

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

FOX TELEVISION STATIONS, INC., et al.

CIVIL ACTION NO. 1:13-cv-00758 (RMC)

Plaintiffs/Counter-Defendants,

v.

FILMON X, LLC, et al.

Defendants/Counter-Plaintiffs.

DECLARATION OF ALKIVIADES DAVID

I, Alkiviades David, declare:

1. I submit this declaration in support of FilmOn X, LLC's ("FilmOn X's") Opposition to Plaintiffs' Motion for a Preliminary Injunction. I have personal knowledge of the facts set forth herein and, if called as a witness, I could and would testify competently thereto.
FilmOn's Business, Technology and Officers
2. I am the Founder and CEO of FilmOn TV Networks, Inc. ("FilmOn"). Since 2008, FilmOn provides high-definition ("HD") subscription-based television services to internet protocol ("IP")-enabled devices including televisions, set-top boxes, personal computers, mobile phones, and tablets. FilmOn subscription packages include access to over a hundred television channels, premium movie channels, pay-per-view channels, as well as over 2,000 video on demand titles. FilmOn also provides some content for free in standard definition ("SD") format.
3. FilmOn provides services across a proprietary delivery platform connected to datacenters in London, Amsterdam, Geneva, New York and Los Angeles. FilmOn is based in the United States with some operations and staff located in Europe.

4. As Founder and CEO, I have full knowledge of FilmOn's business operations. In addition to managing the business, I am the creator of certain radio frequency ("RF") technologies involving video compression. Currently, I have several patents pending for this technology.
5. FilmOn has a senior management team including Chief Technology Officer ("CTO") Mykola Kutovyy. FilmOn relies upon Mr. Kutovyy to implement, operate and manage its technology.

FilmOn's Relationship with Defendant FilmOn X, LLC (formerly known as Aereokiller LLC)

6. FilmOn has an ongoing business relationship with defendant FilmOn X, a company formerly known as Aereokiller LLC ("Aereokiller"). Aereokiller's name has been officially changed to FilmOn X, LLC pursuant to the State of Delaware Certificate of Amendment filed on May 31, 2013
7. FilmOn X is owned and operated by Mark J. Cohen, who resides in New York City. Mr. Cohen is a personal friend.
8. FilmOn has entered into a non-exclusive licensing arrangement with FilmOn X through which FilmOn provides its technology, *i.e.* a platform or delivery system for transmitting and receiving video over the internet using IP. FilmOn X pays licensing fees that are, in part, performance based.
9. FilmOn X has not intentionally retransmitted over-the-air broadcast programming from the New York stations to Washington, D.C. viewers. If any retransmission of programming between markets has occurred, it is the result of an inadvertent spill-over of over-the-air broadcast programming due to recent database testing. To my knowledge, this inadvertent spill-over has been addressed and is no longer occurring. Further, FilmOn X has limited the scope of availability for its customers to receive over-the-air broadcast programming to only 20 miles from the broadcast source, a measure that

provides less spillover between markets than the typical transmission of over-the-air broadcast programming from a network affiliate's broadcast towers.

10. FilmOn reserved the name FilmOnx.com for use by FilmOn X.

Development and Release of FilmOn's Remote DVR Technology

11. Starting in or about 2006, FilmOn began developing and testing a remote digital video recorder ("DVR") technology.
12. Since I travel extensively and maintain different residences, the initial motivation or impetus for developing the remote DVR technology was to permit me to access UK television programming from my home in Greece via computer.
13. FilmOn's development and testing took about a year to complete. It was based on longstanding technology with certain enhancements.
14. FilmOn redesigned its technology in 2009, about a year after publication of the *Cablevision* decision by the Second Circuit.
15. On the same day that the Southern District of New York's *Aereo* decision was published, FilmOn issued a press release entitled "A Victory for Aereo is a Victory for FilmOn" which was covered by news outlets such as Reuters. (A true and correct copy of the 7/11/12 press release is attached hereto as Exhibit A.) The press release lauded the district court decision, stating that "While FilmOn is settling its own dispute with the networks, it is now reinstating its live major Network streams in the state of New York with principally the same application of mini antennas as Aereo uses. This includes ABC, NBC, FOX, CBS, etc. . . . FilmOn is uniquely positioned in every major US market and will soon begin rolling out similar major Network services nationwide." *Id.* The press release was publicly available and widely reported. It is presumed that the NY Plaintiffs (which include certain of the Plaintiffs in this action) had full notice of the press release and its contents. Apparently, FilmOn's public announcement of its intentions to roll out its new remote DVR antenna-based technology, in light of the Southern District of New York's *Aereo* decision, did not alter the settlement strategy of the NY Plaintiffs,

or the scope of the language set forth in the non-public settlement agreement dated August 1, 2012.

