

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.

**EVIDENTIARY OBJECTIONS TO THE DECLARATIONS OF SHERRY BRENNAN
AND JULIE SHEPHERD IN SUPPORT OF PLAINTIFFS'
MOTION FOR A PRELIMINARY INJUNCTION**

In opposition to Plaintiffs Fox Television Stations, Inc.'s *et al* ("Plaintiffs'") Joint Motion for a Preliminary Injunction, defendant FilmOn X, LLC ("FilmOn X") formerly known as Aerokiller, LLC ("Aerokiller") hereby submits these Evidentiary Objections to the Declaration of Julie A. Shepard and exhibits thereto, dated July 23, 2013 (the "Shepard Decl.") and the Declaration of Sherry Brennan and exhibits thereto, dated August 1, 2013 (the "Brennan Decl."), and filed in support of Plaintiffs' Joint Motion for a Preliminary Injunction.

**FILM ON X'S OBJECTIONS TO DECLARATION
OF JULIE SHEPARD**

Shepard Decl. ¶ 2

FilmOn X's Objections

--Lack of foundation, irrelevance.

There is no foundation for Shepard's erroneous opinions about the technical details of FilmOn X's service. Shepard did not design or deploy FilmOn X's hardware and is not otherwise qualified to comment on FilmOn X's technology. The description of FilmOn X's service as a

“streaming” service is without foundation and in any case erroneous, the service is not a “streaming” service. FilmOn X’s service is legal and FilmOn X does not require authorization or licenses from Plaintiffs to provide its service.

Shepard Decl. ¶4

FilmOn X’s Objections

--Lack of foundation. Irrelevance, improper legal conclusions

The speculative claims concerning the number of programs made available for viewing is irrelevant. FilmOn X’s service is legal and FilmOn X does not need authorization or licenses from Plaintiffs to provide its service.

Shepard Decl. ¶5

FilmOn X’s Objections

Lack of foundation, irrelevance, improper speculation.

There is no foundation for Shepard’s erroneous opinions about the technical details of FilmOn X’s service. Shepard did not design or deploy FilmOn X’s hardware and is not otherwise qualified to comment on FilmOn X’s technology. The description of FilmOn X’s service as a “streaming” service is without foundation and in any case erroneous, the service is not a “streaming” service. FilmOn X’s service is legal and FilmOn X does not require authorization or licenses from Plaintiffs to provide its service. This paragraph also contains improper speculation as to FilmOn X intentions concerning the delivery of its service to customers in the Washington, D.C. area.

Shepard Decl. ¶6

FilmOn X’s Objections

--Misstates the facts

The paragraph misstates the facts by ignoring the context of the statements made by FilmOn X in its Reply Brief on Appeals and Response Brief on Cross-Appeals in case nos. 13-55156, 13-55226, and 13-55228. In its appeal, FilmOn X argues that plaintiffs’ request for a nationwide injunction be denied based on the fact that plaintiffs’ failed to allege or prove

irreparable harm outside of the jurisdiction of the Ninth Circuit and based on interests of comity. The statements made in paragraph 6 of the Shepard Declaration ignores a primary argument made by FilmOn X, thereby mischaracterizing the statements made in its appellate filings.

Shepard Decl. ¶ 7 and footnote 2

FilmOn X's Objections

--Lack of foundation, irrelevance, improper lay opinion

There is no foundation for Shepard's incorrect opinions about the technical details of FilmOn X's service. Shepard did not design or deploy FilmOn X's hardware and is not otherwise qualified to comment on FilmOn X's technology. The description of FilmOn X's service as a "streaming" service is without foundation and in any case erroneous, the service is not a "streaming" service. FilmOn X's service is legal and FilmOn X does not require authorization or licenses from Plaintiffs to provide its service.

The footnote to paragraph 7 is also irrelevant to the issues of this action due to the fact that the DMCA notices sent by Fox to Apple, Microsoft, and Google falsely claimed that FilmOn X applications were barred pursuant to an order issued by the court in the Southern District of New York, Case No. 10-7532.

Shepard Decl. ¶¶8-10, footnote 3, and Exhibit D

FilmOn X's Objections

--Lack of foundation, irrelevance, hearsay

There is no foundation for Shepard's speculative opinions about the usage or adoption of the FilmOn X service by the public. Furthermore, the statement of footnote 3 of paragraph 8 that FilmOn X services are available in Bridgeport, CT and Newark, NJ is based on complete speculation without any factual basis. Although a court may take judicial notice of the Exhibit D FilmOn press release referenced in paragraph 10 of the Shepard Declaration, Plaintiffs offer the article for the truth of matters asserted in violation of the hearsay rule.

Shepard Decl. ¶11

FilmOn X Objections

-- Lack of foundation, irrelevance, hearsay, improper legal conclusions, vague and ambiguous

There is no foundation for Shepard's incorrect opinions about the technical details of FilmOn X's service. Shepard did not design or deploy FilmOn X's hardware and is not otherwise qualified to comment on FilmOn X's technology. The description of FilmOn X's service as a "streaming" service is without foundation and in any case erroneous, the service is not a "streaming" service.

