UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CBS BROADCASTING INC., et al.,

Plaintiffs,

- against -

FILMON.COM, INC.,

Defendant.
----------X

**MEMORANDUM & ORDER**

10 Civ. 7532 (NRB)

**NAOMI REICE BUCHWALD**
**UNITED STATES DISTRICT JUDGE**

On October 1, 2010, plaintiffs 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., all broadcast television networks (collectively, "plaintiffs"), brought this action against defendant FilmOn.com, Inc., alleging infringement of their copyrights in various programs exhibited over their broadcast television stations. The case was closed by entry of the Consent Order of Judgment and Permanent Injunction dated August 8, 2012 (dkt. no. 49).

On July 8, 2013, plaintiff CBS Broadcasting Inc. ("CBS") moved this Court by order to show cause to compel the compliance of FilmOn.com, Inc. and its Chief Executive Officer, Alkiviades David (collectively, "FilmOn") with certain provisions of the parties' settlement agreement, and for an order holding FilmOn

in civil contempt for its alleged violation of the Consent Order of Judgment and Permanent Injunction. For the reasons that follow, we grant plaintiffs' motions.

## BACKGROUND[1]

### A. Factual Background

In September 2010, FilmOn launched a for-profit service which captured over-the-air digital terrestrial signals broadcast by television stations, including those owned by plaintiffs, transmitted those signals to its servers, and then streamed them live over the internet to its subscribers. (Compl., dkt. no. 1, ¶ 19.) At that time, the principal way in which FilmOn subscribers viewed plaintiffs' copyrighted programming was by downloading and installing the FilmOn HDi player application from FilmOn's website, which allowed

[1] The following facts are derived from the Memorandum of Plaintiffs in Support of the Order to Show Cause ("Pl. Contempt Br."); the Declaration of C. Scott Morrow in Support of Plaintiffs' Application for an Order to Show Cause for Contempt ("Morrow Contempt Decl.") and the exhibits annexed thereto; Defendant's Memorandum of Law in Opposition to OSC Re: Contempt Motion ("Def. Contempt Opp."); Memorandum of CBS in Support of Motion to Compel Compliance with Section 5.3 of the Settlement Agreement ("Pl. 5.3 Br."); the Declaration of C. Scott Morrow in Support of Plaintiffs' Motion to Compel Compliance with Section 5.3 of the Settlement Agreement ("Morrow 5.3 Decl.") and the exhibits annexed thereto; Non-Party Alkiviades David's Memorandum of Law in Opposition to Plaintiff's Motion to Compel Compliance with Section 5.3 of the Settlement Agreement ("David 5.3 Opp."); Memorandum of CBS in Support of Plaintiffs' Motion to Compel Compliance with Financial Terms of Settlement Agreement ("Pl. Fin. Br."); Declaration of C. Scott Morrow in Support of Plaintiffs' Motion to Compel Compliance with Financial Terms of Settlement Agreement ("Morrow Fin. Decl.") and the exhibits annexed thereto; Memorandum in Opposition to Plaintiffs' Motion to Compel Compliance with Financial Terms of Settlement Agreement ("Def. Fin. Opp."); and the Declaration of Alkiviades David in Opposition to Motion Re: Contempt and Motions Re: Compliance with the Settlement Agreement ("David Decl.").

subscribers to access the programming on their computers or mobile devices. (Id. ¶ 22.)

On October 10, 2010, plaintiffs initiated the above-captioned action, alleging that FilmOn was streaming their broadcast programming without their authorization, thereby infringing their exclusive copyrights in the programming under Sections 106(1)-(5) of the Copyright Act. (Id. ¶¶ 1-5.) Plaintiffs sought monetary damages and a permanent injunction against FilmOn's retransmission service. (Id.)

On November 8, 2010, plaintiffs moved for an order to show cause why this Court should not enter a preliminary injunction against FilmOn to prohibit it from streaming the broadcasts of any television stations owned or associated with plaintiffs, and a temporary restraining order against such acts (dkt. no. 10). On November 22, 2010, we heard oral argument and granted plaintiffs' application for a temporary restraining order ("TRO") (dkt. no. 8). Although we set briefing deadlines on the motion for a preliminary injunction on that date (see id.), briefing was ultimately stayed pending the completion of discovery (dkt. no. 38).

