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17 **UNITED STATES DISTRICT COURT**  
18 **CENTRAL DISTRICT OF CALIFORNIA**

19 **PARAMOUNT PICTURES**  
20 **CORPORATION, *et. al.,***

21 **Plaintiffs,**

22 **v.**

23 **REPLAYTV, INC., *et. al.,***

24 **Defendants.**

CASE NO. CV 01 -09358 FMC (Ex)  
(Consolidated with Case No. CV 02-04445 FMC (Ex))

**DECLARATION OF CINDY A. COHN IN  
SUPPORT OF NEWMARK PLAINTIFFS'  
PORTION OF JOINT STIPULATION FOR  
ACCESS TO DOCUMENTS PRODUCED BY  
THE ENTERTAINMENT COMPANY  
PLAINTIFFS**

25  
26  
27 **AND CONSOLIDATED ACTIONS.**

28

1 I, Cindy A. Cohn hereby declare:

2 1. I am an attorney at law, licensed to practice before this Court, the 9th  
3 Circuit Court of Appeals, the United States Supreme Court and all of the courts of  
4 the State of California, among others. I am attorney of record for Plaintiffs herein.  
5 The facts stated here are known to me of my own personal knowledge. If called  
6 upon to testify thereto I could and would competently do so.

7 2. I am the Legal Director of and General Counsel to the Electronic  
8 Frontier Foundation (EFF), a position I have held for over two years. Prior to that,  
9 for approximately 10 years, I was an attorney in private practice in San Mateo,  
10 California.

11 3. For six years prior to joining EFF, I served as outside cooperating  
12 attorney for the EFF in a case entitled *Bernstein v. Department of Justice, et. al.*  
13 brought in the Northern District of California and the 9th Circuit Court of Appeals.  
14 In total, I have been involved in litigation on behalf of and with the EFF for over  
15 eight years.

16 4. EFF currently has five full-time attorneys. Neither EFF as a whole nor  
17 any of its individual attorneys has ever been sanctioned for misusing documents,  
18 violating protective orders or misusing the discovery process for ends unrelated to  
19 litigation. Indeed, this is the first time any such issue has ever been raised before a  
20 court in any case handled by the EFF.

21 **The Electronic Frontier Foundation**

22 5. EFF has itself been in existence since 1990. It is a registered 501(c)(3)  
23 nonprofit organization under federal law with approximately 6,000 paid members.  
24 EFF's mission is to help ensure that the rights of citizens survive intact into  
25 cyberspace. EFF was founded by several Internet pioneers who recognized that the  
26 digital revolution would invariably result in questions about how civil and individual  
27 rights apply in new technological situations.

28

1           6.     As part of its goal, EFF provides free legal services to individuals  
2 whose rights are threatened online. Since its founding, EFF has focused on  
3 representing clients in litigation. EFF has often been called the "ACLU of the  
4 Internet" as a shorthand way to describe its legal services role. As stated on its  
5 website:

6                   "Representing the Rights of People

7                   EFF has a well-earned reputation among "netizens" for being the  
8 premier source of information about freedom in cyberspace. For over  
9 11 [now 12] years, EFF has been providing legal counsel and assistance  
10 to users of new technologies who get caught on the front line where  
11 technology and law collide."

12 <<http://www.eff.org/abouteff.html>>. EFF's agenda and charitable purpose includes  
13 giving free legal services to those who are at risk of losing their rights "where  
14 technology and law collide."

15           7.     EFF's agenda includes a representing individuals and organizations on  
16 broad range of issues involving technology and civil liberties, with specific focus on  
17 the First Amendment, Fourth Amendment and privacy. EFF handled the first case  
18 holding that e-mail is subject to the same standards for search and seizure by the  
19 government as mail on paper. *Steve Jackson Games v. U.S. Secret Service*, 36 F.3d  
20 457 (5th Cir. 1994). EFF was co-counsel in the first case where the U.S. Supreme  
21 Court established that the Internet is a fully protected medium of expression. *Reno v.*  
22 *ACLU*, 521 U.S. 844 (1997). EFF represented a mathematics professor in the case  
23 establishing the computer programs are protected expression for purposes of First  
24 Amendment analysis, which involved challenge to the U.S restrictions on the export  
25 of encryption software. *Bernstein v. United States Department of State*, 922 F.  
26 Supp. 1426, 1435 (N.D. Cal. 1996). EFF has represented several anonymous  
27 Internet speakers whose identity was sought by those who disagreed with their  
28 speech and was counsel in the leading federal case establishing that the First

1 Amendment protects anonymous speech online. *Doe v. 2TheMart Inc*, 140  
2 F.Supp.2d 1088 (W.D. Wash. 2001).

3 8. All of these cases involved significant press coverage. For each, the EFF  
4 was (and is) also involved in non-litigation work on the same subjects. For example,  
5 during the *Bernstein* case, I testified before a Senate Committee about the encryption  
6 export regulations at issue in the case and was involved in several high-level  
7 meetings with officials of the Departments of Commerce, State and Justice about the  
8 regulations and the broader problems they were causing for scientists and business  
9 interests.

