

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

FOX TELEVISION STATIONS, INC., et al.

Plaintiffs/Counter-Defendants,

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

AEREOKILLER LLC, et al.

Defendants/Counter-Plaintiffs.

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ANSWER

Defendants FilmOn X, LLC, formerly Aereokiller LLC (“FilmOn X”), FilmOn.TV, Inc., FilmOn.TV Networks, Inc., and FilmOn.com, Inc. (collectively, “Defendants”) hereby answer Plaintiffs 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., and Allbritton Communications Company (collectively, “the Networks”) Complaint, by paragraph, as follows:

1. Deny.
2. In answering Paragraph 2, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 2.
3. In answering Paragraph 3, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 3.

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4. In answering Paragraph 4, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 4.

5. In answering Paragraph 5, Defendants admit that “[t]he district court in the California Actions limited the injunction to the Ninth Circuit” and “declined to enjoin preliminarily Defendants’ activities in all circuits other than the Ninth Circuit.” Defendants otherwise deny all other allegations of Paragraph 5.

6. In answering Paragraph 6, Defendants admit that “Plaintiffs in *Aereo* appealed the district court’s decision” and that “on April 1, 2013, a...panel of the Second Circuit Court of Appeals affirmed the *Aereo* decision. *See WNET Thirteen v. Aereo, Inc.*, 712 F.3d 676 (2d Cir. Apr. 1, 2013) (“*Aereo*”).” Defendants otherwise deny all allegations of Paragraph 6.

7. In answering Paragraph 7, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 7.

8. Contains no allegation that requires an admission or denial.

9. Admit that the Court has jurisdiction.

10. Admit that the Court has jurisdiction.

11. Deny.

12. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

13. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

14. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

15. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

16. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

17. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

18. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

19. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

20. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

21. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

22. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

23. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

24. In answering Paragraph 24, Defendants admit that “Defendant Aereokiller LLC is a Delaware limited liability corporation.” Defendant otherwise deny all allegations of Paragraph 24.

25. In answering Paragraph 25, Defendants admit that “Defendant FilmOn.TV, Inc. is a Delaware corporation.” Defendants otherwise deny all allegations of Paragraph 25.

26. In answering Paragraph 26, Defendants admit that “Defendant FilmOn.TV Networks, Inc. is a Delaware corporation” and “FilmOn.TV Networks, Inc.’s business address is 301 N. Canon Drive, Beverly Hills, California.” Defendants otherwise deny all allegations of Paragraph 26.

27. In answering Paragraph 27, Defendants admit that “Defendant FilmOn.com, Inc. is a Delaware corporation.” Defendants otherwise deny all allegations of Paragraph 27.

28. Deny.

29. Deny.

30. In answering Paragraph 30, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 30.

31. In answering Paragraph 31, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 31.

32. In answering Paragraph 32, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 32.

33. Deny.

34. Defendants incorporate paragraphs 1-33 as if set forth fully herein.

35. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

36. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

37. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

38. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

39. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

40. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

41. Defendants are without sufficient knowledge or information to form a belief as to the truth of this paragraph.

42. In answering Paragraph 42, Defendants state that it contains arguments, opinions and legal conclusions that require no response. Defendants otherwise deny the allegations of Paragraph 42.

43. Deny.

AFFIRMATIVE DEFENSES

Pursuant to Rule 8(c) of the Federal rules of Civil Procedure, Defendants further plead the following separate and additional defenses. By pleading these defenses, Defendants do not in any way agree or concede that it has the burden of proof or persuasion on any of these issues. Defendants reserve the right to assert such additional affirmative defenses as discovery indicates are proper.

FIRST AFFIRMATIVE DEFENSE

(Failure to State A Claim)

The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

(Comparative Fault)

The Complaint is barred, in whole or in part, based on the doctrine of comparative fault.

THIRD AFFIRMATIVE DEFENSE

(Failure to Mitigate Damages)

The Complaint is barred, in whole or in part, based on Plaintiffs' failure to mitigate damages.

FOURTH AFFIRMATIVE DEFENSE

(Estoppel)

The Complaint is barred, in whole or in part, based on the principles of estoppels.