In July 2012, the parties reached an agreement to resolve the action, the full terms and conditions of which were set forth in a settlement agreement dated July 31, 2012. (See Settlement Agreement, Morrow Fin. Decl. Ex. 1 (the "Settlement

Agreement").) In relevant part, the Settlement Agreement, which refers to FilmOn.com, Inc. and David collectively as "FilmOn" (Settlement Agreement § 1), provided the following:

- Section 4.3. Within seven (7) calendar days of the Effective Date [July 31, 2012], FilmOn shall deliver to counsel for the Plaintiffs the sum of $1.6 million. . . . If Plaintiffs' counsel have not received complete payment of the $1.6 million sum within the time specified herein, then the Plaintiffs may bring a claim for breach in accordance with the provisions of this Agreement or may, in their sole and unreviewable discretion, declare this Agreement null and void.

- Section 4.4. The Court shall retain continuing jurisdiction over the Parties and the above captioned action to enforce this Agreement and the Stipulated Consent Judgment and Permanent Injunction entered in connection therewith.

- Section 4.6. FilmOn agrees that they and all of their then-current officers, directors, agents, servants, and employees, and all persons in active concert with or in active participation with or under the control of or controlling or in privity with FilmOn, will not violate (or fail to take any actions that would be required to comply with) the terms of the Permanent Injunction.

- Section 5.3. Within seven (7) days of the Effective Date, David shall cause his counsel to execute and file with the United States District Court for the Central District of California a Stipulation of Dismissal with prejudice of all of the claims in the matter of Alkiviades David, et al. v. CBS Interactive Inc., et ano., No. 11 Civ. 9437 (DSF) (C.D. Cal) (the "California action"), that David asserted or that could have been asserted against CBS Interactive Inc. . . . David shall not fund the California action in any way on or after the Effective Date. Within fourteen (14) calendar days of the Effective Date and at all times thereafter, David shall neither participate in, nor

support, nor promote, nor encourage participation in the California action in any way.

- Section 6.2. The Parties expressly agree that the United States District Court for the Southern District of New York shall retain continuing jurisdiction over the Parties and the Action for purposes of enforcing this Agreement and the Stipulated Consent Judgment and Permanent Injunction, and that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the United States District Court for the Southern District of New York.

- Section 12. In the event of a dispute arising out of or relating to the terms of this Agreement or the Stipulated Consent Judgment and Permanent Injunction . . ., the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs.

- Section 13. This Agreement . . . contains the entire agreement of the Parties relating to the subject matters addressed herein and may not be modified or amended except by a further document in writing and signed by the Parties. In executing this Agreement and making the settlement contained herein, none of the Parties is relying upon any promise, representation or statement not contained within this Agreement.

(Id.) David signed the Settlement Agreement both individually and in his capacity as CEO of FilmOn. (Id. at 11.)

The Settlement Agreement was conditioned upon this Court's entry of a stipulated consent judgment and permanent injunction prohibiting FilmOn from further infringing plaintiffs' copyrights. (Settlement Agreement, § 4.1.) Accordingly, on August 8, 2012, we entered the parties' Stipulated Consent

Judgment and Permanent Injunction (dkt. no. 49) (the "Injunction"), which permanently enjoined FilmOn:

> its affiliated companies, and all of its officers, directors, agents, servants, and employees, and all natural and corporate persons in active concert or participation or in privity with any of 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.

(Injunction ¶ 1.) The Injunction further provided that violation of its provisions would expose FilmOn and all other persons bound by its provisions to "all applicable penalties, including contempt of Court." (Id. ¶ 2.) Finally, it provided that "[t]his Court shall retain continuing jurisdiction over the Parties and the action for purposes of enforcing th[e] Stipulated Consent Judgment and Permanent Injunction and/or enforcing the Parties' Settlement Agreement." (Id. ¶ 4; see also Settlement Agreement, Morrow Decl. Ex. 1, ¶ 4.4.)

