

UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

FOX TELEVISION STATIONS, INC., et al.

Plaintiffs,

v.

FILMON X, LLC, et al.

Defendants.

Civil Action No. 1:13-cv-00758-RMC  
Hon. Rosemary M. Collyer

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO STAY  
THE INJUNCTION PENDING APPEAL AND TO MODIFY THE GEOGRAPHIC  
SCOPE OF THE INJUNCTION**

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## INTRODUCTION

The Court should deny FilmOnX's motion to stay the preliminary injunction pending appeal (the "Stay Motion"), with its accompanying request to modify the geographic scope of the injunction, which is nothing more than an attempt to seek reconsideration of this Court's prior determination that the injunction should apply nationwide except in the Second Circuit.

In the Stay Motion, FilmOnX asks the Court for a free pass to continue its infringement while it challenges this Court's thorough and well-reasoned preliminary injunction order. But FilmOnX has not come close to demonstrating that *any* of the relevant factors weigh in favor of a stay. FilmOnX has not established a strong likelihood of success on appeal – to the contrary, FilmOnX has simply recycled the same arguments that this Court rejected when it held that based on the clear language of the Copyright Act, FilmOnX is violating Plaintiffs' exclusive right of public performance by retransmitting their copyrighted broadcast programming to the public without permission.

FilmOnX claims that it will be irreparably harmed by an injunction because Aereo will steal its customers. But even if this were true, the notion that FilmOnX should be allowed to continue infringing because a competing company not before this Court is also infringing is unsupported. Moreover, FilmOnX's claim that it will be driven out of business by the injunction fails because, among other reasons, it is not supported by any evidence. Alki David has publicly admitted it is not true, and it is undisputed that FilmOnX's legal transmission of non-broadcast programming and international business will not be impacted by the injunction. In contrast, this Court has already found that the injunction is necessary to prevent irreparable harm to the Plaintiffs, and FilmOnX has provided no colorable basis for the Court to reverse that

finding. Finally, FilmOnX has offered no valid reason for this Court to reconsider its prior determination that the public interest favors enjoining FilmOnX's infringement.

## ARGUMENT

### I. **FILMONX IS NOT ENTITLED TO A STAY OF THE INJUNCTION PENDING APPEAL**

In deciding whether to stay an order under Federal Rule of Civil Procedure 62(c), a court considers: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009).

“The first two factors . . . are the most critical. It is not enough that the chance of success on the merits be better than negligible. . . . [M]ore than a mere possibility of relief is required. By the same token, simply showing some possibility of irreparable injury fails to satisfy the second factor.” *Nken*, 556 U.S. at 434-35 (internal citations and quotation marks omitted). “Even should Respondent show that irreparable harm would result without the imposition of a stay, if Respondent has not provided a sufficient showing of likelihood of success on the merits of the appeal, the stay will not be granted.” *Barnstead Broad. Corp. v. Offshore Broad. Corp.*, 869 F. Supp. 35, 39 (D.D.C. 1994) (citing *Blankenship v. Boyle*, 447 F.2d 1280 (D.C. Cir. 1971)).

#### A. **FILMONX HAS NOT DEMONSTRATED ANY LIKELIHOOD OF SUCCESS**

FilmOnX's contention that it is likely to succeed on appeal is merely a rehash of the same arguments that the Court considered and rejected when it granted Plaintiffs' preliminary injunction motion. Courts have recognized that where, as here, the defendant seeking a stay

“raises essentially the same arguments made in its original opposition to [the] motion for preliminary injunction,” the standard for a stay pending appeal cannot be met. *CytoSport, Inc. v. Vital Pharms., Inc.*, 617 F. Supp. 2d 1051, 1084-85 (E.D. Cal. 2009); *Bailey v. Callaghan*, No. 12-11504, 2012 WL 3134338, at \*2 (E.D. Mich. Aug. 1, 2012) (“Defendants’ rehashing of their previous arguments does not establish more than a mere possibility of success on the merits. This factor does not weigh in favor of granting a stay.”); *see also Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nebara*, 264 F. Supp. 2d 484, 486 (S.D. Tex. 2002) (denying motion to stay where motion relied on the same arguments the court rejected when it granted the preliminary injunction); *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, No. 00-5361, 2001 WL 493266, at \*1 (D.N.J. Jan. 17, 2001) (denying motion to stay and noting that where the defendant “offers no new circumstances to support its application for a stay [of a preliminary injunction] pending appeal,” granting the motion would “effectively be a reconsideration and reversal” of the preliminary injunction).

