also allow copyright owners to deal directly with VOD distributors. In the broadcast business model, broadcasters are adding numerous, varied, and ever-changing bundles of rights to a linear broadcast channel. Without the compulsory licenses, broadcasters would have to secure rights to re-license every copyrighted work contained in their linear feed before they can enter into a retransmission agreement with VOD distributors.

9. Online Video.

The Copyright Office inquires whether the television marketplace is entering an era when the current statutory licenses are no longer needed because all broadcast programming is becoming available online. ivi's entire business is predicated on online video delivery and our answer to that question is an unequivocal "no".

While there is certainly a market demand for VOD programming online, there is also a demand for live television programming and 24/7 broadcast programming online. Those latter two categories are the types of programming that ivi's software and delivery architecture is designed to deliver. VOD is a terrific choice for television viewers who want to watch specific programming whenever they want. But it cannot replace the traditional television viewing experience.

Without the statutory licenses (or the unlikely event that broadcasters agree to sublicense their linear feeds), there will never be 24/7 broadcast programming available online. With statutory licensing, online distributors can compete in a regulated market with cable and satellite distributors, resulting in more viewer choice.

10. Internet licensing distribution models

If it weren't for the statutory licenses, broadcast content would only be licensed for distribution in fragmented forms over all distribution platforms, including the Internet. Currently on Hulu (jointly owned by broadcaster networks) the broadcast network negotiates rights on the show level, not the 24/7 broadcast signal level. Conversely, AT&T U-Verse, covered by the statutory license, carries entire 24/7 broadcast signals over the Internet to their subscribers.

The business model that will likely succeed in the online space is the same that have succeeded in the other distribution spaces. The subscription model developed by the cable industry applies perfectly well to all forms of distribution, be those cable, wires, microwave, or other communication channels, such as the Internet, WiFi, and cellular.

11. TV Everywhere

The Office seeks comment on whether the TV Everywhere effort and popular services, such as Hulu and Netflix, will eventually offer live broadcast signals to their subscribers with a broadband connection.

ivi's answer is "yes", as long as the statutory license remains in place. It is now technologically possible to deliver a 24/7 linear broadcast signal to subscribers with a broadband connection today. ivi TV proved that subscribers want such a service. The Copyright Office goes on to ask what licensing models might be used to clear the public performance rights for programs carried by television broadcast stations for online distribution and whether these alternative means of obtaining access to broadcast programming will vitiate the rationale underlying the Section 111, 119 and 122 statutory licenses. ivi's position is that the rationale for the statutory licenses is as legitimate today as it was the day they were enacted.

Alternative means of obtaining access to broadcast programming rights are so rife with contractual impediments, anti-competitive pressures, and self-dealing opportunities that the statutory licenses are of paramount importance. The underlying rationale of the statutory licensing is that it would be very difficult if not impossible to negotiate the rights of every single copyright holder in a 24/7 linear broadcast channel. There is nothing proposed by this notice of inquiry that addresses that continuing problem better than the statutory licenses already in place.

H. Conclusion

The compulsory license works. In the last forty years, the television industry has reaped the benefits of new and innovative distribution methodologies to grow from an over-the-air broadcast medium with a handful of channel offerings to the vibrant industry it is today. At the same time that the networks and copyright owners saw unprecedented growth in the television marketplace, television viewers also saw substantial benefits as consumers in the form of increased content choice as well as affordable competitive choice in delivery methodology.

The interest in fostering new and innovative methods to allow the public access to televised works is still as important today as it was when the compulsory license was enacted by Congress. As the Internet, Wi-Fi, cellular, and other new delivery platforms are developed, the television distribution marketplace should develop as well. No public interest is served by allowing established legacy distribution companies like cable and satellite companies the competitive advantage of guaranteed access to content at the expense of marketplace entrants that develop innovative distribution technologies on new delivery platforms.