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' RESPONSE TO THE ORDER TO SHOW CAUSE WHY DEFENDANTS SHOULD NOT BE HELD IN CONTEMPT OF THE SEPTEMBER 5, 2013 PRELIMINARY INJUNCTION

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All Plaintiffs in this action respectfully submit this response to the Court's Order to Show Cause why Defendants should not be held in contempt of the preliminary injunction herein.

INTRODUCTION

On September 5, 2013, this Court issued a preliminary injunction, prohibiting Defendants "from streaming, transmitting, retransmitting, or otherwise publicly performing, displaying, or distributing any [of Plaintiffs'] Copyrighted Programming over the Internet (through websites such as filmon.com or filmonx.com) . . . or by means of any device or process" throughout the United States, except within the Second Circuit. [Dkt. No. 34, at 2.] Notwithstanding that clear injunction, two weeks ago, Defendants began retransmitting broadcasts of Plaintiffs' copyrighted programming over the Internet on the FilmOnX website in Boston. Defendants do not dispute these facts, which plainly constitute contempt of court.

Defendants' contempt appears to be deliberate, and not an "accident" as they now claim. The day before Defendants commenced retransmitting Plaintiffs' broadcasts in violation of this Court's Preliminary Injunction, FilmOn's CEO Alki David declared that he would "defy" this Court's order. [Dkt. No. 53-2 (Ex. 1 to Declaration of Julie Shepard) (John Eggerton, *FilmOn Says It Will Defy Injunction In Boston*, Broadcasting & Cable (Oct. 10, 2013)).] After Plaintiffs raised Defendants' apparent contempt with the Court based on Mr. David's statements and the proof that FilmOnX acted on them, Defendants submitted a declaration from Mr. David to explain Defendants' conduct. Tellingly, nowhere in that declaration does Mr. David deny that he publicly stated his intent to defy the preliminary injunction.

Defendants' claims that their retransmissions were "accidents" due to "testing" are also inconsistent with the positions they have taken to justify their violations of the injunction. Defendants argued that their actions were not contemptuous because a district court in Boston recently denied a preliminary injunction against the Aereo Internet television service and found

that the plaintiff in that case was not likely to succeed in demonstrating that Aereo infringes copyright when retransmitting broadcast television over the Internet. *See Hearst Stations Inc. v. Aereo, Inc.*, -- F. Supp. 2d --, 2013 WL 5604284 (D. Mass. Oct. 8, 2013) ("*Hearst*"). Defendants further claimed they had a good faith belief that this Court would automatically modify its injunction to exclude the First Circuit in light of *Hearst* and that they could therefore disregard the injunction in the First Circuit without consequence. In addition to revealing Defendants' willfulness, both of these arguments are meritless.

Defendants were legally obligated to comply with this Court's injunction until such time as the Court modified it. Their assumption that the Court would modify the injunction proved ill-founded, as the Court rejected their post-hoc motion for modification and a subsequent motion for reconsideration last week. Defendants' deliberate defiance of the injunction before even raising a motion for modification amounts to contempt and is part of a pattern of contemptuous disregard for court orders. Indeed, just last month, one of the Defendants and Mr. David were held in contempt in the Southern District of New York for violating another injunction that prohibited them from streaming copyrighted television programming over the Internet. On this record, the Court should find Defendants in contempt of the preliminary injunction in this case and impose strong and meaningful sanctions so that Defendants do not further repeat this behavior.