FIFTH AFFIRMATIVE DEFENSE

(Fair Use)

The Complaint is barred, in whole or in part, by the doctrine of fair use.

SIXTH AFFIRMATIVE DEFENSE

(Laches)

The Complaint is barred, in whole or in part, by the doctrine of laches.

SEVENTH AFFIRMATIVE DEFENSE

(Unclean Hands)

The Complaint is barred, in whole or in part, by the doctrine of unclean hands.

EIGHTH AFFIRMATIVE DEFENSE

(Waiver)

The Complaint is barred, in whole or in part, by the doctrine of waiver.

NINTH AFFIRMATIVE DEFENSE

(First Amendment)

The Complaint is barred, in whole or in part, because application of the Copyright Act to impose liability in this case would violate the First Amendment to the United States Constitution.

TENTH AFFIRMATIVE DEFENSE

(Copyright Abandonment)

The Complaint is barred, in whole or in part, to the extent any Plaintiffs have forfeited or abandoned copyright or failed to comply with all necessary formalities.

ELEVENTH AFFIRMATIVE DEFENSE

(Innocent Infringers)

The Complaint is barred, in whole or in part, to the extent any persons, based on whose behavior seek to hold Defendants liable, are innocent infringers.

TWELFTH AFFIRMATIVE DEFENSE

(Supervening Events)

The Complaint is barred, in whole or in part, because any alleged injury or loss sustained by Plaintiffs was caused by intervening or supervening events over which Defendants had and have no control.

THIRTEENTH AFFIRMATIVE DEFENSE

(Responsibility of Third Parties)

The Complaint is barred, in whole or in part, because any alleged injury or loss sustained by Plaintiffs was the fault and responsibility of third parties over whom Defendants had and have no control, and for whose actions Defendants had and have no responsibility.

FOURTEENTH AFFIRMATIVE DEFENSE

(Express or Implied License)

The Complaint is barred, in whole or in part, because Plaintiffs have granted an express or implied license in some or all of their copyrighted works to Defendants.

ADDITIONAL AFFIRMATIVE DEFENSES

(Subsequently Discovered Defense)

Defendant has insufficient knowledge or information upon which to form a belief as to whether it may have additional affirmative defenses, and reserves the right to assert additional defenses if and as it learns of facts that may support such defenses.

June 24, 2013

Respectfully submitted,

By: /s/ Jaime W. Marquart

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Plaintiffs FilmOn X LLC, FilmOn.TV, Inc.,
FilmOn.TV Networks, Inc., and FilmOn.com, Inc.*

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

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FOX TELEVISION STATIONS, INC.,

10201 West Pico Blvd.,
Los Angeles, CA 90035,

TWENTIETH CENTURY FOX FILM
CORPORATION,

10201 West Pico Blvd.,
Los Angeles, CA 90064,

FOX BROADCASTING COMPANY,

10201 West Pico Blvd.,
Los Angeles, CA 90064,

NBC SUBSIDIARY (WRC-TV) LLC,

4001 Nebraska Avenue, NW,
Washington, D.C. 20016,

NBC STUDIOS LLC,

100 Universal City Plaza
Universal City, CA 91608,

UNIVERSAL NETWORK TELEVISION LLC,

100 Universal City Plaza,
Universal City, CA 91608,

OPEN 4 BUSINESS PRODUCTIONS LLC,

100 Universal City Plaza,
Universal City, CA 91608,

TELEMUNDO NETWORK GROUP LLC,

2290 West 8th Avenue,
Hialeah, FL 33010,

AMERICAN BROADCASTING COMPANIES,
INC.

77 West 66th Street,
New York, NY 10023,

DISNEY ENTERPRISES, INC.,

CIVIL ACTION NO. 1:13-cv-00758 (RMC)

**AEREOKILLER LLC'S, FILMON.TV
NETWORKS, INC.'S, FILMON.TV, INC.'S,
AND FILMON.COM, INC'S ANSWER AND
AFFIRMATIVE DEFENSES TO
COMPLAINT;**

**COUNTERCLAIM FOR DECLARATORY
JUDGMENT**

500 S. Buena Vista Street,
Burbank, CA 91521,

ALLBRITTON COMMUNICATIONS
COMPANY,
1000 Wilson Boulevard, Suite 2700
Arlington, VA 222209

Plaintiffs/Counter-Defendants,

v.