The paragraph provides only vague statements about the "monitoring" conducted of the FilmOn X service, and the availability of Plaintiffs' programming on FilmOn X. The paragraph provides no mention of when, how, and with what frequency the FilmOn X service was monitored, only stating that FilmOn X services were monitored "periodically" The paragraph also makes the vague and ambiguous statement that the "availability of Plaintiff's programming...has changed on a number of occasions." Finally, the paragraph is full of improper legal conclusions about purported infringement and violation of the preliminary injunction issued in the Central District of California.

Shepard Decl. ¶13, Exhibit E

FilmOn X's Objections

--Lack of foundation

There is no foundation for Shepard's incorrect opinions about the technical details of FilmOn X's service. Shepard did not design or deploy FilmOn X's hardware and is not otherwise qualified to comment on FilmOn X's technology. Shepard has no personal knowledge of the content available to Washington D.C. customers, including any purported content from other markets.

Shepard Decl. ¶14

FilmOn X's Objections

--Irrelevance

FilmOn X does not require authorization or licenses from Plaintiffs to provide its legal service to its customers; therefore, the existence of authorization for the retransmissions of is irrelevant to the issues, claims, and defenses in this action.

Shepard Decl. ¶20

FilmOn X's Objections

--Improper legal conclusion

The statement is an improper legal conclusion alleging copyright infringement of Fox programming. FilmOn X services operates legally and does not infringe on the copyright of Fox, or any other Plaintiff in this action.

Shepard Decl. ¶21

FilmOn X's Objections

--Irrelevance

The press attention regarding Mr. David is not relevant to any of the claims, issues, or defenses in this action.

Shepard Decl. ¶22

FilmOn X's Objections

--Irrelevance; improper legal conclusion

The injunction issued against FilmOn.com, Inc. in Southern District of New York, Case No. 10-7532 applied to technology that differs in many material respects from the technology utilized by FilmOn X that is the subject matter of this action. Therefore, the injunction is irrelevant to the issues, claims, and defenses in this action.

**FILM ON X'S OBJECTIONS TO
DECLARATION OF SHERRY BRENNAN**

Brennan Decl. ¶¶ 2-4

FilmOn X's Objections

--Irrelevance

The copyright ownership of the Broadcast Companies and the retransmission agreements they have entered into with other content distributors are irrelevant to the claims, issues, and defenses in this case. FilmOn X's services operate legally.

Brennan Decl. ¶5

FilmOn X's Objections

--Lack of Foundation, irrelevance, improper lay opinion, undue prejudice

This paragraph contains speculative, vague opinions on subjects inappropriate for lay testimony, and opinions beyond the knowledge and experience of the declarant. Furthermore, the current methods used by Broadcast Companies to develop and distribute their content is completely irrelevant to any of the issues in this case. The quantity of programming bought or developed by the Broadcast Companies is irrelevant to the legal operation of FilmOn X's services.

Brennan Decl. ¶6

FilmOn X's Objections

--Lack of Foundation, irrelevance, improper lay opinion

There is no foundation for Brennan's incorrect opinions about the technical details of FilmOn X's service. Brennan did not design or deploy FilmOn X's hardware and is not otherwise qualified to comment on FilmOn X's technology. The description of FilmOn X's service as a "streaming" service is without foundation and in any case incorrect. The fact that FilmOn X's service has not received the authorization of Plaintiffs' is irrelevant. The FilmOn X service is legal and accordingly FilmOn X is not required to obtain Plaintiffs' authorization to provide its services. The Injunction in the Ninth Circuit does not apply to FilmOn's operations outside of the Ninth Circuit.

Brennan Decl. ¶¶8-18, 20-29, 32-34, Exhibit B

FilmOn X's Objections

--Lack of Foundation, irrelevance, improper lay opinion, hearsay, improper legal conclusions.

The above-referenced paragraphs contain speculative, vague opinions, improper legal opinions, improper subjects for lay testimony, opinions beyond the knowledge and experience of the declarant, and statements dependent on hearsay. Furthermore, these paragraphs contain opinions about the impact of the competition presented by the FilmOn X service on the current business model of Plaintiffs are completely irrelevant to any of the issues in this case. For example, there is no foundation for the speculative and vague testimony in paragraph 16 that FilmOn X will “significantly reduce” the amount certain distributors are willing to pay Plaintiffs for content. Later in the same paragraph, Brennan admits that it is “impossible to know” how much revenue will be lost in hypothetical future negotiations, and then unhelpfully states she is “certain” that FilmOn X-type startups will be a “factor” in such negotiations. The paragraph ends with a reference to vague and anonymous hearsay statements that FilmOn X-type startups have been “referenced” in ongoing negotiations with cable companies.

Brennan Decl., ¶19

FilmOn X’s Objections

--Lack of foundation

There is no foundation for Brennan’s incorrect opinions about the technical details of FilmOn X’s service. Brennan did not design or deploy FilmOn X’s hardware and is not otherwise qualified to comment on FilmOn X’s technology. Neither Brennan, nor Shepard has any personal knowledge of the content available to Washington D.C. customers, including any purported content from other markets.

August 15, 2013

Respectfully submitted,

By: /s/ Ryan G. Baker

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