ARGUMENT

I. THE COURT SHOULD FIND FILMON X IN CONTEMPT OF THE PRELIMINARY INJUNCTION

FilmOnX's apparently deliberate decision to stream broadcasts of Plaintiffs' copyrighted programming over the Internet in Boston, in open defiance of this Court's preliminary injunction, constitutes contempt and should be treated as such. Federal courts possess inherent

and statutory authority to enforce compliance with their orders, including by contempt sanctions. *Chabad v. Russian Fed'n*, 915 F. Supp. 2d 148, 151 (D.D.C. 2013); *accord FG Hemisphere Assocs., LLC v. Democratic Republic of Congo*, 637 F.3d 373, 377 (D.C. Cir. 2011) ("It is incontrovertible that federal courts enjoy inherent contempt power."); *cf.* 18 U.S.C. § 401(3). An order of civil contempt serves the dual purpose of securing future compliance with court orders and compensating the party that has been harmed. *S.E.C. v. Bilzeran*, 613 F. Supp. 2d 66, 70 (D.D.C. 2009); *see In re Fannie Mae Sec. Litig.*, 552 F.3d 814, 823 (D.C. Cir. 2009). Courts have broad discretion to fashion contempt remedies and ensure compliance with their orders. *S.E.C. v. Levine*, 671 F. Supp. 2d 14, 35 (D.D.C. 2009).

Civil contempt is established if the Court finds by clear and convincing evidence that: (1) the order Defendant failed to comply with was clear and unambiguous; and (2) Defendant has not diligently attempted to comply in a reasonable manner. *See S.E.C. v. Bilzerian*, 112 F. Supp. 2d 12, 16 (D.D.C. 2000); *accord Guantanamera Cigar Co. v. Corporacion Habanos, S.A.*, 750 F. Supp. 2d 31, 34 (D.D.C. 2010). Noncompliance need not be willful to establish contempt. *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123, 130-31 (D.D.C. 2005); *Bilzerian*, 112 F. Supp. 2d at 16. FilmOnX's violations of this Court's preliminary injunction easily establish both elements of civil contempt.

First, FilmOnX cannot seriously contend that its defiance of the preliminary injunction in Boston was part of a good faith compliance effort or an accident in connection with "testing." Its own principal's public statements belie that argument. As set forth in Plaintiffs' opposition to defendants' motion to modify, immediately after the *Hearst* decision came down, Mr. David told the press that FilmOnX would "'defy'" this Court's injunction and start retransmitting network television broadcasts to its subscribers in Boston. [Dkt. No. 53-2 (Ex. 1 to Declaration of Julie

Shepard) (John Eggerton, *FilmOn Says It Will Defy Injunction In Boston*, Broadcasting & Cable (Oct. 10, 2013)).] He further explained Defendants' position that "[n]aturally this [decision in *Hearst*] now allows FilmOn to fire up our local service" in Boston. *Id.* Tellingly, despite having the opportunity to do so in the multiple documents they have filed with the Court since Plaintiffs informed the Court of FilmOnX's announced contempt, neither Defendants nor Mr. David have disavowed or denied that he made these remarks. On the contrary, Mr. David's declaration in response to this Court's OSC only confirms that Defendants' violations of the injunction were willful. In it, he claims that, in the aftermath of the *Hearst* decision, "Defendants began testing their technology in anticipation of the possibility that [this Court's preliminary injunction] would be lifted as applied to the First Circuit." [Dkt. No. 55-2, at 2.] In other words, Defendants deliberately violated an injunction they knew prohibited their retransmission of broadcasts of Plaintiffs' programming on the hope that the injunction "would be lifted" in the future.

Second, the preliminary injunction is clear and unambiguous and FilmOnX plainly failed to comply with it. The Court prohibited FilmOnX and its co-defendants "from streaming, transmitting, retransmitting, or otherwise publicly performing, displaying, or distributing any Copyrighted Programming over the Internet (through websites such as filmon.com or filmonx.com) . . . or by means of any device or process." [Dkt. No. 34, at 2.] And FilmOnX's violation is equally obvious and admitted. Notwithstanding the injunction, which expressly "applies throughout the United States pursuant to 17 U.S.C. § 502, [except within] the Second Circuit," *id.*, FilmOnX retransmitted Plaintiffs' copyrighted programming over the Internet in Boston.