This was not a close case on the merits. The Court found that “the provisions of the 1976 Act that protect Plaintiffs’ work are clear: FilmOn X’s service violates Plaintiffs’ ‘exclusive right . . . to perform the copyrighted works publicly.’” Dkt. No. 33, at 25 (quoting 17 U.S.C. § 106(4)). It was not a “mistake,” as FilmOnX claims, for the Court to conclude that “the particular technological system used by FilmOnX . . . is legally irrelevant.” *See FilmOnX Stay Mot.* at 4. To the contrary, the Court’s conclusion that the inner workings of FilmOnX’s technology is irrelevant was commanded by the statute, which states that it is a public performance “to transmit . . . a performance . . . of the work . . . to the public, *by means of any device or process*[.]” 17 U.S.C. § 101 (emphasis added). As the Court correctly found, FilmOnX’s “convoluted process for relaying television signals” is a device or process used to

make Plaintiffs' copyrighted performances available to the public, and therefore falls within the Copyright Act's intentionally broad definitions of "transmit," "device," and "process." Dkt. No. 33, at 25. FilmOnX's belated attempts to introduce new evidence about the copies and directories its system uses in the course of retransmitting live broadcast television programs over the Internet is unavailing, since under the statute's plain language FilmOnX's system is nonetheless a "device or process" that transmits copyrighted broadcast programming to the public, infringing the Plaintiffs' exclusive public performance right. *See id.* at 25-28.

FilmOnX claims that it has submitted new evidence because this Court supposedly did not understand its technology and use of unique copies. FilmOnX Stay Mot. at 4-5. That argument amounts to no more than saying FilmOnX's technology is identical to *Aereo*'s, which Plaintiffs accepted for purposes of their Motion for Preliminary Injunction. The Court knew and acknowledged this. Dkt. No. 33, at 4 n.4 ("There are some differences between FilmOn X's system and the system in *Aereo*, most notably minor distinctions in the sequence in which signals are processed. . . . Nonetheless, the systems are essentially the same, and the parties agree that there are no legally meaningful differences."). Nonetheless, the Court decided that *Cablevision* and *Aereo* should not be applied. *Id.* at 25. There was no misunderstanding of the technology.

Although FilmOnX insists that the D.C. Circuit could choose to follow *Aereo* and *Cablevision*, Plaintiffs respectfully submit that this is unlikely given that these cases are not controlling and both commentators and judges — including this Court — have recognized that their analysis is based on a misreading of the statute. *See id.* at 20. The mere existence of two non-controlling, widely-criticized cases supporting FilmOnX does not create a strong likelihood that the D.C. Circuit will reverse the injunction. Accordingly, this factor weighs heavily — perhaps dispositively — against a stay.

**B. FILMONX CANNOT SHOW THAT IT WILL SUFFER IRREPARABLE INJURY ABSENT A STAY**

This Court fully considered the parties' arguments regarding irreparable harm and concluded that Plaintiffs showed they will likely suffer irreparable harm if the FilmOnX service is not enjoined and the balance of hardships tips in Plaintiffs' favor. *Id.* at 29-32. Nothing in FilmOnX's Stay Motion warrants this Court drawing different conclusions now.

In its Motion, FilmOnX essentially repeats its same arguments it made earlier about the harm to its business that it will supposedly suffer if enjoined from retransmitting Plaintiffs' copyrighted programming. *Compare* Dkt. No. 31, at 25 ("Granting of an injunction now could very well cripple FilmOn X's business.") *with* FilmOnX Stay Mot. at 8-9 (claiming loss of market share to Aereo and revenues because FilmOnX cannot transmit Plaintiffs' copyrighted content if enjoined). This Court already rejected that argument, finding that "FilmOnX has no cognizable interest in continuing to infringe Plaintiffs' copyrights and thus cannot complain of the harm it will suffer if ordered to cease doing so." Dkt. No. 33, at 32.

The only arguable nuance FilmOnX has added to its prior business-harm argument is its claim that it will suffer harm specifically because it will not be able to continue to infringe while Aereo's infringing activities are still being challenged in other courts. FilmOnX Stay Mot. at 8. FilmOnX's argument boils down to the plea that it should be allowed to continue to infringe because there is another infringing service in operation (Aereo) with which FilmOnX competes. *Id.* In the height of irony, FilmOnX complains that Aereo will "steal" FilmOnX's customers if FilmOnX is enjoined. *Id.* FilmOnX's arguments based on Aereo's ongoing business should be rejected.

First, it could not have escaped this Court's notice that Aereo is currently in operation given that FilmOnX relied extensively on Aereo's existence in its Opposition to Plaintiffs'

Preliminary Injunction Motion. *See generally* Dkt. No. 31. Indeed, the Court acknowledged that the litigation against Aereo involves Transmit Clause challenges to a service that operates technology that is purportedly identical to FilmOnX. Dkt. No. 33, at 4, n. 4 and 10-15.