AEREOKILLER LLC,
400 E. 58th Street, Apt. 8B,
New York, NY 10022,

FILMON.TV NETWORKS, INC.,
301 N. Canon Drive,
Beverly Hills, CA 90210,

FILMON.TV, INC.
301 N. Canon Drive,
Beverly Hills, CA 90210,

FILMON.COM, INC,
301 N. Canon Drive,
Beverly Hills, CA 90210,

Defendants/Counter-Plaintiffs.

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COUNTERCLAIM

Counterclaim Plaintiffs, by their attorneys, allege against Counterclaim Defendants 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., and Allbritton Communications Company (collectively, “the Networks”) as follows:

INTRODUCTION

1. To the extent that any defendant would have any liability by way of this or any other action related to the mini-antenna services associated with defendant FilmOn X, all defendants to this action (“Counterclaim Plaintiffs”) hereby counterclaim against all of the Plaintiffs for a declaration that the FilmOn X service does not infringe upon any of the defendants’ copyrights. FilmOn X’s technology serves an important government interest in “preserving the benefits of free, over-the-air local broadcast television” recognized by the Supreme Court in *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997), by providing a unique technology that allows consumers access to their own remotely located television antenna and DVR, thereby enabling consumers to create and access from any Internet-enabled device unique copies of the same free-to-air broadcast programming that they would have been able to access freely with a traditional “rabbit ears” antenna and traditional DVR. The FilmOn X technology enhances customers’ ability to watch the same free over-the-air broadcast content that the American public is entitled to receive in accordance with the public interest recognized by Congress and the Supreme Court.

2. Despite FilmOn X’s furthering of these important interests, Counterclaim Defendants (collectively, “the Networks”) – who have already been denied a preliminary injunction against Aereo, a company employing technology similar to FilmOn X, in the Second Circuit – continue to attempt to block consumers’ access to valuable and beneficial technologies like FilmOn X’s. Consistent with the same anticompetitive purpose that caused NBC to refuse to deal with defendant FilmOn (even when required to do so by law), the Networks have taken their fight against these emerging technologies to the courts, filing disruptive and redundant litigation in multiple jurisdictions.

3. This repetitive litigious behavior is inconsistent with the statutory obligations associated with the broadcast licenses granted to the Networks, which enable the Networks to access valuable broadcast frequencies – a public trust. Having initially accepted billions of dollars in public resources and various other regulatory benefits, the Networks now seek to renege on the deal struck with Congress under the Communications Act of 1934 and abandon their responsibilities to the American public. Only broad declaratory relief like that sought in this Counterclaim can preserve this public trust.

JURISDICTION AND VENUE

4. This is an action for declaratory judgment pursuant to 28 U.S.C. § 2201 and Fed. R. Civ. P. 57, seeking a declaration of rights regarding the parties to this litigation with respect to an actual and justiciable controversy arising under the copyright laws of the United States, 17 U.S.C. § 101 *et seq.*

5. This Court has exclusive jurisdiction over the copyright subject matter of this action pursuant to the Copyright Act (17 U.S.C. § 101 *et seq.*), 28 U.S.C. §1331, 1338, and the Declaratory Judgment Act (28 U.S.C. § 2201).

6. Venue is proper in this district pursuant to 28 U.S.C. § 1391.

PARTIES

7. Counterclaimant FilmOn X, LLC is a Delaware limited liability company.

8. Counterclaimant FilmOn.com, Inc. (“FilmOn”) is a Delaware corporation with its principal place of business at 301 N. Canon Drive, Beverly Hills, California.

9. Counterclaimant FilmOn.TV Networks, Inc. (“FilmOn”) is a Delaware corporation with its principal place of business at 301 N. Canon Drive, Beverly Hills, California.

10. Counterclaimant FilmOn.TV, Inc. (“FilmOn”) is a Delaware corporation with its principal place of business at 301 N. Canon Drive, Beverly Hills, California.