**B. Events Giving Rise to the Instant Motions**

By letter dated January 30, 2013, plaintiffs' counsel brought to the Court's attention certain information about FilmOn's failure to deliver the full payment due to them under section 4.3 of the Settlement Agreement. As plaintiffs' counsel informed us, on August 3, 2012, former counsel for FilmOn notified them that due to "unexpected international tax and

accounting complications," FilmOn would not be able to obtain the funds necessary to make the $1.6 million payment due on August 7, 2012. (Morrow Fin. Decl. Ex. 2, at 1.) Counsel for FilmOn explained that that, "[w]hile Mr. David is personally extremely well-situated financially, FilmOn.com, Inc. is in no position to make any sort of payment to speak of" and requested that the parties agree to an alternative payment schedule permitting FilmOn to complete payment by December 1, 2012. (Id.) Strangely, David wrote to plaintiffs' counsel on August 6, 2012 to advise them that FilmOn was planning to launch a broadcast station in Los Angeles for which it would spend approximately $50 million to promote. (Morrow Fin. Decl. Ex. 3, at 1.)

FilmOn's counsel ultimately delivered a single payment of $250,000 to plaintiffs' counsel on August 7, 2012. (Pl. Fin. Br. at 2.) Although plaintiffs' counsel did not accept or otherwise respond to FilmOn's proposed alternative payment schedule, plaintiffs' counsel accepted the initial $250,000 payment. FilmOn made no further payments before December 1, 2012, or at any time thereafter. (Id.) To date, plaintiffs have not received the remaining $1,350,000 due to them under section 4.3. (Id.)

In addition to the January 30, 2013 letter on behalf of all plaintiffs, counsel for CBS separately wrote to this Court to

address David's failure to remove from the Internet certain inflammatory videos and other material which they allege continues to encourage participation in the California action against CBS Interactive, in violation of section 5.3 of the Settlement Agreement. (See Pl. 5.3 Br. at 2.) Specifically, plaintiffs identified a video of David still available at the website www.cbsyousuck.com, in which he recites the following:

> Has your song, movie, software, literary work, or even a photograph been illegally distributed on the Internet through the software Limewire? Well, if it has, please sign the form below. You are cordially invited to join this class action lawsuit against CNET[2] for distributing the software with malicious intent to infringe on your copyright. The damages are in the many billions of dollars and you could be a part of that award.

http://www.cbsyousuck.com (last visited September 9, 2013). The phrase "LEGAL FEES ALREADY PAID" appears as an overlay to the video. (Id.; see Morrow 5.3 Decl. Ex. 1, at 1.) Plaintiffs have since identified further material which they allege violates section 5.3 on the following websites:

http://www.youtube.com/watch?v=1onY5-NvGf0&feature=plcp;

http://www.youtube.com/watch?v=exZzv7IBVcg&feature=plcp;

http://www.youtube.com/watch?v=HggFApQauds&feature=plcp;

http://www.twitter.com/cbsyousuck.

[2] CNET Networks, Inc. and CBS Interactive Inc. are co-defendants in the California action from which David was required to withdraw pursuant to section 5.3 of the Settlement Agreement. See Compl., Alkiviades David, et al. v. CBS Interactive Inc., et ano., No. 11 Civ. 9437 (DSF) (C.D. Cal Nov. 14, 2011) (dkt. no. 1).

Finally, plaintiffs allege that FilmOn's recently launched video on demand ("VOD") service infringes plaintiffs' copyrights in their broadcast television programming in violation of the Injunction. The VOD service provides subscribers with access to an archive of previously televised programs for streaming "on demand," or at the time of their choosing, via the website www.filmon.com and the company's associated iPhone and Android applications. (Pl. Contempt Br. at 2.)

On March 20, 2013, upon learning about the VOD service, counsel for CBS wrote to defense counsel to inform him that FilmOn was making such content available without plaintiffs' consent, and to demand that FilmOn immediately remove the copyrighted programming from its website. (Morrow Contempt Decl. Ex. 3, at 1-2.) Defense counsel responded by letter dated March 26, 2013, claiming that the VOD service did not violate the Injunction because FilmOn had acquired valid licenses to the programming from an unidentified third party provider. (Morrow Contempt Decl. Ex. 4, at 1-2.) Plaintiffs requested that defense counsel identify the third party from whom FilmOn purportedly licensed plaintiffs' copyrighted programming and produce copies of such licensing agreements to plaintiffs' counsel, but to date, FilmOn has done neither. Plaintiffs maintain that no such third party provider with the authority to

license their copyrighted content for VOD use exists. (Pl. Contempt Br. at 2.)

