

**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
FOR RECONSIDERATION OF THE GEOGRAPHIC SCOPE OF
THE PRELIMINARY INJUNCTION AND BOND AMOUNT**

Plaintiffs¹ respectfully submit their Opposition to Defendants'² Emergency Motion for Reconsideration of the Geographic Scope of the Preliminary Injunction and Bond Amount ("Reconsideration Motion") (Dkt. No. 37).

INTRODUCTION

Less than one week ago, this Court held that "the Copyright Act forbids FilmOn X from retransmitting Plaintiffs' copyrighted programs over the Internet" without Plaintiffs' consent and preliminarily enjoined Defendants' infringing retransmission service nationwide, except within the boundaries of the Second Circuit. The Court imposed a bond of \$250,000, which is the same amount the federal court in Los Angeles ordered but twenty-five times higher than Plaintiffs

¹ Plaintiffs are Fox Television Stations, Inc., Twentieth Century Fox Film Corporation, Fox Broadcasting Company, NBC Subsidiary (WRC-TV) LLC, NBC Studios LLC, Universal Network Television, LLC, Open 4 Business Productions LLC, Telemundo Network Group LLC, American Broadcasting Companies, Inc., Disney Enterprises, Inc., CBS Broadcasting Inc., CBS Studios Inc., Allbritton Communications Company, and Gannett Co., Inc.

² Defendants are FilmOnX LLC (f/k/a Aereokiller LLC), FilmOn.TV Networks, Inc., FilmOn.TV, Inc., and FilmOn.com, Inc. (collectively "FilmOnX").

requested. Now Defendants return to this Court, purportedly seeking “reconsideration” of the geographic scope of the preliminary injunction and the amount of the bond. The Reconsideration Motion consists entirely of legal and factual arguments that Defendants made (or could have made) when opposing Plaintiffs’ motion for preliminary injunction and should be denied for this reason alone.

Moreover, even if this Court were to reach the merits of Defendants’ arguments, none of them justifies reconsideration:

- As the Court acknowledged, Section 502(b) of the Copyright Act “commands a nationwide injunction” and comity does not dictate excluding circuits where the law does not conflict with its decision from the scope of the injunction;
- FilmOnX’s inability to compete with other infringing services is not a cognizable harm that factors into the injunctive relief analysis and Defendants have presented no evidence of other harms they claim they will suffer if enjoined;
- Defendants’ claim that the Court misunderstood their technology is incorrect, is irrelevant to the scope of the injunction, and does not undermine the Court’s conclusion that “any device or process,” including their “aggregation of new kinds of technology,” is covered by the Transmit Clause; and
- The Court independently considered the proper amount of the bond and was well within its discretion to set a number higher than Plaintiffs suggested and lower than Defendants requested.

For these reasons, and also because the Court considered Defendants’ arguments when it granted the preliminary injunction, the Reconsideration Motion should be denied.

I. RULE 59(e), NOT RULE 54(b), GOVERNS DEFENDANTS’ MOTION FOR RECONSIDERATION.

As a procedural matter, Defendants’ reliance on Federal Rule of Civil Procedure 54(b) is misplaced. *See* Mem. of P. & A. in Supp. of Recons. Mot. (“Recons. Mem.”) at 2-3. Although Rule 54(b) governs reconsideration of some interlocutory rulings, *see Cobell v. Norton*, 224 F.R.D. 266, 271-72 (D.D.C. 2004), this Court has clarified that “injunctive orders are generally considered to be outside the scope of Rule 54(b).” *Decatur Liquors, Inc. v. District of Columbia*, No. 04-CV-1971, 2005 WL 607881, at *2 n.1 (D.D.C. Mar. 16, 2005). A motion for

reconsideration of a preliminary injunction is properly brought under Rule 59(e). *See, e.g., Ellipso, Inc. v. Mann*, No. 05-CV-1186, 2005 WL 5612442, at *1 (D.D.C. Nov. 14, 2005), *aff'd*, 450 F.3d 1153, 1157 (D.C. Cir. 2007).

The standard for reconsideration under Rule 59(e) is “distinct from” and less “flexib[le]” than the standard for reconsideration under Rule 54(b). *See Cobell*, 224 F.R.D. at 272 (quotation marks omitted). As this Court has explained, “[a] Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an ‘intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.’ [It] is not . . . an opportunity to reargue facts and theories upon which a court has already ruled . . . [or] to raise new issues that could have been raised previously.” *Cohen v. District of Columbia*, 744 F. Supp. 2d 236, 250 (D.D.C. 2010) (quoting *Fox v. Am. Airlines Inc.*, 389 F.3d 1291, 1296 (D.C. Cir. 2004)).

