

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

FOX TELEVISION STATIONS, INC., et al.

Civil No. 1:13-cv-00758 (RMC)

Plaintiffs/Counter-Defendants,

Hon. Rosemary M. Collyer

v.

FILMON X LLC, et al.

Defendants/Counter-Plaintiffs.

**DEFENDANT FILMON X'S REPLY TO PLAINTIFFS' RESPONSE TO ORDER TO
SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT OF THE
SEPTEMBER 5, 2013 PRELIMINARY INJUNCTION**

Introduction

FilmOn X¹ submits this brief reply to clarify two issues raised in Plaintiffs' response to this Court's Order to Show Cause. FilmOn X has not willfully violated this Court's September 5, 2013 preliminary injunction ("Order"), and it respects the decisions of other courts, as well.

First, Plaintiffs' reliance on an unauthenticated internet article, published on MultiChannel.com that uses the word defy in quotes is wholly misplaced and does not prove any intent to willfully violate this Court's Order. The article does not attribute the word "defy" to any particular individual and takes that word out of context. According to the text of the article, Mr. Alkiviades David commented on the Massachusetts District Court's decision in *Hearst Stations, Inc. v. Aereo, Inc.* by stating: "Naturally this now allows FilmOn to fire up our Local Service" [Dkt. 53-2.] Consistent with that statement, FilmOn X filed a motion before this

¹ "FilmOn X" or "Defendants" refers collectively herein to defendants FilmOn X LLC, FilmOn.TV Networks, Inc., FilmOn.TV, Inc. and FilmOn.com, Inc.
{00064582.DOCX - v1}

DEFENDANT FILMON X'S REPLY
TO PLAINTIFFS' RESPONSE RE OSC

Court to modify the injunction on October 10, 2013 (the same day as the article was published).² FilmOn X thus took appropriate legal steps to obtain a modification of the injunction that would allow FilmOn X to “fire up” its local services in the First Circuit. Mr. David’s declaration, filed in this case, makes it clear that FilmOn X intended to comply with the Order and promptly took voluntary action (before Plaintiffs’ counsel raised the issue and before this Court ruled on FilmOn X’s motion to modify the injunction) to ensure compliance with the existing Order when it learned that its testing had inadvertently allowed some users in the First Circuit to access programming. [Dkt. 55-2.]

Second, the contempt finding issued by Judge Buchwald in the Southern District of New York does not warrant a finding of contempt here, especially where FilmOn X has acted in good faith. Further, that contempt finding was based on a factual error and it would be a mistake for this Court to rely on it without the complete record. At a hearing, Judge Buchwald had ordered “FilmOn to produce” licensing agreements “to the plaintiffs on or before August 21, 2013,” which allegedly showed that FilmOn had the right to stream the plaintiffs’ programming. *CBS Broadcasting Inc. v. FilmOn.com, Inc.*, 2013 WL 4828592, *8 (Sept. 10, 2013 S.D.N.Y.). FilmOn’s counsel timely produced the agreement with an attorneys’ eyes-only designation, on August 20, 2013—one day before it was due. (Declaration of Ryan Baker filed concurrently herewith, ¶¶ 4-8 & Ex. A.) However, shortly after plaintiffs filed another pleading without

² Plaintiffs’ timeline is inaccurate and misleading. There is no evidence to support their claim that FilmOn X “began retransmitting Plaintiffs’ programming in Boston, apparently before they even considered filing a motion to modify its scope” [Dkt. 57 at 6.] In fact, FilmOn X filed the motion to modify on October 10, 2013 on the day that it learned of the Hearst decision. The screenshot submitted by Plaintiffs as evidence that users in Boston might be able to access copyrighted programming is dated one day later, on October 11, 2013. [Dkt. 53-3.]

advising the Court that FilmOn had produced the agreement,³ the Court, *sua sponte*, found FilmOn in contempt on the mistaken premise that FilmOn had “failed to produce [the alleged licensing agreements] despite that court order.” *Id.* Accordingly, that contempt order was erroneous. It provides no basis for holding FilmOn X in contempt in this action.

FilmOn X should not be held in contempt in this case.

October 24, 2013

Respectfully submitted,

By: /s/ Ryan G. Baker

Ryan G. Baker
BAKER MARQUART LLP
10990 Wilshire Blvd., Fourth Floor
Los Angeles, California 90024
(424) 652-7811 (telephone)
(424) 652-7850 (facsimile)
Bar No.: 200344

/s/ Kerry J. Davidson

LAW OFFICE OF KERRY J. DAVIDSON
1738 Elton Road, Suite 113
Silver Spring, Maryland 20903
(301) 586-9516 (telephone)
(866) 920-1535 (facsimile)
Bar No.: 456431

*Attorneys for Defendants and Counterclaim
Plaintiffs FilmOn X, LLC, FilmOn.TV, Inc.,
FilmOn.TV Networks, Inc., and FilmOn.com, Inc.*

³ Further, Plaintiffs in the New York action have misled that court on other occasions. They recently submitted and obtained entry of a 10 million dollar judgment in the action against FilmOn, which the court subsequently deleted from the docket after FilmOn advised the court that the judgment was actually against another party and originated from a completely different litigation. (Baker Decl., ¶ 9 & Ex. B.)