11. On information and belief, Counterclaim Defendant Fox Broadcasting Company is a Delaware corporation with its principal place of business at 10201 West Pico Blvd., Los Angeles, California. Fox Broadcasting Company operates the Fox network, a national broadcast television network (the “Fox Network”).

12. On information and belief, Counterclaim Defendant Twentieth Century Fox Film Corp. is a Delaware corporation with its principal place of business at 10201 West Pico Blvd., Los Angeles, California. Twentieth Century Fox owns copyrights in certain original primetime television programs broadcast on the Fox Network and distributed via other media in the United States and around the world.

13. On information and belief, Counterclaim Defendant Fox Television Stations, Inc. (“FTS”), a Delaware corporation, owns and operates numerous local broadcast television stations that broadcast television programming, including the Fox Network, over-the-air to numerous localities throughout the United States, including WTTG in Washington, D.C., which broadcasts the Fox Network to viewers over-the-air on channel 5 in the Washington, D.C. market. The FCC has licensed FTS to operate WTTG (among other television stations). FTS is actively engaged, among other things, in the production and distribution of television programs and other copyrighted works, including local news programming. Cable systems, satellite services and other multichannel video programming distributors also make retransmissions of WTTG television broadcasts available to their subscribers upon negotiating the right to do so under Section 325(b) of the Communications Act, 47 U.S.C. § 325(b).

14. On information and belief, Counterclaim Defendant NBC Subsidiary (WRC-TV) LLC (“WRC”) is a Delaware limited liability company with its principal place of business at 4001 Nebraska Avenue, NW, Washington, D.C. WRC owns and operates the television station WRC-TV, which is an FCC-licensed broadcast station that broadcasts to viewers over-the-air on channel 4 in the Washington, D.C. market. WRC-TV is affiliated with the NBC Television Network, a national broadcast network. WRC is actively engaged, among other things, in the production and distribution of television programs and other copyrighted works, including local news programming. Cable systems, satellite services and other multichannel video programming distributors also make retransmissions of WRC-TV television broadcasts available to their subscribers upon negotiating for the right to do so under Section 325 of the Communications Act, 47 U.S.C. § 325.

15. On information and belief, Counterclaim Defendant NBC Studios LLC (“NBC Studios”) is a Delaware limited liability company with its principal place of business at 100 Universal City Plaza, Universal City, California. NBC Studios is actively engaged in the production and licensed distribution of television programs, including programs that are transmitted to numerous broadcast stations in the United States affiliated with the NBC Television Network and distributed elsewhere in the world.

16. On information and belief, Counterclaim Defendant Universal Network Television LLC (“UNT”) is a Delaware limited liability company with its principal place of business at 100 Universal City Plaza, Universal City, California. UNT is actively engaged in the production and licensed distribution of television programs, including programs that are transmitted to numerous broadcast stations in the United States affiliated with the NBC Television Network and distributed elsewhere in the world.

17. On information and belief, Counterclaim Defendant Open 4 Business Productions LLC (“O4B”) is a Delaware limited liability company with its principal place of business at 100 Universal City Plaza, Universal City, California. O4B is actively engaged in the production and licensed distribution of television programs, including programs that are transmitted to numerous broadcast stations in the United States affiliated with the NBC Television Network and distributed elsewhere in the world.

18. On information and belief, Counterclaim Defendant Telemundo Network Group LLC (“Telemundo”) is a Delaware limited liability company with its principal place of business at 2290 West 8th Avenue, Hialeah, Florida. Telemundo is, among other things, actively engaged in the production and licensed distribution of Spanish-language television programs, including programs that are transmitted to numerous broadcast stations in the United States affiliated with the Telemundo Network, a broadcast network, and distributed elsewhere in the world.

19. On information and belief, Counterclaim Defendant American Broadcasting Companies, Inc. (“ABC”) is a Delaware corporation with its principal place of business at 77 West 66th Street, New York, New York, and does business as the ABC Television Network. ABC is actively engaged in the production and distribution of television programs and other copyrighted works, including programs ABC transmits to numerous broadcast television stations that it owns as well as other stations that are affiliated with its ABC Television Network and with other networks, in the United States. ABC grants these stations the right to broadcast programming within their communities of license. ABC is a wholly-owned, indirect subsidiary of plaintiff Disney Enterprises, Inc.