II. THE COURT SHOULD NOT FURTHER LIMIT THE GEOGRAPHIC SCOPE OF THE PRELIMINARY INJUNCTION.

In opposing Plaintiffs’ motion for a preliminary injunction, Defendants argued that any such injunction “should be limited to the D.C. Circuit.” Defs.’ Opp’n to Mot. for Prelim. Inj. (“PI Opp’n”) at 27, 29 (Dkt. No. 31). Plaintiffs responded that the injunction should be nationwide, as mandated by Section 502(b) of the Copyright Act, 17 U.S.C. § 502(b). Pls.’ Reply in Support of Mot. for Prelim. Inj. (“PI Reply”) at 21-22 (Dkt. No. 32). After considering these arguments, the Court determined the injunction should extend nationwide except in the Second Circuit. *See* Memorandum Opinion (“Mem. Op.”) (Dkt. No. 33) at 33-34. Nothing in Defendants’ Reconsideration Motion provides a proper basis, under Rule 59(e), for limiting the geographic scope of the preliminary injunction to the D.C. Circuit. Defendants “do[] not allege

any change in law nor do[] [they] point to new evidence.”³ *Cohen*, 744 F. Supp. 2d at 250. They do not even “assert[] that the Court committed clear error.” *Id.* Under this Court’s precedents, their Reconsideration Motion should therefore be denied.

A. Comity Concerns Do Not Justify Modifying the Court’s Injunction

As Plaintiffs argued, and this Court recognized, Section 502(b) of the Copyright Act “commands a nationwide injunction.” Mem. Op. at 33. As noted in its preliminary injunction opinion, this Court understands that there are other pending actions involving FilmOnX (in Los Angeles) and Aereo (in New York and Boston). *Id.* at 2. Nothing about the Court’s opinion prevents the courts in those or other appropriate cases or others from deciding the Transmit Clause issues presented here. And the mere possibility that another court might reach a different result does not justify limiting the scope of the injunction in this case, when FilmOnX is conducting its infringing activities nationwide. *See* PI Reply at 22 (discussing *Apple, Inc. v. Psystar Corp.*, 658 F.3d 1150, 1161 (9th Cir. 2011) and *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990)). The Court properly found that no conflict exists that would warrant limiting the scope of its injunction based on comity concerns outside of the Second Circuit. Mem. Op. at 33-34. Nothing in FilmOnX’s Reconsideration Motion undermines that conclusion.

³ Defendants cite press releases issued by one of their competitors, Aereo, Inc. (“Aereo”). (*See* Recons. Mem. at 4.) None of these documents constitute “new evidence” for purposes of reconsideration. All of the cited press releases were issued before Defendants filed their August 15, 2013 opposition to Plaintiffs’ motion for a preliminary injunction. *See* Defs.’ Req. for Judicial Notice (Dkt. No. 38), Exs. 1-9 (press releases by Aereo, Inc., dated January 8, 2013, through August 8, 2013). Therefore, any issues presented by these press releases “could have been raised previously.” *Cohen*, 744 F. Supp. 2d at 250; *see also id.* at 251 (declining to consider “evidence that [the party seeking reconsideration] failed to present in opposition to the motions” that were granted”).

B. FilmOnX's Alleged Harms Are Not Cognizable And Lack Support

The Court should also reject Defendants' argument that reconsideration is warranted on the ground that Defendants will suffer irreparable harm because its competitor, Aereo, Inc., will not be subject to the same nationwide injunction. Defendants plainly could have raised this argument in their opposition to Plaintiffs' motion, but did not. In fact, Aereo was already operational in several cities at the time of Defendants' opposition. Moreover, the Court effectively considered and rejected the premise that Defendants should be allowed to continue operating their infringing service because their business would be harmed if FilmOnX were enjoined. *See* Mem. Op. at 32 ("FilmOnX has no cognizable interest in continuing to infringe Plaintiffs' copyrights and cannot complain of the harm it will suffer if ordered to cease doing so."); *accord Fox Television Stations, Inc. v. BarryDriller Content Sys., PLC*, 915 F. Supp. 2d 1138, 1148-49 (C.D. Cal. 2012). The harm Defendants identify in the Reconsideration Motion -- a reduced ability to compete with a business offering similar infringing services -- is of the same type that this Court correctly found has no place in the balance of hardships analysis.

Defendants have known since they began offering the FilmOnX service that Plaintiffs would assert infringement claims and seek an injunction, and nonetheless decided to expand their infringing service with full knowledge of the possible consequences. *See* Pls.' Mot. for Prelim. Inj. ("PI Mot."), Decl. of Julie Shepard ("Shepard Decl") (Dkt. No. 27-3) ¶¶ 2-4.