The parties have made efforts to resolve the above issues informally, but to no avail. Thus, on July 2, 2013, plaintiffs moved to compel FilmOn's and David's compliance with the financial terms of the Settlement Agreement, and with section 5.3 of that Agreement. They further moved this Court for an order to show cause why FilmOn should not be found in civil contempt for its violation of the Injunction. FilmOn submitted its opposition papers on July 15, 2013, and plaintiffs replied on July 29, 2013. We held oral argument on the pending motions on August 15, 2013 ("oral argument").[3]

## DISCUSSION

### A. Motion to Compel Compliance with Financial Terms of Settlement Agreement

Plaintiffs have moved to compel Filmon's compliance with section 4.3 of the Settlement Agreement. (Pl. Fin. Br. at 1.) FilmOn and David, as a signatory and as FilmOn's CEO, do not dispute that they failed to deliver the full $1.6 million sum due to plaintiffs' counsel on or before August 7, 2012. (See Settlement Agreement § 4.3; see also id. § 9 ("The parties each agree to perform all acts and execute, deliver and file all documents necessary to carry out the provisions, purposes and

[3] References preceded by "Tr." refer to the transcript of oral argument.

intent of this Agreement.") Instead, they advance two arguments which they assert relieve them of the obligation to comply.[4] First, they argue that defense counsel's August 3, 2012 letter proposing an alternate payment schedule constituted an offer, which plaintiffs accepted by retaining the $250,000 partial payment, thereby modifying the financial terms of the Settlement Agreement. (Def. Fin. Opp. at 1; see Tr. at 15-16.) As a matter of contract law, that argument is unavailing for several reasons. The Settlement Agreement itself precludes modification of its terms other than by a written document signed by all parties, which no one suggests exists. (See Settlement Agreement § 13.) Moreover, under New York law,[5] a written contract containing an integration clause cannot be modified except as provided therein. See N.Y. Gen. Oblig. L. §

[4] Relying on sections 4.3 and 6.2 of the Settlement Agreement, FilmOn further asserts that plaintiffs' motion is procedurally improper because those sections require that plaintiffs file a separate breach of contract claim to compel compliance. (Def. Fin. Opp. at 8-9.) However, FilmOn's argument is refuted by a plain reading of those sections, quoted below, which permit, but do not require, a separate action to be filed upon FilmOn's failure to deliver full payment by the agreed upon date. (See Settlement Agreement § 4.3 ("If Plaintiffs' counsel have not received complete payment of the $1.6 million sum within the time specified herein, then the Plaintiffs may bring a claim for breach in accordance with the provisions of this Agreement") (emphasis added); see id. § 6.2 ("The Parties expressly agree that the United States District Court for the Southern District of New York shall retain continuing jurisdiction over the Parties and the Action for purposes of enforcing this Agreement and the Stipulated Consent Judgment and Permanent Injunction, and that all actions or proceedings arising in connection with this Agreement shall be tried and litigated exclusively in the United States District Court for the Southern District of New York. The aforementioned choice of venue . . . .") (emphasis added).)

[5] The Settlement Agreement requires that all questions with respect to the construction of its provisions, and the rights and liabilities of the parties thereto, be governed by and construed in accordance with the laws of the State of New York. (See Settlement Agreement § 12.)

15-301(1) (a "written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed"); see also Bozetarnik v. Mahland, 195 F.3d 77, 83 (2d Cir. 1999). Thus, plaintiffs' acceptance of partial payment could not, on its own, modify the terms of the Settlement Agreement. Moreover, from a policy perspective, acceding to FilmOn's argument would undermine the enforceability of contracts generally, as it would permit a party to enter into a binding contract and later modify its terms unilaterally.

FilmOn also submits that its full performance under the financial terms of the Settlement Agreement was excused when the Fox plaintiffs breached the Agreement's implied covenant of good faith and fair dealing. (Def. Fin. Opp. at 6-8.) FilmOn points to letters Fox wrote in October 2012 to various companies, including Lenovo, Apple, Microsoft, and Google, to inform them of its belief that FilmOn was retransmitting its broadcast signals without authorization, in violation of the Injunction in this action. (Id.) However, FilmOn maintains that, because the service it employed at the time allowed subscribers to access their own unique, remotely-located antenna, enabling them to create unique copies of the broadcast programming, the technology about which Fox complained was separate and distinct

from that contemplated by the Injunction, and indeed had been deemed non-infringing within the Second Circuit. (Def. Fin. Opp. at 2; see David Decl. ¶ 2.) Thus, FilmOn contends, Fox misrepresented its performance under the Settlement Agreement by publicly condemning a technology which it knew to be lawful, thereby breaching the implied covenant by "engag[ing] in a course of action aimed at depriving FilmOn of the benefit of the Agreement." (Def. Fin. Opp. at 2.)