Second, FilmOnX's argument turns the principles of equity on their head and violates the well-established tenet that an infringer cannot complain of the harm it will suffer if required to cease infringing. *See, e.g.*, Dkt. No. 33, at 32; *Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1147 (C.D. Cal. 2012); *Triad Sys. Corp. v. Se. Express Corp.*, 64 F.3d 1330, 1338 (9th Cir. 1995). If FilmOnX's logic were to apply, copyright holders would never be able to obtain an injunction to stop an infringing service where there were multiple infringers because the defendant could always claim it was competitively disadvantaged in the market for pirated works. The fact that Aereo's infringement is not stopped by this Court's Injunction Order provides no basis for this Court to stay its Injunction Order stopping FilmOnX's ongoing infringement, which as this Court and others — including Judge Nathan in *Aereo I* — have found will cause irreparable injury. Dkt. No. 33, at 31-32 (citing cases).

Moreover, despite FilmOnX's assertion that the Injunction Order will somehow put FilmOnX out of business, the historical evidence shows otherwise. *First*, as this Court noted, FilmOnX has other content partners and is "free to continue legal retransmission." Dkt. No. 33, at 32. *Second*, building on the non-infringing aspects of FilmOnX's Internet television service, FilmOnX expanded its operation within the Ninth Circuit based on its legal, non-infringing content to include Seattle in August 2013. Shepard Decl., Ex. A. FilmOnX engaged in this expansion even though it clearly could not (and to Plaintiffs' knowledge does not) retransmit Plaintiffs' local copyrighted broadcast programming in Seattle as part of its Internet television service due to the injunction in the Ninth Circuit, which was entered in December 2012.

*Third*, Mr. David’s statements to this Court about the supposed harm FilmOnX will suffer if it cannot retransmit Plaintiffs’ broadcast programming over the Internet (David Decl. ¶¶ 7-10) are belied by his own public statements that FilmOnX does not need Plaintiffs’ programming in order to succeed. Declaration of Julie Shepard in Support of Plaintiffs’ Joint Motion for a Preliminary Injunction, Dkt. No. 27-3 (“Shepard PI Decl.”), Ex. M (“Although David talked tough after the Fox suit, he said today that his company ‘is temporarily ceasing to retransmit the Network content’ — he says because consumers would prefer to receive alternative programming such as BikiniTV. He adds: ‘We have better things to do than screw around with ageing [sic], irrelevant free to air TV[.]’”).

*Fourth*, and correspondingly, the Southern District of New York issued an injunction against FilmOnX’s predecessor (FilmOn), prohibiting them from streaming Plaintiffs’ programming over the Internet without a license, using purportedly different technology. Notwithstanding the injunction, FilmOn continued to operate and developed relationships with content providers whose programming it streamed over its website. *See* Shepard PI Decl. Ex. N (stipulation by FilmOn acknowledging 2010 injunction); Declaration of Alkiviades David, Dkt. No. 31-1, ¶ 16 (discussing other content providers on FilmOnX platform).

*Fifth*, a substantial amount of FilmOn’s business is international, none of which will be affected by compliance with this Court’s order. *See* Shepard Decl. Ex. B ¶ 36 (Alki David CD Cal Decl.) (“To date, the FilmOn mobile application has been downloaded about nine million times worldwide. About 20,000 to 30,000 of those downloads were in the United States.”). In light of this it is particularly telling that, while Mr. David claims that FilmOnX has invested, and will lose, millions of dollars by stopping its illegal retransmission (David Decl. ¶¶ 5, 7, 9-10), FilmOnX has not introduced a scintilla of the actual evidence that would support such a

statement (e.g., FilmOnX’s actual books and records), if it were true. In fact, it would appear that FilmOnX’s predominantly foreign business would be unaffected by an injunction that affects only what programming may be retransmitted in the United States.

*Sixth*, and perhaps most glaring, FilmOnX does not provide a shred of evidence that it suffered any harm — let alone irreparable harm — by being enjoined from infringing Plaintiffs’ copyrighted works in the Ninth Circuit for over eight months.

*Finally*, none of the “evidence” as to FilmOnX’s supposed irreparable harm is new or of the nature that FilmOnX could not have brought it to this Court’s attention before. Hence, this Court should not consider Mr. David’s declaration since FilmOnX has not provided any reason why it could not have been presented along with its Opposition to the Plaintiffs’ Motion for a Preliminary Injunction. *See Schoenbohm v. F.C.C.*, 204 F.3d 243, 250 (D.C. Cir. 2000) (evidence that was “previously available” is not “new evidence” supporting reconsideration); *Olson v. Clinton*, 630 F. Supp. 2d 61, 63 (D.D.C. 2009) (“Even if evidence is newly raised, it is not considered new evidence if it was previously available.”) (internal quotation marks omitted); *see also James v. England*, 226 F.R.D. 2, 7 (D.D.C. 2004) (“[A]rguments that should have been previously raised, but are only raised for the first time in a motion for reconsideration, will not be entertained by this Court.”).

