

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' OBJECTIONS TO DEFENDANTS'
SUPPLEMENTAL EVIDENCE

Plaintiffs¹ respectfully submit their Objections to the Declarations of Alkiviades David and Mykola Kutovyy filed by Defendants FilmOn X, LLC, FilmOn.TV Networks, Inc., FilmOn.TV, Inc., and FilmOn.com, Inc. (collectively, "FilmOnX") in support of FilmOnX's Motion for Reconsideration and Motion to Stay.²

This Court should not consider either declaration, since FilmOnX has not provided any reason why its evidence could not have been presented along with its opposition to the Plaintiffs' motion for a preliminary injunction, which the Court granted. *Schoenbohm v. F.C.C.*, 204 F.3d 243, 250 (D.C. Cir. 2000) (evidence that was "previously available" is not "new evidence"

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 FilmOnX filed identical declarations by Mr. David and Mr. Kutovyy in support of each of its motions. *See* Dkt. Nos. 36-2; 36-3; 37-2; 37-3. For the Court's convenience, Plaintiffs refer to the declarations collectively.

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); *Bao Ge v. Li Peng*, 209 F.R.D. 250, 251 (D.D.C. 2000) (denying motion for reconsideration because the plaintiffs “failed to present any new evidence that was not previously available and which would alter this Court’s conclusions”); *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.”); *Summitt Investigative Serv., Inc. v. Herman*, 34 F. Supp. 2d 16, 26 (D.D.C. 1998) (“Furthermore, it is a cardinal tenet of federal-civil practice that a court — trial or appellate — will not consider matters raised for the first time in a motion for reconsideration.”).

FilmOnX relies on Mr. David’s Declaration to substantiate the purported harms that compliance with this Court’s injunction will cause FilmOnX. Dkt. No. 36, at 8-9; Dkt. No. 37, at 5. FilmOnX’s complaints are primarily directed at the fact that this Court — in accordance with 17 U.S.C. § 502 — enjoined FilmOnX’s infringement nearly nationwide. *See id.* But FilmOnX was entirely aware of that possibility when it filed its opposition to Plaintiffs’ motion for a preliminary injunction — indeed, it strenuously argued for the imposition of a geographically limited injunction. *See* Dkt. No. 31, at 27-29.³ That was FilmOnX’s opportunity to make the arguments it raises now. *See Schoenbohm*, 204 F.3d at 250; *James*, 226 F.R.D. at 7; *Summitt Investigative Serv.*, 34 F. Supp. 2d at 26. Its failure to do so renders Mr. David’s Declaration improper, and so it should not be considered.

Beyond being untimely, Mr. David’s Declaration suffers from additional serious

³ FilmOnX submitted statements from both of its current declarants in support of its opposition.

evidentiary problems. First, Mr. David relies on his alleged “knowledge” and “experience” “in the industry” to support the harms he claims will befall FilmOnX, *see* David Decl. ¶¶ 6-8, but has not provided any evidence suggesting that he has any knowledge or experience qualifying him to make such statements. Fed. R. Evid. 602; 701. Second, while Mr. David repeatedly speculates on the potential future implications of FilmOnX’s compliance, *see* David Decl. ¶¶ 7-10, including its effect on Aereo, FilmOnX has not produced a shred of evidence corroborating his prognostication beyond his own say-so. By way of an example, FilmOnX has not shown that complying with Judge Wu’s order — to the extent that it did — cost it even a single subscriber, despite the fact that the Central District of California’s injunction has been in place for nearly a year. Third, Mr. David claims that FilmOnX has invested, and will lose, millions of dollars by stopping its illegal retransmission. David Decl. ¶¶ 5, 7, 9-10. Better evidence for that statement obviously exists — FilmOnX’s actual books and records. FilmOnX has not provided any of them. Fed. R. Evid 1001; 1002.

Moreover, Mr. Kutovyy’s Declaration, which FilmOnX relies on in its Motion for Reconsideration, should be excluded because the statements it contains are irrelevant. Fed. R. Evid. 402. FilmOnX cites Mr. Kutovyy’s Declaration to “clarify” the Court’s description of its infringing service. Dkt. No. 37, at 6-8. Specifically, FilmOnX has warmed over its argument that its service permits its users to access “individual copies” of Plaintiffs’ programming by relying on a complex system of single antennas and hard drive space. *Id.*

This Court understood the individual nature of FilmOnX’s service. *See* Dkt. No. 33, at 1 (“FilmOn X assigns an individual user the content stream from one of thousands of minute antennas that it operates in major metropolitan areas, including Washington, D.C.”); *id.* at 5 (describing the “dynamic” option as “a specific antenna [] assigned to one specific individual

Facsimile: (202) 639-6066

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.