We find that argument unpersuasive because there is ample reason to conclude that Fox had a good faith basis to believe that FilmOn's technology violated the Injunction. As an initial matter, the Injunction clearly prohibits FilmOn from "infringing, by any means, directly or indirectly," any of plaintiffs' copyrights in their broadcast television programming. (Injunction ¶ 1.) Its scope is in no way limited to the precise form of infringement that precipitated the filing of this lawsuit.

Furthermore, at the time Fox wrote the letters at issue, the state of the law with respect to the retransmission of television broadcast signals was in flux. While Judge Alison Nathan of the Southern District of New York had denied the networks' motion to preliminarily enjoin an antenna-based retransmission service in Am. Broadcasting Cos., Inc., et al. v. Aereo, Inc., et al., 874 F. Supp. 2d 373, 405 (S.D.N.Y. 2012),

on July 11, 2012, the Second Circuit had not yet ruled, and in fact did not affirm that denial until April 1, 2013, some six months after Fox's letters. See WNET, Thirteen v. Aereo, Inc., 712 F.3d 676 (2d Cir. 2013); see also WNET, Thirteen v. Aereo, Inc., Nos. 12-2786, 12-2807, 2013 WL 3657978, at *1 (2d Cir. July 16, 2013) (denying plaintiffs' petition for rehearing en banc). Thus, as of October 2012, there was no binding Second Circuit precedent concerning the legality of FilmOn's technology.[6] Contrary to FilmOn's assertions, its antenna-based technology was not "clearly operat[ing] within the parameters established by leading Second Circuit precedent" at the time that Fox sent the letters at issue, and we find that Fox did not in fact misrepresent FilmOn's performance under the Settlement Agreement.

Nor do we accept the argument that Fox's failure to bring an enforcement action against FilmOn indicates that it did not truly believe FilmOn's antenna-based technology infringed its copyrights. (Def. Fin. Opp. at 2; see Tr. at 19-20.) No provision in the Settlement Agreement requires plaintiffs to bring suit in order to enforce its terms or those of the

[6] Moreover, on February 22, 2011, this Court granted plaintiffs' motion for a preliminary injunction in WPIX, Inc. et al. v. ivi, Inc., 765 F. Supp. 2d 594, 622 (S.D.N.Y. 2011). The conduct enjoined in that case was similar to that used by FilmOn at the time the parties entered into the Settlement Agreement; ivi was capturing over-the-air broadcasts of network programming and simultaneously streaming those signals over the internet to its subscribers. See id. at 598 and n.2.

Injunction against FilmOn. Moreover, it was not unreasonable for Fox to await the outcome of the appeal in Aereo, which it could anticipate would help clarify the law, at least within the Second Circuit.

Notably, plaintiffs have brought suit in courts outside of the Second Circuit where the issue remains unresolved. See, e.g., Fox Television Stations, Inc., et al. v. FilmOn X LLC, et al., No. 13-cv-00758-RMC, 2013 WL 4763414, at *19 (D.D.C. Sept. 5, 2013) (granting injunction); Fox Television Stations, Inc., et al. v. BarryDriller Content Sys., PLC, et al., 915 F. Supp. 2d 1138, 1150-51 (C.D. Cal. 2012) (granting injunction), appeal docketed sub nom., Fox Television Stations, Inc. v. Aereokiller, LLC, et al., Nos. 13-55156, 13-55157, 13-55226, 13-55228 (9th Cir. filed Jan. 25, 2013). The District Courts for the District of Columbia and the Central District of California have both resolved the issue in plaintiffs' favor; the Central District of California case is currently pending before the Court of Appeals for the Ninth Circuit, where oral argument was held on August 27, 2013. Indeed, Fox's infringement suit against BarryDriller Content Systems had been filed before it wrote the letters at issue here, thereby affirming and publicizing its belief that FilmOn's service was unlawful. See Compl., Fox Television Stations, Inc., et al. v. BarryDriller Content Sys., PLC, et

al., No. CV-12-6921-GW(JCx), 2012 WL 3581895 (C.D. Cal. filed Aug. 10, 2012).