16. On or about August 3, 2012, I sent an electronic message to Hayden Katz, Esq. of Arnold & Porter LLP, legal counsel for the NY Plaintiffs; attaching a photograph of myself holding an antenna in front of an antenna farm. (A true and correct copy of the 7/3/12 electronic mail is attached hereto as Exhibit B.) In the message, I wrote “Dear Mr. Katz, Please see attached. This is a picture taken from one of several Antenna/DVR locations across the country. Like the Aereo system, FilmOn Air X allows audiences to connect to a unique antenna and tune into over the air signals freely available to them to watch them remotely from a DVR. As we do with the other Content Partners on the FilmOn.com platform, which is different from FilmOn Air X, we will be making regular payments to your clients from all subscribers in the USA We have at this time assumed that \$0.50 Cents per subscription from each channel that is allowed into the system is appropriate. \$0.25 Cents to the local affiliate and 25 Cents to the Network. Even though we recognize that FilmOn Air is not a Cable system, we have made these assumptions based on the practices of the Cable industry.” *Id.*
17. On or about August 7, 2012, FilmOn deployed its new DVR remote antenna= based technology.

The Remote DVR Technology Described

18. FilmOn’s technology relies on several pieces of equipment (*i.e.* antennas, tuners, and transcoders), matched by correspondent servers to transmit broadcast programming from television into internet format for use on IP-enabled devices. The programming offered by FilmOn and its licensees, such as FilmOn X, includes free-to-air programming provided by the networks and regulated by the FCC.
 - a. **The Antennas**
19. FilmOn’s technology utilizes small antennas, no larger than the size of a dime and spaced about 8 inches apart from each other on a board.

20. To date, FilmOn has purchased approximately 10,000 small antennas from vendors in the United States and Asia.
21. Each antenna corresponds to an antenna server.
22. FilmOn provides subscribing customers in the United States with their own individual remote antennas and antenna servers.

b. Tuners and Transcoders

23. FilmOn purchases tuners and tuner servers which are matched to each antenna and antenna server.
24. Programming content goes from antenna/ antenna server and tuner/ tuner server to a transcoder, built by FilmOn, and a corresponding transcoder server.
25. The transcoder servers translate the data from mpeg-2 to mpeg-4 format for transmission over the internet. FilmOn has customized and purpose built the software needed for the transcoding process.

c. Optional Storage Directories

26. Each subscribing customer's media, or data, is stored on a unique directory, which is created when a temporary buffer writes to the drive memorizing the information transmitted. If the customer pays for a recording, the data is stored by writing to a drive in a storage directory. Otherwise, the data is erased.
27. Subscribing customers—whether directly from FilmOn or through a licensee, have the right to record, pause, rewind and fast forward broadcast programming through the internet on their own computers at home.

FilmOn's Licensing Agreements, and Efforts to Enter into Licenses with Plaintiffs in this Action

28. FilmOn has entered into licenses for the retransmission of some of the content it provides. For example, FilmOn has license agreements with KFLA in Los Angeles, KDOC, and Azteca.

29. FilmOn has licenses to broadcast content with about 15 different traditional cable channels, including Inspiration Network and Real Channel.
30. FilmOn believes in licensing. Thus, in its July 11, 2012 press release, FilmOn stated that it “pays retransmission fees on behalf of all of its paying subscribers. FilmOn feels its only right to pay the content producers their fair dues.” See Exhibit A, attached hereto.
31. FilmOn has engaged in discussions and negotiations with Fox and NBC to enter into licenses for content distribution, and had similar discussions with the Disney Channel and CBS. Despite FilmOn’s desire to enter into such licenses, the major television networks have not agreed to such relationships.