FilmOnX seeks refuge in the argument that the injunction's prohibition against "publicly performing" Plaintiffs' copyrighted programming is somehow ambiguous because courts have

reached different conclusions about whether retransmission of television broadcasts over the Internet using technology similar to what FilmOnX claims to use constitutes public performance. *See* Supplemental Response (Dkt. No. 56) at 4. The argument is specious. As an initial matter, the Court did not merely prohibit FilmOnX from "publicly performing" Plaintiffs' programming. It also prohibited "streaming, transmitting, [and] retransmitting . . . over the Internet." There is nothing ambiguous about that language, or the fact that FilmOnX ignored it, both when it retransmitted Plaintiffs' programming over the Internet in Boston and in its Supplemental Response to this Court's OSC re Contempt. Moreover, the Court's use of the term "publicly performing" in the injunction is hardly ambiguous. The parties litigated the question of whether retransmission of Plaintiffs' programming over FilmOnX's Internet television service constitutes public performance and this Court correctly held that it does. *See Fox Television Stations v. FilmOnX LLC*, --- F. Supp. 2d ---, 2013 WL 4763414, at *11-*15 (D.D.C. 2013).

Nor does the decision in *Hearst* create any ambiguity in this Court's preliminary injunction or its applicability to FilmOnX's activities in Boston or the First Circuit. In *Hearst*, a district court denied a preliminary injunction, finding that a local Boston broadcaster had not demonstrated a likelihood of success that it would prevail on its copyright infringement claims against another Internet television service. As this Court noted in denying FilmOnX's recent motion to exclude the First Circuit from the scope of the injunction in this case in light of *Hearst*, a District of Massachusetts decision in a case involving different parties is neither the law of the First Circuit nor a controlling authority that has any effect on the injunction here. [Dkt. No. 54, at 1-2.]

Finally, even if one were to credit Defendants' story that they thought the injunction would be modified, at best, that puts the cart before the horse. To the extent they believed that

this Court should modify its injunction in light of *Hearst*, Defendants' obligation was to comply with the injunction until such time as the Court modified it. *See United States v. Philip Morris USA Inc.*, 287 F. Supp. 2d 5, 14 (D.D.C. 2003) ("Federal court orders are to be obeyed unless and until litigants succeed in having them duly overturned by the appropriate court . . . . Litigants may not defy court orders because their commands are not to the litigants' liking."). But Defendants began retransmitting Plaintiffs' programming in Boston, apparently before they even considered filing a motion to modify its scope, let alone obtained an order from this Court granting the modification. In colloquial terms, Defendants chose the path of "asking for forgiveness rather than permission." In legal terms, that is contempt.

Nor is there any exception to FilmOnX's compliance obligation for "testing" the technology, in anticipation of an injunction being modified. In the face of an injunction that prohibited their retransmission of Plaintiffs' programming over the Internet, Defendants' obligation was to stop. Instead, Defendants deliberately chose to violate the injunction, whether for "testing" purposes or otherwise. That is the opposite of a good faith effort at compliance.

II. THE COURT HAS BROAD DISCRETION TO FASHION A REMEDY THAT WILL ASSURE FILMONX'S FUTURE COMPLIANCE WITH THE PRELIMINARY INJUNCTION

When fashioning a remedy for contempt, courts should "consider the character and magnitude of the harm threatened by the continued contumacy and the probable effectiveness of any suggested sanction in bringing about the result desired." *United States v. United Mine Workers*, 330 U.S. 258, 304 (1947). As this Court has held, it is of paramount importance that contempt be addressed by appropriate judicial action. "If the rule of law is to be upheld, it is essential that the judiciary takes firm action to vindicate its authority to compel compliance with lawfully issued directives, and to not reward delay and disobedience." *Philip Morris*, 287 F.

Supp. 2d at 14. Courts have "broad discretion to fashion a remedy that will bring a defendant into compliance." *Chere Amie, Inc. v. Windstar Apparel, Corp.*, 175 F. Supp. 2d 562, 567 (S.D.N.Y. 2001); *accord Levine*, 671 F. Supp. 2d at 35.