In sum, none of the above arguments persuades us that Fox did not honestly believe FilmOn was making its copyrighted programming available to subscribers in violation of the Injunction. As a result, we conclude that Fox did not breach the implied covenant, and FilmOn is not excused from its obligation to pay plaintiffs the full amount due to them under the financial terms of the Settlement Agreement.[7]

**B. Motion to Compel Compliance with Section 5.3 of Settlement Agreement**

CBS next seeks an order compelling David to remove certain inflammatory videos and other material from websites he controls, consistent with his obligations under section 5.3 of the Settlement Agreement.

David does not challenge the enforceability of section 5.3, nor does he dispute that the video currently accessible at button 3 on www.cbsyousuck.com "support[s]," "promote[s]," or "encourage[s] participation in" the California action within the meaning of section 5.3. Rather, he argues that section 5.3 was

[7] Further, we note that FilmOn was effectively in breach of section 4.3 of the Settlement Agreement as of August 8, 2012. Thus, even assuming arguendo that Fox breached the implied covenant on October 30, 2012, when the letters at issue were sent, that breach would not have excused FilmOn's failure to perform months earlier. Cf. Versatile Housewares & Gardening Sys., Inc. v. Thill Logistics, Inc., 819 F. Supp. 2d 230, 237 (S.D.N.Y. 2011) (noting that under New York law, a party claiming breach of contract must prove, inter alia, that it has "in all respects complied with [its] obligations").

drafted to apply only prospectively, thereby rendering any video he created before the Settlement Agreement's effective date outside its scope. (See David 5.3 Opp. at 3.) However, that argument misreads the language of section 5.3. The provision clearly states that "[w]ithin 14 calendar days of the Effective date and at all times thereafter," David must "neither participate in, nor support, nor promote, nor encourage participation in the California Action in any way." (Settlement Agreement § 5.3.) Based on its plain meaning, that language is clearly intended to prevent David from engaging in any activity which encourages or otherwise supports participation in the California action in an ongoing fashion, regardless of whether the activity began before or after the effective date of the Settlement Agreement. Indeed, since the video accessible at www.cbsyousuck.com served as inspiration for the inclusion of section 5.3, it would be illogical to exclude it from the provision's scope simply because it predates the Agreement's effective date. Our interpretation applies with particular force to inflammatory videos posted online which, unless taken down, remain publicly accessible in perpetuity. It is the public's continuing access to the video, and not David's one time creation of it, which causes the harm addressed in section 5.3.

David further argues that section 5.3 does not require him to affirmatively remove material whose existence predates the effective date of the Settlement Agreement, and complains that requiring him to locate all such material would place an undue burden upon him. (David 5.3 Opp. at 3.) We disagree. Courts possess broad discretion to require a party to take affirmative steps when such steps are required to bring that party into compliance with a court order. See Perfect Fit Indus., Inc. v. Acme Quilting Co., Inc., 673 F.2d 53, 56-57 (2d Cir. 1981), cert. denied, 459 U.S. 832 (1982); see also Clissuras v. City Univ. of New York, No. 02 Civ. 8310 (SAS), 02 Civ. 8138 (SAS), 2005 WL 3288097, at *2 (S.D.N.Y. Dec. 2, 2005). It is perfectly reasonable to order David to bring himself into compliance with section 5.3 by requiring him to remove all videos within his control which violate the provision.

Moreover, it surely imposes no undue burden on David to require him to remove content which CBS has specifically identified and located for him. Indeed, David is the individual most capable of ensuring the removal of the material at issue, given that the websites CBS identifies are within his control and he possesses the ability, which CBS lacks, to remove video content from them at his discretion.

For those reasons, we grant CBS's motion to compel David's compliance with section 5.3 of the Settlement Agreement.