20. On information and belief, Counterclaim Defendant Disney Enterprises, Inc. (“DEI”) is a Delaware corporation with its principal place of business at 500 S. Buena Vista

Street, Burbank, California. DEI is actively engaged in the licensing of its copyrighted properties, and certain of its affiliates are engaged in the worldwide production and distribution of copyrighted entertainment products, including programs that television broadcast stations and other media outlets transmit or retransmit to the public.

21. On information and belief, Counterclaim Defendant Allbritton Communications Company (“Allbritton”) is a Delaware corporation with its principal place of business at 1000 Wilson Boulevard, Suite 2700, Arlington, Virginia. Allbritton owns and operates the television station WJLA-TV, which is an FCC-licensed broadcast station that broadcasts to viewers over-the-air on channel 7 in the Washington, D.C. market. WJLA-TV is affiliated with the ABC Television Network. Allbritton is actively engaged, among other things, in the production and distribution of television programming and other copyrighted works, including local news programming. Cable systems, satellite services and other multichannel video programming distributors also make retransmissions of WJLA-TV television broadcasts available to their subscribers upon negotiating for the right to do so under Section 325 of the Communications Act, 47 U.S.C. § 325.

GENERAL BACKGROUND

22. The American public has the right to access free over-the-air broadcasting. The United States Constitution recognizes this right through the First Amendment's protection of participation in the marketplace of ideas. 4-19E *Nimmer on Copyright* § 19E.02 (2012) (First Amendment recognizes the public's right to be informed of matters of general interest). Since the enactment of the Radio Act of 1927, it has been a central tenet of American communications policy that a license to use the valuable resource of the public airwaves carries with it the obligation to operate in the public interest, convenience, and necessity. Pub. L. No. 69-169, 44 Stat. 1162 (1927); *see also* 47 U.S.C. § 303 (directing the Federal Radio Commission to grant licenses to the public airwaves in the "public convenience, interest, or necessity.").

23. The Networks use, for free, a resource worth billions of dollars (or more)¹ – the public radio spectrum. Pursuant to the Communications Act of 1934, the Networks are granted licenses to operate only if the "public convenience, interest, or necessity will be served thereby." 47 U.S.C. § 307(a). They are required to serve the needs and interests of the communities to which they are licensed. If a broadcaster fails to meet its public obligations, the Federal Communications Commission can decline to renew its license. 47 U.S.C. § 309(k).

¹ Economist Thomas Hazlett has explained that "Today, the social opportunity cost of using the TV Band for television broadcasting – 294 MHz of spectrum with excellent propagation characteristics for mobile voice and data networks, including 4G technologies – is conservatively estimated to exceed \$1 trillion (in present value)." Comment of Thomas Hazlett, in A National Broadband Plan for Our Future, GN Dckt. No. 09-51, Federal Communications Commission (filed Dec. 18, 2009), *available at* http://mason.gmu.edu/~thazlett/pubs/NBP_PublicNotice26_DTVBand.pdf.

More conservatively, CTIA – The Wireless Association and the Consumer Electronics Association have concluded that the FCC's broadcast incentive auctions, where only a few broadcasters would give up their licenses to more productive uses, could produce more than \$33 billion in revenue for the U.S. Treasury. *See* CTIA and CEA Study Finds Broadcast Incentive Auction Will Net U.S. Treasury More Than \$33 Billion, Feb. 15, 2011, <http://www.ctia.org/media/press/body.cfm/prid/2051>.

24. As over-the-air broadcasters, the Networks also receive special statutory rights, including: the right to demand carriage by cable systems, 47 U.S.C. § 534; guaranteed placement on the "basic tier," 47 U.S.C. § 543(b)(8); and the legal right to "consent" to the retransmission by cable systems of programming they may not own the copyright to, 47 U.S.C. § 325(b). In exchange for these rights – and in recognition of the fact that the number of broadcast licenses is limited – the Networks have an obligation to serve the public. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969) (citing S. Rep. No. 86-562, at 8-9 (1959)) ("[B]roadcast frequencies are limited and, therefore, they have been necessarily considered a public trust.").