In the seven weeks since the preliminary injunction issued, FilmOnX has shown great disrespect for this Court's order, in both comments to the press, *see* Declaration of John Ulin, Ex. 1 (Todd Spangler, *Broadcasters Win Preliminary Injunction Against Internet-Video Streamer FilmOn X*, Variety (Sept. 5, 2013) (quoting FilmOn CEO Alki David) ("The judge is clearly in (the broadcasters') pockets[.] From the day they filed in DC I suspected they had influence in the courts there.")), and repeated efforts to seek reconsideration. Defendants' recent actions in Boston further underscore their intention to defy this Court's order at the first perceived opportunity.

On this record, the Court should impose a monetary contempt sanction that is sufficient to send the message that Defendants must comply with its injunction in the future, even when circumstances arise that cause them to believe the Court may grant a motion to modify its order. Requiring Defendants to pay a substantial monetary sanction for their contempt of the preliminary injunction by retransmitting in Boston this month would ensure that they await a ruling on any motion for modification of the injunction before simply disregarding the portions of the order that they believe should be modified. And, that is a point the Court needs to make forcefully, given FilmOnX's demonstrated pattern of disregarding court orders.

Just over a month ago, one of these same Defendants and FilmOnX's principal were held in contempt in the Southern District of New York for streaming Plaintiffs copyrighted programming over the Internet, in violation of a separate injunction in a case involving a prior incarnation of FilmOnX's Internet television service. *See CBS Broad., Inc. v. FilmOn.com, Inc.*,

2013 WL 4828592, at *8-*9 (S.D.N.Y. Sept. 10, 2013). Plaintiffs respectfully submit that the Court can and should impose a monetary sanction that will break FilmOnX of this contemptuous pattern and assure its future compliance with the injunction in this case (and the proper procedures for seeking modification *before* engaging in conduct that violates its current terms).

In addition, the Court should specify the consequences of future violations of the injunction as part of the contempt sanction. In the New York action, Judge Buchwald's contempt order contained the following provision: "Any . . . further failure to comply with the Injunction [] shall be punishable by a penalty of $10,000 per day of noncompliance." *See CBS Broadcasting, Inc. v. FilmOn.com, Inc.*, No. 1:10-cv-7532 (NRB), Dkt. No. 89, at 3 (S.D.N.Y. Oct. 3, 2013). A similar, forward-looking remedy in this case might provide FilmOnX with further incentive to comply with the injunction.

FilmOnX contends that no contempt sanction is warranted because it has stopped retransmitting Plaintiffs' programming in Boston. In light of the Court's denial of multiple motions to modify the scope of the preliminary injunction, one would hope so. However, given FilmOnX's rush to seize upon the non-controlling decision in *Hearst* as a purported justification to violate this Court's clear order, FilmOnX's publicized disrespect for this Court and its orders, FilmOnX's prior history of contempt for injunctions, and its dissembling after having been caught in blatant contempt, it appears that only a significant contempt sanction will ensure the appropriate respect for and ongoing compliance with this Court's orders.

Finally, the Court should reject FilmOnX's contention that a contempt award is not necessary to compensate Plaintiffs for their damages. This Court entered a preliminary injunction precisely to prevent a series of severe and irreparable harms that Plaintiffs are likely to suffer as a result of FilmOnX's infringing operations. *See FilmOnX*, 2013 WL 4763414, at *15-

*17. Defendants' defiance of the injunction obviously threatens to cause Plaintiffs the precise harms that the Court sought to prevent and prejudices them in their ability to protect against such harms, which is a principal purpose of this litigation. A meaningful sanction is thus necessary to serve both of the core purposes of contempt awards -- assuring FilmOnX's future compliance with the preliminary injunction and preventing and redressing the harm this Court found Plaintiffs are likely to suffer if it does not. *See Bilzeran*, 613 F. Supp. 2d at 70.

CONCLUSION

For all of the reasons set forth above, the Court should find FilmOnX in contempt of the September 5 preliminary injunction and issue an appropriate sanction that will effectively assure FilmOnX's future compliance and protect Plaintiffs from further irreparable harm.

Dated: October 24, 2013

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