FilmOn’s Investment and Revenues

32. FilmOn has invested over \$10 million into its technology, with several patents pending.
33. FilmOn receives revenue from multiple sources, including direct customer subscriptions, licensee fees, and advertising revenue.
34. Through third party vendors, FilmOn has the ability to track percentages of user viewing by content, including free-to-air network programming.
35. Approximately 50% of FilmOn’s United States-based customers have subscriptions for local channels which includes network programming.
36. To date, the FilmOn mobile application has been downloaded about 20,000 to 30,000 times in the United States.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on August 15th, 2013 at Saronik Gulf, Greece



By _____
Alkiviades David

EXHIBIT A

REUTERS



COMPANY NEWS AND PRESS RELEASES

A Victory for Aereo is a Victory for FilmOn

Wed, Jul 11 21:25 PM EDT

BEVERLY HILLS, Calif., July 11, 2012 (GLOBE NEWSWIRE) -- (www.filmson.com) -- In a huge blow to the major TV broadcasters, Federal Judge Alison Nathan has ruled that plaintiffs in American Broadcasting Companies, Inc. et al vs. Aereo, Inc. have not demonstrated a likelihood of prevailing in the case.

While FilmOn is settling its own dispute with the networks, it is now reinstating its live major Network streams in the state of New York with principally the same application of mini antennas as Aereo uses. This includes ABC, NBC, FOX, CBS, etc. The aforementioned network content is geo-restricted to the state of New York's DMA. The other 160 HD channels are largely available worldwide on FilmOn.com which, as Alki David says, "dwarfs Aereo's pitiful local TV offering."

David added "Furthermore, FilmOn is uniquely positioned in every major US market and will soon begin rolling out similar major Network services nationwide.

The fundamental difference, unlike Barry Diller's Aereo, is that FilmOn pays retransmission fees on behalf of all of its paying subscribers. FilmOn feels it's only right to pay the content producers their fair dues.

"This is a significant move in the right direction. Television is meant to be for the consumer and the consumer deserves to have it anywhere and everywhere, whenever the consumer wants," said David.

Keith Garsee

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The following pictures are available for download:

[Image] FilmOn Long

[Image] diller-david-e1334813925959

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EXHIBIT B

Jaime Marquart

From: Alki David [alki@filmon.com]
Sent: Friday, August 03, 2012 8:05 AM
To: Hadrian Katz
Cc: TButterfield; alex@filmon.com; kim@filmon.com; dmca@filmon.com; James Beshoff; Jaime Marquart; Chris Anstett
Subject: FilmOn Air X
Attachments: Alki_antenna2.jpg

Dear Mr. Katz

Please see attached. This is a picture taken from one of several Antenna/DVR locations across the country. Like the Aereo system, FilmOn Air X allows audiences to connect to a unique antenna and tune into over the air signals freely available to them to watch them remotely from a DVR.

As we do with the other Content Partners on the FilmOn.com platform, which is different from FilmOn Air X, we will be making regular payments to your clients from all subscribers in the USA. There will be basic pack and a local pack. This is not too dissimilar from traditional Cable operators's practices. Please note that all these Antenna/DVR locations are strategically located and that the signals they pick up are geo-restricted to their respective markets.

We have at this time assumed that \$ 0.50 Cents per subscription from each channel that is allowed into the system is appropriate. \$0.25 Cents to the local affiliate and 25 Cents to the Network. Even though we recognize that FilmOn Air is not a Cable system, we have made these assumptions based on the practices of the Cable industry.

As FilmOn is also entering the broadcast industry this September 1st, we recognize that free to air television data must be protected. We will have our antenna and DVR viewing data available to measuring groups like Nielsen and Rentrak, though we may publish our viewing data too.

Though we will be making deploying our own marketing initiatives, we hope that going forward in good faith, your clients also help promote FilmOn Air X to establishing itself as a premiere destination for Television viewing.

Yours Sincerely

Alki David

CEO FilmOn TV Networks

CC

Legal et al

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Alki David
CEO FilmOn.tv Networks

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