25. Since the earliest days of broadcasting, policymakers have required stations to make their service freely available to the public. *Id.* at 390; *see also Third Annual Report of the Federal Radio Commission* 34 (1929), available at <http://transition.fcc.gov/fcc-bin/assemble?docno=291101>. The Supreme Court has also held that "preserving the benefits of free, over-the-air local broadcast television" is an important government interest. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 189 (1997).

26. FilmOn X sought to serve this important government interest by providing a unique technology that allows consumers access to their own remotely located antenna, thereby enabling those consumers to create and access, from any Internet-enabled device, unique copies of the same free-to-air broadcast programming that they would have been able to access freely with a traditional "rabbit ears" antenna. Consumers can record and play-back unique copies of the free-to-air broadcast programming at a later time, just as they could with a traditional DVR. The commercial programming being broadcast over the local signal is not interrupted in any way while the broadcast is streaming. Thus, the technology merely enhances how customers may watch over-the-air broadcast content, which the Networks must provide for free in accordance

with the public interest recognized by the FCC, Congress and the Supreme Court. Attempts to limit that ability such as the Networks' lawsuits against Aereo and FilmOn X hardly comport with the Networks' obligation to serve the public. As Justice Warren Burger lamented:

A broadcaster seeks and is granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations . . . [T]he broadcast industry does not seem to have grasped the simple fact that a broadcast license is a public trust.

Office of Communication of United Church of Christ v. FCC, 359 F.2d 994, 1003 (D.C. Cir. 1966).

27. The importance of making broadcast programming more accessible by creating more choices for private viewing technologies was recently reasserted by the Department of Justice. In approving the merger of Comcast and NBC Universal in 2011, the Department required the merged companies to make programming available to Internet video services. This requirement, the Department concluded, would give television viewers more choices of how to receive programming, as well as greater access to the programming itself. *See Competitive Impact Statement of the Department of Justice at 10-11, United States v. Comcast Corp.*, 1:11-cv-00106, (D.C. Cir. Jan. 18, 2011) (“DoJ Analysis”) (available at <http://www.justice.gov/atr/cases/f266100/266158.pdf>). The Department also found that competitive pressures from online video distributors (“OVDs”) like FilmOn X were stimulating incumbents such as cable networks to offer more on-demand choices, further enhancing consumer choice. DoJ Analysis at 15. The Department observed that, among OVDs, “[n]ew developments, products, and models are announced on almost a daily basis by companies seeking to satisfy consumer demand.” DoJ Analysis at 15-16.

28. Similarly, the FCC stated that OVDs “can provide and promote more programming choice, viewing flexibility, technological innovation and lower prices.” *See In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. for Consent to Assign Licenses and Transfer Control of Licensees, Memorandum Opinion & Order*, 26 FCC Rcd. 4238 ¶ 78 (2011) (“FCC Analysis”) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-4A1.pdf). Preventing more OVDs from reaching the market would therefore “have a substantial anticompetitive effect on consumers and the market.” DoJ Analysis at 27. Despite their currently-small market share, the Justice Department found that the emergence and growth of OVDs was extremely significant, saying that OVDs “represent the most likely prospect for successful competitive entry in the existing video programming distribution market.” DoJ Analysis at 28. This analysis reaffirms the recognized and significant public benefit of increased competition in video distribution.

THE NETWORKS ACT AGAINST THE PUBLIC INTEREST

29. The context in which the FCC made the statements noted above was the contested merger of NBC and Comcast. The merger was ultimately allowed, but only in return for NBC agreeing to meet in good faith and negotiate with OVDs. Defendant FilmOn is one such OVD. Pursuant to the government’s mandate, FilmOn contacted NBC to arrange such a good faith meeting to acquire NBC-owned content for its OVD service. In return, NBC agreed to meet with FilmOn’s CEO, Alki David. The meeting occurred, with several lawyers and executives from both sides present. At the meeting, Mr. David asked NBC what titles it was willing to sell to FilmOn. NBC’s executives responded by saying they would only be willing to sell FilmOn one particular program from the dawn of television that is essentially worthless at present day, for a

cost of \$500,000.00 per year. Recognizing this to be an obvious non-offer (no one would ever pay market premium rates for such an aged title), Mr. David implored NBC to make FilmOn a reasonable offer for legitimate content. It refused to do so.