**C. Motion to Hold FilmOn in Contempt of Court for Violation of Permanent Injunction**

Finally, CBS alleges that FilmOn's VOD service makes plaintiffs' copyrighted programs available for streaming to FilmOn subscribers who visit www.filmon.com or use the company's iPhone and Android applications, which falls within the Injunction's prohibition of "streaming over mobile telephone systems and the Internet the broadcast television programming in which Plaintiffs own the copyrights." (Injunction ¶ 1.) Thus, they move for an order holding FilmOn and David, as its CEO, in contempt of Court for violating the terms of the Injunction.

"A party may be held in civil contempt for failure to comply with a court order if '(1) the order the contemnor failed to comply with is clear and unambiguous; (2) the proof of noncompliance is clear and convincing; and (3) the contemnor has not diligently attempted to comply in a reasonable manner.'" Utica College v. Gordon, 389 Fed. App'x 71, 72 (2d Cir. 2010) (quoting Paramedics Electromedicina Comercial, Ltda v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004)). Upon finding that a party is in civil contempt, this Court retains "broad discretion to fashion an appropriate coercive remedy . . . based on the nature of the harm and the probable effect of alternative sanctions." City of New York v. Venkataram, No. 06 Civ. 6578 (NRB), 2012 WL 2921876, at *3 (July

18, 2012) (quoting Equal Employment Opportunity Comm'n v. Local 28 of the Sheet Metal Workers Int'l Ass'n, 247 F.3d 333, 336 (2d Cir. 2001).

Plaintiffs move for contempt based solely on the VOD service, which FilmOn concedes falls within the broad scope of the Injunction's clear and unambiguous prohibition on "streaming over mobile telephone systems and the Internet." Tr. at 4-5; (see David Decl. ¶¶ 2-3, 11-12 (distinguishing between FilmOn's antenna-based service, which was "designed to not violate the injunction," and FilmOn's VOD service, which utilizes more traditional streaming technology).) Thus, the only issues for resolution are whether FilmOn has complied with the Injunction or made diligent attempts to do so.

To that end, FilmOn submits that it does not infringe plaintiffs' copyrights because it has "acquired the rights to display content featured in its VOD service from third parties, which have represented to FilmOn that they have the valid rights to license." (David Decl. ¶ 3.) However, FilmOn has persistently declined to identify the third party from whom it purportedly obtained those rights, despite having had ample opportunity to do so. No such information was provided in response to plaintiffs' March 20, 2013 cease and desist letters, in which FilmOn asserted that they had "acquired valid rights to display the content cited in [the] letters." (Morrow Contempt

Decl. Ex. 4, at 1.) FilmOn further failed to identify the third party provider or provide copies of the licensing agreements in response to the filing of plaintiffs' motion for contempt. Finally, at oral argument, we ordered FilmOn to produce the licensing agreements to plaintiffs on or before August 21, 2013, but they have failed to produce them despite that court order. Moreover, although defense counsel has repeatedly indicated that he would disclose the third party provider's identity subject to a protective order, he has not done so, despite the entry of a protective order in this case on June 3, 2011, more than two years ago (dkt. no. 35).

In sum, FilmOn has offered no evidence whatsoever that they have validly acquired the right to stream plaintiffs' copyrighted programming. Because plaintiffs assert that there is no third party provider with authority to license its copyrighted programming (see Pl. Contempt Br. at 2), we can only assume that no such licensing agreements exist, and any representations to the contrary can hardly be deemed to have been made "in good faith." (Def. Contempt Opp. at 4.) For those reasons, we find FilmOn and David in contempt for violating the Stipulated Consent Judgment and Permanent Injunction.

**CONCLUSION**

Based on the foregoing, we grant plaintiffs' motions to compel FilmOn's compliance with section 5.3 and the relevant financial terms of the Settlement Agreement and find FilmOn in civil contempt of court for its violation of the Injunction. FilmOn and David are hereby ordered to forthwith deliver to plaintiffs' counsel the sum of $1,350,000, plus interest at the statutory rate, the costs of collection, and reasonable attorneys' fees. Plaintiffs' counsel shall submit on notice a proposed form of judgment to this Court on or before September 17, 2013. FilmOn's counter proposal, if any, shall be filed no later than September 20, 2013. The Clerk of the Court is directed to terminate the motions pending at docket nos. 54, 65, and 68.

**SO ORDERED.**

DATED: New York, New York
September 10, 2013

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Copies of the foregoing Order have been mailed on this date to the following:

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