CBS Broadcasting Inc. et al v. Filmon.Com, Inc. Doc. 18

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CBS BROADCASTING INC., NBC STUDIOS, INC., UNIVERSAL NETWORK TELEVISION, LLC, NBC SUBSIDIARY (KNBC-TV), INC. TWENTIETH CENTURY FOX FILM CORPORATION, FOX TELEVISION STATIONS, INC., ABC HOLDING COMPANY INC., and DISNEY ENTERPRISES, INC., **Plaintiffs,** **v.** **FILMON.COM, INC.,** **Defendant.**	**Case No. 1:10-cv-7532-NRB**

REPLY MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' APPLICATION FOR AN ORDER TO SHOW CAUSE FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

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FilmOn's opposition papers, which plaintiffs' counsel received early this morning, confirm that the Court should issue a preliminary injunction with temporary restraining order pending a final determination of the merits of this matter.

1. FilmOn adds nothing to the Section 111 arguments already made by the defendants in the *WPIX, Inc. v. ivi, Inc.* litigation pending before the Court, choosing instead merely to incorporate by reference those arguments. For the reasons set forth by plaintiffs in their *WPIX* filings (*see* Declaration of C. Scott Morrow, Exhibits 1 and 2), none of these arguments provides any proper support for FilmOn. Furthermore, FilmOn fails even to acknowledge, let alone deal with, the points plaintiffs made in their opening memorandum demonstrating that FilmOn does not satisfy the threshold definition of "cable system" in Section 111 (f) of the Copyright Act. *See* Pl. Memo. at 8.

2. FilmOn is not entitled to the passive carrier exemption in Section 111 (a) (3) of the Copyright Act, 17 U.S.C. § 111 (a) (3). That conclusion follows inescapably from the Court's decision in *Infinity Broadcasting Corp. v. Kirkwood*, 63 F. Supp. 2d 420 (S.D.N.Y. 1999). There, the Court held that a service analogous to FilmOn's does not qualify for the Section 111 (a) (3) passive carrier exemption. The defendant in *Infinity* provided subscribers nationwide access to broadcast radio signals from distant markets via the telephone (just as FilmOn provides worldwide access via the Internet to distant broadcast television signals). The Court in *Infinity* rejected the claim that the defendant was a "carrier" entitled to the passive carrier exemption. *Id.* at 426.

FilmOn attempts to distinguish *Infinity* on the ground that FilmOn's "primary business is the retransmission of Networks' signals." Opp. at 9. But that is not a basis of distinction. The Court held that the defendant in that case could not be considered a carrier because "the essence

of his business is the retransmission of copyrighted material . . . ." 63 F. Supp. 2d at 426. The same is true of FilmOn.

FilmOn also mistakenly relies upon the *Hubbard*, *Eastern Microwave* and *Insight* decisions. In each of these cases, however, the court held only that the defendant was a passive carrier when it transported programming to cable systems that were authorized to receive (and paid copyright owners for) that programming. FilmOn does not transport programming to cable systems; it streams programming, using the wires, cables, and communications channels of its Internet service provider, to individuals around the world who are not authorized to receive (and do not pay anyone) for the programming. Under FilmOn's theory of the passive carrier exemption, no one would be required to obtain any authorization to receive the programming that FilmOn expropriates or pay any royalty whatsoever to receive that programming. No court has sanctioned such a result, and the Court in *Infinity* has rejected it.

3. The fact that a television station broadcasts programming "for free" to viewers within its local geographic market does not give FilmOn the right to steal the signal and programming of that station. It does not give FilmOn the right to build an unlawful commercial business by streaming that signal and programming to anyone in the world with an Internet connection and/or mobile device.

The Section 111 compulsory license does permit cable systems (such as Time Warner and Cablevision) to carry broadcast television signals but only where such carriage is "permissible" under FCC rules. *See* 17 U.S.C. § 111 (c) (2) (A). The FCC has adopted rules requiring cable operators both (1) to obtain the consent of broadcast stations before retransmitting their signals and (2) to black out the programming on out-of-market broadcast signals to which local television stations have exclusivity. *See* 47 C.F.R. §§ 76.64, 76.92 &

76.101. FilmOn does not comply with any of these requirements, claiming that none are applicable to it. That claim only underscores the facts that FilmOn's service irreparably harms plaintiffs and that FilmOn is not entitled to either the Section 111 compulsory license or the Section 111 passive carrier exemption.

4. Most of the declaration accompanying FilmOn's opposition is simply irrelevant to any issue in this case (for instance, there is an extended discussion of "SlingBox," a piece of hardware that some consumers use to stream programming to themselves from their own home). But much of the declaration is either false or misleadingly incomplete. In time, these misrepresentations will be a focus of discovery, but a few examples follow:

In paragraph 8, the declaration states that "[i]n order for a subscriber to view any programs on FilmOn's website, the subscriber must first purchase and download proprietary software developed by FilmOn. Upon purchasing this software, the subscriber must enter a license agreement with FilmOn for the right to use the software." To the contrary, live NBC, CBS, FOX, and ABC programming is shown on FilmOn's site in an industry-standard Flash player window without any purchase, download, license agreement, or subscription. *See* Declaration of Hadrian R. Katz ("Katz Decl."), ¶ 3 and Ex. 3.