30. In addition, FilmOn.TV Networks recently entered into an agreement with Baby TV, a Fox Entertainment Group Channel in Europe based out of the United Kingdom. On March 14, 2012, FilmOn.TV Networks announced the deal, and a representative of Baby TV/Fox International Channels was quoted in a press release as saying, "It is important for the development of our industry to explore all new distribution opportunities. Therefore we look forward to making Baby TV available to families through FilmOn." Likewise, Mr. David expressed his excitement over working with a Fox-affiliated channel. Shortly after the March 14 announcement, Fox's headquarters in the United States learned about the deal and immediately intervened, forcing its European affiliate to renege on its commitment, even *after* the Baby TV content was already up and running on www.filmon.com.

31. Counterclaim Defendant CBS has also acted against the public interest and, in fact, brings its claims in this case with unclean hands. CBS's subsidiary CBSI, through its property CNET (cnet.com or download.com), has sold and distributed hundreds of millions of copies of illegal file-sharing (or "P2P") software (such as BitTorrent, Napster, Grokster and Limewire) for massive profit for more than a decade, by inducing wide-scale copyright infringement of musical works and television shows belonging to various Networks or their subsidiaries. In fact, CBSI, through download.com and cnet.com, distributed practically all of the copies of many of world's most notorious P2P applications, including Limewire and others.

32. CBSI's promotion and distribution of P2P software did more than just induce and encourage massive infringement of copyrighted works, but also had a myriad of additional

negative social consequences. For example, the software CBSI distributed was used to construct massive file-sharing networks that traded all manner of obscene, pornographic and illegal files – including but not limited to child pornography.²

THE NETWORKS' STRATEGIC LITIGATION AGAINST THE PUBLIC

INTEREST

33. The Networks have furthered their anti-competitive aims by bringing lawsuits against FilmOn X, as well as another Internet technology service, Aereo, in multiple jurisdictions. The Networks first brought suit against Aereo in March 2012 in the District Court for the Southern District of New York (“the Consolidated 2012 Actions”), alleging that Aereo violated the Networks’ asserted public performance and reproduction rights under the Copyright Act by providing to consumers certain remote antenna and digital video recorder (“DVR”) technology so that the consumer could access, record, and play back over-the-air broadcasts made freely available to the public. The Networks moved for a preliminary injunction against Aereo in the Second Circuit, but the District Court denied the motion because it found that the Networks were unlikely to succeed on the merits of their claims. *Am. Broad. Cos., Inc. v. Aereo*, 874 F. Supp. 373 (S.D.N.Y. 20012).

34. Following the denial of a preliminary injunction by the district court in the Consolidated 2012 Actions, the Networks brought a similar suit against FilmOn X, alleging copyright infringement, in the District Court for the Central District of California in August 2013. The District Court erroneously found against FilmOn X, finding that the transmissions

² There is no doubt that Defendants knew about the amount of indecent materials available on P2P networks: they reported on it. By way of one example, an article on the ZDNet website on July 28, 2003 by Lisa Bowman, referenced a finding in a report authored by the United States General Accounting Office and the House Government Reform Committee that “typing in words such as ‘underage’ or ‘pre-teen’ [to P2P software] yielded numerous images of child porn.” The article also noted that the same report found that file-blocking software “did not do enough” to filter out porn files. The article described proposed legislation that called on the FTC to require P2P companies to get permission before minors use their services.

consumers make using FilmOn X's technology constitute public performances, and enjoined FilmOn X from operating its service in the Ninth Circuit. This ruling – the scope of which is specifically limited to the geographic boundaries of the Ninth Circuit – is currently being appealed in the Ninth Circuit.

35. A number of respected technology-related organizations filed amicus briefs in the Second Circuit and the Ninth Circuit appeal in support of Aereo and FilmOn X, respectively. For example, the Electronic Frontier Foundation (“EFF”), which is a member-supported non-profit dedicated to protecting civil liberties and free expression in the digital age, filed an amicus brief in support of FilmOn X likening its service to “new technologies like the VCR and DVR [which] created new markets for film and television,” adding that FilmOn X and similar services and technology “have the potential to revitalize broadcast TV as a major distribution medium to compete with cable and satellite, and with non-broadcast programming.”