**C. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF FILMONX IS NOT ENJOINED AS THIS COURT ALREADY FOUND**

After fully considering the evidence submitted and the relevant legal authorities, this Court determined that Plaintiffs had established that they are likely to suffer irreparable harm in at least four respects absent an injunction: “harm to their ability to negotiate with advertisers; damage to their contractual relationships and ability to negotiate with authorized retransmitters; interference with their propriety and licensed online distribution avenues, such as their own

websites, Hulu.com, and Apple’s iTunes; and the loss of control over the distribution and quality of their copyrighted programs.” Dkt. No. 33, at 31.

FilmOnX asks this Court to reverse this finding. Notably, FilmOnX does not, and cannot, argue that Plaintiffs are not likely to suffer these irreparable harms that the Court found. To the contrary, FilmOnX argues that because Plaintiffs are already being irreparably harmed by Aereo in these same ways, FilmOnX should not be enjoined. FilmOnX Stay Mot. at 9. Under FilmOnX’s theory, increased, expanded and further infringement by FilmOnX causes no cognizable irreparable harm to Plaintiffs. That is clearly wrong. One of the fundamental reasons that injunctions are granted is to deter others from deciding to jump on the infringement bandwagon by commencing to free ride on Plaintiffs’ copyrights:

The absence of a preliminary injunction would encourage current and prospective retransmission rights holders, as well as other Internet services, to follow *ivi*’s lead in retransmitting plaintiffs’ copyrighted programming without their consent. The strength of plaintiffs’ negotiating platform and business model would decline. The quantity and quality of efforts put into creating television programming, retransmission and advertising revenues, distribution models and schedules — all would be adversely affected. These harms would extend to other copyright holders of television programming. Continued live retransmissions of copyrighted television programming over the Internet without consent would thus threaten to destabilize the entire industry.

*WPIX, Inc. v. ivi, Inc.*, 691 F.3d 275, 286 (2d Cir. 2012).

As this Court has found, Plaintiffs are likely to suffer irreparable harm if FilmOnX is not enjoined. The Injunction Order should remain in place.

**D. THE PUBLIC INTEREST SUPPORTS A REFUSAL TO STAY THE COURT’S INJUNCTION ORDER PENDING APPEAL**

The public interest does not support a stay of the Injunction Order. FilmOnX’s Stay Motion merely rehashes the same technology and consumer demand arguments that FilmOnX made in its Opposition to Plaintiffs’ Preliminary Injunction Motion. *Compare* FilmOnX PI Opp., Dkt. No. 31, at 26 (“FilmOnX merely provides the public with a service it increasingly

desires and demands: Internet access to media through a remote DVR.”); *with* FilmOnX Stay Mot. at 10-11 (“there is a strong public demand for the technology services offered by FilmOnX”). FilmOnX proffers no reason for this Court to reconsider its prior determination that the public interest favors enjoining FilmOnX’s infringement. Indeed, none exists. As this Court and others have found, “the public interest can only be served by upholding copyright protections and correspondingly preventing the misappropriation of skill, creative energies, and resources which are invested in the protected work.” Dkt. No. 33, at 32-33 (quoting *Apple Computer, Inc., v. Franklin Computer Corp.*, 714 F.2d 1240, 1255 (3d Cir. 1983)); *accord* *WPIX, Inc., v. ivi, Inc.*, No. 10-7415, 2011 WL 1533175, at \*4 (S.D.N.Y. Apr. 19, 2011) (denying motion to stay injunction of similar Internet infringing service; “Defendants offer no theory as to why this Court, having found that they are in violation of Plaintiffs’ copyrights, should discount the object of copyright law to ‘promote the store of knowledge available to the public’ by ‘providing individuals a financial incentive to contribute to the store of knowledge’”) (quoting *Salinger v. Colting*, 607 F.3d 68, 82 (2d Cir. 2010)).

**II. FILMONX’S REQUEST FOR THE COURT TO RECONSIDER THE GEOGRAPHIC SCOPE OF THE INJUNCTION SHOULD BE DENIED**

FilmOnX’s request for a modification of the injunction to limit the scope of the injunction to the D.C. Circuit is nothing more than a request for reconsideration of another issue that was fully briefed and argued in Plaintiffs’ Preliminary Injunction Motion. As set forth more fully in Plaintiffs’ Opposition to FilmOnX’s Emergency Motion for Reconsideration, this Court should deny FilmOnX’s request to limit the scope of the injunction to the D.C. Circuit.

**CONCLUSION**

For the reasons set forth above, Plaintiffs respectfully request that the Court deny FilmOnX’s request to stay the Injunction Order anywhere.

Dated: September 12, 2013

/s/ Paul Smith

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