

CBS Broadcasting Inc. et al v. FilmOn, Com, Inc.



COWAN  
DEBETS  
ABRAHAMS &  
SHEPPARD LLP

41 MADISON AVENUE  
NEW YORK, NY 10010  
t: 212 974 7474  
f: 212 974 8474  
www.cdas.com

TOBY M.J. BUTTERFIELD  
212 974 7474 EXT 1905  
tbutterfield@cdas.com

Doc. 37

August 4, 2011

# MEMO ENDORSED

VIA FACSIMILE (212) 805-7927

Hon. Naomi Reice Buchwald, U.S.D.J.  
Daniel Patrick Moynihan United States Courthouse  
500 Pearl Street, Room 2270  
New York, NY 10007-1312

USDC SDNY DOCUMENT ELECTRONICALLY FILED DOC #: DATE FILED: <b>8/12/11</b>	RECEIVED IN CHAMBERS OF NAOMI REICE BUCHWALD AUG - 4 2011 UNITED STATES COURT JUDGE
---	--

Re: CBS Broadcasting, Inc. v. FilmOn.com Inc., 1:10-cv-7532-NRB

Dear Judge Buchwald:

# MEMO ENDORSED

Late last week, approximately Wednesday, July 27, our office received a copy of the Court's July 21 letter (the "Letter") responding to the parties' letters dated July 5, 14, 19 and 20. On behalf of our client defendant FilmOn.com, Inc., we respectfully request a pre-motion conference as soon as possible, as we wish to move pursuant to 28 U.S.C. §1292(b) for an order certifying to the Court of Appeals whether current Second Circuit law permits the defendant in a copyright action to be denied the right to documentary discovery concerning the factors relevant in an assessment of statutory damages in a copyright action.

We recognize that the Letter indicates that Plaintiffs' refusal to produce such documents will impact what the Court would allow as damages if Plaintiffs establish liability. However that is far from being a ruling sufficient to protect our client on the point. Rather, the Court's Letter denies our client the right to challenge the blanket allegations of harm which Plaintiffs have claimed throughout this action. In their initial response to Defendant's Request No. 23 seeking documents about the categories of damages allegedly suffered, Plaintiffs stated objections but indicated they "will produce such information as is found at a time and place and subject to terms and conditions agreed upon by counsel for all parties." Yet they now refuse to produce any documents, despite seeking the maximum statutory damages for willful infringement. The Court's Letter permits Plaintiffs to change their position, evade their discovery obligations and denies Defendant the right to examine what facts exist (or, as we believe, contradict) Plaintiffs' claims.

The Court's Letter also denies Defendant the opportunity to obtain any discovery whatsoever concerning the most important issue in this case: whether Defendant's business falls outside the Section 111 statutory licensing scheme, as Plaintiffs maintain, and if so how. Plaintiffs asserted in their TRO papers that there are many unspecified differences between Defendant's system and other distribution systems used by Plaintiffs' licensees, including cable systems licensed pursuant to the Section 111 statutory scheme. Defendant is entitled to seek documents concerning those alleged differences in order to defend itself on the merits. Such documents are vital to Defendant's ability to demonstrate that it too falls within the Section 111 statutory scheme enacted by Congress. Plaintiffs' claims that they cannot provide such documents because they are confidential and contain sensitive business information is belied by the existence of the Court's Stipulated Protective Order; plaintiffs' litigation of claims against

*Applicant  
acquiesced  
Naomi  
Reice  
Buchwald  
8/11/11*

{A070992.DOC/1}



COWAN  
DEBAETS  
ABRAHAMS &  
SHEPPARD LLP

Hon. Naomi Reice Buchwald  
August 4, 2011  
Page 2

other cable systems concerning the scope of the rights; and obviously conduct business in the regular course with dozens if not hundreds of counterparties in business notwithstanding any of their confidentiality concerns.

We submit these are grounds for the Court to reconsider and modify or vacate its rulings in the Letter. We certainly believe our client should be entitled to discovery targeted towards plaintiffs' licensing to others pursuant to Section 111, and concerning plaintiffs' assertion that defendants consumer tracking, authentication, and antipiracy procedures are inadequate. Depositions are simply inadequate to gather that information. If the Court believes otherwise, it should formally prohibit plaintiffs from submitting evidence of such alleged harm. The Court's admonition that "plaintiffs will have to bear the consequences of [their] decision" not to produce documents leaves completely up in the air how defendant can and should challenge plaintiffs' unsupported assertions of harm. Without the opportunity to cross-examine witnesses with contrary documents, Defendant will be denied a fair opportunity to defend itself at trial or otherwise.

Because the Court's Letter is inconsistent with law and threatens to require Defendant to engage in substantial deposition practice, summary judgment and conduct trial without the benefit of relevant discovery permitted by law, the Court of Appeals should resolve the question of the scope of discovery in this action now, before all those proceedings take place. Plaintiffs would not be prejudiced, as Defendant has agreed to continue the TRO while the case is heard. Without an interlocutory appeal of this issue, Defendant will be relegated to challenging the result of the Court's ultimate determination of the claims, at which time the parties will face a reversal and remand for a repeat of discovery and trial using the discovery to which defendant is entitled under the Copyright Act and binding Second Circuit authority. "...[T]here is nothing in section 504 to prevent a court from taking account of evidence concerning actual damages and profits in making an award of statutory damages within the range set out in subsections (c)." H.R. Rep. 94-1476, 94<sup>th</sup> Cong. 2<sup>ND</sup> Sess. 1976, \*161; quoted in Patry on Copyright, § 22:174 (adding: "At the same time, courts have held that the absence of actual damages is a mitigating factor for defendant.")

We would appreciate the Court hearing this pre-motion conference as soon as possible, as discovery is currently scheduled to end soon. We will be writing separately shortly about a proposal to extend the deadline for completion of discovery, which counsel for all parties believe is necessary in the circumstances, once we have completed our discussions with opposing counsel on that topic.

Respectfully submitted,

Toby M. J. Butterfield

cc (via E-Mail): Hadrian R. Katz, Esq.  
Scott Morrow, Esq.  
Al J. Daniel, Esq.  
Christopher J. Marino, Esq.