36. By way of further example, the amicus brief of the Computer & Communications Industry Association (“CCIA”) – which includes numerous member companies residing in the Ninth Circuit, such as Google, Yahoo!, Facebook, Ebay, and Pandora, for example – notes that the district court’s reasoning in granting the injunctions “would not only put consumers ‘time-shifting’ and ‘space-shifting’ television [*i.e.*, DVR technology] in jeopardy, but also inhibit innovation by cloud providers intent on giving consumers ubiquitous online access to digital assets that have nothing to do with television.” The CCIA explained:

[T]he District Court’s ruling imperils new digital locker services, as well as cloud-based personal back-up services, all of which are premised on a user transferring her personal files (including lawfully acquired music, video, text, and software files) to ‘the

cloud,' thereby making those files accessible to that same user from any Internet-connected device.

Indeed, any ruling that FilmOn X's technology is infringing would be a substantial set back to innovation in the emerging field of cloud computing.

37. On April 1, 2013, during the pendency of FilmOn X's Ninth Circuit appeal, the Second Circuit Court of Appeals affirmed the district court's decision in favor of Aereo. *WNET, Thirteen v. Aereo, Inc.*, Nos. 12-Civ-2786, 12-Civ-2807, 2013 WL 1285591, at *1 (2d Cir. Apr. 1, 2013).

38. Despite losing their preliminary injunction motion against Aereo in the 2012 Consolidated Actions (and later having that denial affirmed by the Second Circuit Court of Appeals), and notwithstanding the pendency of FilmOn X's appeal in the Ninth Circuit, the Networks continue to threaten Aereo and FilmOn X with follow-on suits, attempting to get another "bite at the apple" in different jurisdictions. For example, in response to the public announcement made by Aereo on April 23, 2013 that it planned to launch its technology in Boston, Massachusetts on May 15, 2013, Leslie Moonves, the President and Chief Executive Officer of CBS Broadcasting – one of the Plaintiffs in the 2012 Consolidated Actions – reportedly stated in a press release that wherever Aereo expands from its first market in New York, "we'll follow" Aereo and "we'll sue them again" in those markets. Similarly, Dana McClintock, CBS Broadcasting's Executive Vice President of Communications, stated on his Twitter feed that "We will sue" in Boston, and that "Stealing our signal will be found to be illegal in Boston, just as it will be everywhere else."

39. This action against Counterclaim Plaintiffs, filed on May 23, 2013, alleges near-identical copyright infringement claims against Counterclaim Plaintiffs and seeks injunctive relief and damages.

40. In light of the explicit threats by CBS to initiate duplicative follow-on suits against Aereo in other jurisdictions, and in view of the present action taken by the Networks against FilmOn X in the District Court for the District of Columbia, FilmOn X files this related action seeking a declaratory judgment as set forth below.

COUNT I (Request for Declaratory Judgment)

41. Counterclaim Plaintiffs incorporate paragraphs 1-39, as if set forth fully herein.

42. In light of Counterclaim Defendants' Complaint, there exists an actual and justiciable controversy concerning whether FilmOn X infringes Counterclaim Defendants' copyrights by providing technology that allows consumers to receive free over-the-air broadcast signals via the Internet, which those consumers are entitled to receive and which broadcasters are required to transmit under statutory obligations.

WHEREFORE, Counterclaim Plaintiffs pray for relief as follows:

1. That the Court enter judgment in Counterclaim Plaintiffs' favor and against Counterclaim Defendants declaring that Counterclaim Plaintiffs have not violated the Copyright Act with respect to any of the Counterclaim Defendants' copyrighted works.
2. That the Complaint be dismissed, with prejudice and in its entirety;
3. That Counterclaim Plaintiffs be awarded costs incurred in defending this action;
4. That Counterclaim Plaintiffs be granted such other and further relief as the Court may deem just and proper.

June 24, 2013

Respectfully submitted,

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