In paragraph 12, the declaration states that:

> Any adult-oriented program accessible through FilmOn is not easily identifiable by a subscriber as such. Upon viewing FilmOn's website homepage, a subscriber is presented with a number of buttons displaying television stations, including those of the networks. In order to access any adult-oriented station, or even know that such a station is available through FilmOn, a subscriber must scroll through many different stations to locate such a station. Importantly, the proximity of any cable station button to a network station button on the FilmOn website cannot cause the networks irreparable harm, because it can be easily relocated on the website to avoid any perceived harm.

However, on mobile phones, the two pornographic stations – not very cryptically named "Filthon XXX" and "Filthon XXX Latina" – are displayed right under the logos of the plaintiff networks. *See* Katz Decl., ¶ 4 and Ex. 4.

In paragraph 15, the declaration states that "[i]n order to protect its streams from piracy, FilmOn employs the Common Scrambling Algorithm developed and maintained in accordance with DVB standards, in addition to its own proprietary encryption technology which can lock a video stream between the server and the viewer." What the declaration fails to point out is that because FilmOn's video appears in an industry-standard Flash player, it is easily captured by viewers. Attached as Exhibit 5 to the Katz Declaration is the first page of "about 769,000" Google entries identifying utilities to capture, store, and recirculate Flash video. *See* Katz Decl., ¶ 5 and Ex. 5.

One portion of the declaration with which plaintiffs agree is the statement in paragraph 27 that "FilmOn began offering its subscribers the ability to access network programs in the United States on September 27, 2010." That date is significant as the first *ivi* complaint was filed a week earlier, on September 20, 2010. It was apparently the considerable publicity that ivi was receiving that led FilmOn to launch its copycat service. Accordingly, FilmOn commenced its infringing service with full knowledge that the television networks and content owners would vigorously oppose it. Indeed, FilmOn's billionaire chairman and founder, Mr. Alki David, gave an interview (reported in a September 28, 2010 article) in which he said he would obtain a "declaratory ruling from a court." The article quotes Mr. David as saying "If somebody wants a fight, bring it on." *See* Morrow Decl., Ex. 6. FilmOn hurried to launch its new service in the hope that it would be able to make some sort of argument that it would be irreparably injured by having to shut it down.

5. FilmOn argues that "The Networks are seeking a *mandatory* injunction, requesting the Court to alter the status quo," but that is incorrect. Plaintiffs do not ask the Court to require FilmOn affirmatively to do anything; they ask that the Court *to maintain the status quo* and stop FilmOn from misusing their copyrighted programming. As discussed in plaintiffs' initial memorandum, the television business is based on a system of licenses and agreements among content owners, networks, stations, cable companies, and Internet sites respecting the economic value of copyrighted programming. FilmOn's misappropriation and unauthorized transmission of copyrighted content threatens to destroy that system. As an Executive Vice President of CBS Corporation explained:

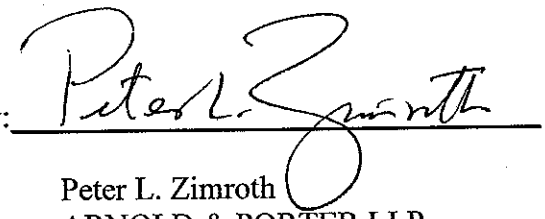
> Unless stopped, the newly expanded activities of FilmOn will cause irreparable harm to CBS and the other television networks. Most importantly, they will cause CBS to lose control of the distribution of its copyrighted programming in ways that could damage its standing with both business partners and consumers. Further, by distributing CBS's programming in digital form over mobile telephone systems and the Internet – without CBS's having any say about the employment of copy protection and conditional access controls – FilmOn exposes CBS to virtually unlimited piracy. And by making CBS's programs available online without charge and in real time, FilmOn preempts CBS's ability to exploit new media markets, while at the same time lessening the value of those programs to traditional providers of linear broadcast programming, whether multichannel distributors, over-the-air television network affiliates (which will potentially lose viewers – and thus advertising revenues – to an out-of-market CBS station) or foreign telecasters.

Franks Decl. ¶ 9. The Court should preserve the integrity of the existing broadcast system by entering the preliminary injunction with temporary restraining order that plaintiffs seek.

CONCLUSION

For the foregoing reasons, the plaintiffs are entitled to entry of an order to show cause why the Court should not grant a preliminary injunction with temporary restraining order, pursuant to Rule 65 of the Federal Rules of Civil Procedure, restraining defendant FilmOn.com, Inc. and its officers, employees, agents, and those in privity with them, from infringing by any means, directly or indirectly, any of plaintiffs' exclusive rights under Section 106 (1)-(5) of the Copyright Act, including but not limited to through the streaming over mobile telephone systems and/or the Internet of any of the broadcast television programming in which any plaintiff owns a copyright.

Respectfully submitted,

By: 

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