Defendants argue that, by narrowing the geographic scope of the injunction, the Court "would reduce the irreparable harm that FilmOnX would suffer" Recons. Mot. at 2; *see id.* at 3 ("Defendants will suffer both legal and tangible harm should the Court . . . maintain its virtual nationwide injunction."). Defendants, however, did not demonstrate in opposing the preliminary injunction -- and they have not demonstrated in seeking reconsideration of the Court's preliminary injunction order -- that they will suffer any harm, let alone irreparable harm,

from the Court's limited injunction. There is nothing in Defendants' generic, generalized and vague declaration that provides even the most basic facts concerning the impact of the Court's injunction as compared to an injunction limited to the D.C. Circuit, such as the number of subscribers in different circuits or the revenues (if any) received from subscribers in different circuits. The only evidence on that issue in the record on the preliminary injunction motion was FilmOn's CEO's public statement that Plaintiffs' programming was unimportant to Defendants' business. *See* PI Mot., Shepard Decl., Ex. M ("We have better things to do than screw around with aging, irrelevant, free to air TV that they can't even give away.").

In opposing Plaintiffs' preliminary injunction motion, the most Defendants could say, without any factual support, is that: "Granting of an injunction now could very well cripple FilmOn X's business." PI Opp'n at 25 (emphasis added). Even if the Court were to consider Defendants' purportedly "new" evidence, nothing that Defendants submitted in connection with the Reconsideration Motion undermines the Court's conclusion that they "overstated" their claims of harm. Mem. Op. at 32. As the Court noted, nothing in the injunction prevents FilmOnX from continuing to offer many of the channels included in its service. Mem. Op. at 32. Indeed, FilmOnX built its business, in significant part, by offering channels such as "Battle Cam," "Bikini TV," or others that it apparently believes are of interest to many viewers, even though they do not retransmit Plaintiffs' copyrighted programming. *See* PI Mot., Shepard Decl. Exs. A, M. Moreover, as the Court held, any harm that Defendants claim to suffer is outweighed by the "severe" irreparable harms that Plaintiffs will face in the absence of an injunction. Mem. Op. at 32.

C. FilmOnX's Technology Arguments Have Been Rejected And Provide No Reason To Limit The Scope Of The Injunction

Defendants do not dispute that the FilmOnX service continuously retransmits Plaintiffs' copyrighted live broadcast programming over the Internet without consent. Despite statements to the contrary in their Reconsideration Motion, the FilmOnX service is not just a DVR service. As the Court's opinion makes clear, no matter what technology Defendants use, they therefore are publicly performing Plaintiffs' works, in violation of the Copyright Act. *See* Mem. Op. at 26 (“[I]t is incongruous to suggest that FilmOnX does not ‘perform’ ‘publicly’ by making Plaintiffs’ programs available to any person with an Internet-enabled device . . .”). Defendants spill considerable ink in an attempt to show that the Court’s opinion contained “factual errors” concerning the fine details of the operation of FilmOnX’s technology. *See* Recons. Mem. at 5-8. But Defendants ignore the critical legal point, which the Court got right. In granting the preliminary injunction, the Court squarely rejected Defendants’ “one-to-one relationship” defense and found that FilmOnX engages in public performance because it retransmits Plaintiffs’ copyrighted programming to the public, regardless of what technology it uses. *See* Mem. Op. at 27 (“[T]he aggregation of several new kinds of technology does not avoid the Copyright Act because Congress intended ‘device or process’ in the Transmit Clause to include ‘all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, *and any other techniques and systems not yet in use or even invented.*’”) (quoting House Report, 1976 U.S.C.C.A.N. at 5677) (emphasis added by the Court). None of Defendants’ attempts to “clarify” how its technology operates affect the Court’s rejection of their technology defense.

Finally, FilmOnX claims that it is a mere “provider of remote equipment enabling users to view free over-the-air broadcast television.” Recons. Mot. at 7. Any cable system, satellite

carrier or other commercial broadcast retransmission service can make the same claim. All such services must obtain copyright performance licenses and FilmOnX is no different. If any such service fails to obtain the necessary licenses, a court would routinely enjoin that service nationwide. FilmOnX's service likewise should be enjoined nationwide and not simply in the D.C. Circuit.

III. THERE IS NO VALID BASIS FOR INCREASING THE AMOUNT OF THE BOND BEYOND \$250,000

Defendants also seek a “drastic[]” increase in the existing \$250,000 bond, which Plaintiffs have already posted (*see* Dkt. No. 35), if the Court declines to stay or amend the injunction. Recons. Mem. at 8. Defendants contend that the Court should increase the bond because the Court “seemingly based” the amount on the bond that was set in the *BarryDriller* case, without consideration of the difference between a nationwide injunction and one that covered only the Ninth Circuit.

Of course, this Court was well aware that the *BarryDriller* injunction only barred Defendants “from offering their content in the Ninth Circuit.” Mem. Op. at 1. The Court went to great lengths to explain that it was “not bound . . . by the California court’s ruling,” that it was instead “tasked with making a legal judgment,” and that it would not simply adopt “the reasoning . . . in *BarryDriller*.” *Id.* at 2, 9. Rather, it “carefully considered the competing authorities offered by the parties” *Id.* at 9. There is no reason to doubt that this careful consideration extended to all parts of the Court’s ruling, including the bond amount.

In its bond analysis, the Court expressly cited Defendants’ arguments about potential harm if the injunction were wrongly granted. *See* Mem. Op. at 34-35. The Court expressly noted that Plaintiffs have the resources to satisfy any substantial damage award in the unlikely event that one is necessary. *Id.* at 35. Defendants did not actually quantify the harm asserted or

offer any evidence from which the Court could do so. *See* PI Opp’n at 24.⁴ Nevertheless, while the Court rejected Defendants’ proposed bond amount, it also rejected Plaintiffs’ proposal. *See* Mem. Op. at 35. The Court’s opinion, taken as a whole, reflects that it “evaluated the entire record presented by the parties” and reached its conclusion on the bond “[i]n light of the entire record” *See, e.g., Cohen*, 744 F. Supp. 2d at 252 (rejecting argument that the Court should reconsider ruling because it “did not adopt the views” of movant’s experts). Defendants offer no basis to conclude otherwise.⁵

CONCLUSION

For the foregoing reasons, the Reconsideration Motion should be denied.

Dated: September 12, 2013

/s/ Paul Smith

Paul Smith (D.C. Bar No. 358870)
psmith@jenner.com
JENNER & BLOCK LLP
1099 New York Avenue, NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

⁴ Despite ample opportunity to do so, Defendants have never given the Court the data necessary to calculate potential harm. In particular, Defendants have never quantified for this Court how many paying customers they have in the United States, or how many of these U.S. subscribers use the local broadcasts in their service package. At most, Defendants represented that there have been up to 30,000 domestic downloads of the FilmOn mobile application, and that half of the U.S. subscribers receive local television broadcasts. *See* PI Opp’n, Decl. of Alkiviades David (Dkt. No. 31-1) ¶¶ 35-36. But downloads are not the same as paying customers.

⁵ Defendants’ suggestion that the existing bond should be multiplied by the number of judicial circuits covered is also flawed on several levels. *See* Recons. Mem. at 9 (“[T]he proper bond amount based on this Court’s Order would be at a minimum, substantially larger, if not eleven times larger, given this injunction covers eleven circuits.”). First, judicial circuits are not identical in population. Second, Defendants offer no facts to suggest what volume of business they conduct or plan to conduct, let alone what that volume is outside the D.C., Second, and Ninth Circuits. Absent such information, there is no basis to conclude that the Court’s multi-circuit injunction poses any materially greater burden than did the *BarryDriller* injunction.

Richard L. Stone (admitted *pro hac*)
rstone@jenner.com
Julie A. Shepard (admitted *pro hac*)
jshepard@jenner.com
Amy Gallegos (admitted *pro hac*)
agallegos@jenner.com
JENNER & BLOCK LLP
633 West 5th Street, Suite 3600
Los Angeles, CA 90071
Telephone: (213) 239-5100
Facsimile: (213) 239-5199

*Attorneys for Plaintiffs Fox Television
Stations, Inc., Twentieth Century Fox Film
Corporation, and Fox Broadcasting Company*

/s/ Robert Garrett

Robert Alan Garrett (D.C. Bar No. 239681)
Hadrian R. Katz (D.C. Bar No. 931162)
Christopher Scott Morrow
(D.C. Bar No. 491925)
Murad Hussain (D.C. Bar No. 999278)
ARNOLD & PORTER LLP
555 12th St., NW
Washington, DC 20004
Telephone: (202) 942-5444
Facsimile: (202) 942-5999

James S. Blackburn (admitted *pro hac*)
james.blackburn@aporter.com
John C. Ulin (admitted *pro hac*)
john.uln@aporter.com
ARNOLD & PORTER LLP
777 South Figueroa Street, 44th Floor
Los Angeles, CA 90017
Telephone: (213) 243-4000
Facsimile: (213) 243-4199

*Attorneys for Plaintiffs NBC Subsidiary
(WRC-TV) LLC, NBC Studios LLC,
Universal Network Television LLC, Open 4
Business Productions LLC, Telemundo
Network Group LLC, American
Broadcasting Companies, Inc., Disney*

*Enterprises, Inc., Allbritton
Communications Company, CBS
Broadcasting Inc., CBS Studios Inc., and
Gannett Co., Inc.*