10 9. EFF's work in on the subject of intellectual property online is grounded  
11 in the same principles that inform our work in: that individual rights online should  
12 be the same as those enjoyed offline.

13 10. EFF's current Board of Directors includes, among others, leading law  
14 professors (Professor Lawrence Lessig of Stanford Law School, and Professor  
15 Pamela Samuelson of Boalt Hall School of Law, University of California, Berkeley)  
16 and one of the acknowledged "fathers" of the Internet, Professor David Farber of the  
17 University of Pennsylvania, former Chief Technologist of the Federal  
18 Communications Commission. Past Board Members have included some of the  
19 founders of leading technology companies, including Mitchell Kapor, EFF founder  
20 and the founder of Lotus Software, Steve Wozniak, co-founder of Apple Computers,  
21 George Vradenberg, Executive Vice President of Defendant AOL/Time Warner and  
22 John Place, former general counsel to Yahoo!

23 **EFF Has Never Been Found to Have Violated A Protective Order or**  
24 **Misused the Discovery Process to Obtain Confidential Information**

25 11. The current case, *Newmark v. Turner*, marks the third time that EFF has  
26 been adverse to many of the Entertainment Company Defendants in litigation. EFF  
27 was counsel for the Defendants and so adverse to all eight of the major movie  
28 studios from 2000-2002 in *Universal v. Corley* 273 F.3d 429 (2nd Cir. 2001) before

1 the Southern District of New York and 2nd Circuit Court of Appeals. EFF is co-  
2 counsel to MusicCity/Streamcast and so adverse to twenty-eight major movie and  
3 recording studios (plus five music publishers) in *MGM v. Grokster*, Case No. CV  
4 01-0851 SVW consolidated with CV 01-09923 SVW, currently pending in this court  
5 before Judge Wilson.<sup>1</sup>

6 12. In both of these cases we have entered into protective orders with the  
7 studios in order to protect their confidential business records during the discovery  
8 process. In both of those cases confidential business records of the studios have been  
9 reviewed by me and the other EFF attorneys and stored at our offices.

10 13. The studios have made no allegation in either the *Universal v. Corley*  
11 or *MGM v. Grokster* cases that EFF has misused the confidential information of the  
12 movie studios or that EFF Attorneys have inadvertently disclosed any protected  
13 information. The studios have also never before argued that EFF has not fulfilled its  
14 ethical duties to work on behalf of its clients or that it has conducted litigations in  
15 order to gain access to confidential information. In fact, the papers recently filed by  
16 the Entertainment Companies in Opposition to the Motion to Consolidate are the  
17 first we have heard of this rather bizarre and unsubstantiated allegation.

18 **The Current Dispute Concerning Access To Discovery Materials**

19 14. Since August 15, 2002, the date the Newmark case was consolidated with  
20 the ReplayTV case, the three EFF Attorneys and the fourth named attorney of record  
21 for the Newmark Plaintiffs, Mr. Ira Rothken, have been attempting to join the  
22 existing Protective Order as they promised in seeking consolidation.  
23

24  
25 <sup>1</sup> Similarly, EFF is currently under a protective order in a California trade secrets case with an  
26 organization created by the movie studios, DVD CCA. In that case, EFF, as counsel for the  
27 Defendant, has been given access to highly confidential information concerning the protection  
28 scheme for DVD movies. *DVD CCA v. Bunner et. al.*, (6th Dist. 2001) 94 Cal.App.4th 648, rev.  
granted 117 Cal.Rptr.2d 167 (February 20, 2002). Once again, there has been no allegation, much  
less a substantiated claim, that EFF has mishandled confidential information in that case.

1           15.       I understand and believe that Mr. Rothken commenced the meet and  
2 confer process with the Entertainment Companies on August 16, 2002.

3           16.       On August 28, 2002, Mr. Rothken told me that one of the Entertainment  
4 Company counsel, Mr. Cooper of Proskauer Rose, had advised that the  
5 Entertainment Company Plaintiffs considered that EFF's Attorneys should be treated  
6 as "in-house counsel" under the Protective Order. This would have had the effect of  
7 restricting access to the "Restricted" and "Highly Restricted" designated documents.  
8 I asked Mr. Rothken to convey to the Entertainment Company Plaintiffs that this  
9 position was unacceptable.

10          17.       On September 3, 2002 Mr. Rothken sent me a copy of a draft  
11 stipulation prepared by the Entertainment Companies' counsel that included this  
12 restriction on EFF's access to documents produced by the Entertainment Company  
13 Plaintiffs but which also preserved the opportunity for a motion by EFF to lift the  
14 restriction.

15          18.       After discussion among co-counsel, we decided that this provision was  
16 insufficient because it would not bring the matter before the Magistrate with  
17 sufficient time and because it contained restrictions on Mr. Rothken that would  
18 prevent initiation of the document review process by *any* Newmark counsel. At  
19 approximately noon on September 5, 2002, I faxed a letter to all of the parties in this  
20 action notifying them of our intent to bring this application before this court on  
21 September 6, 2002.

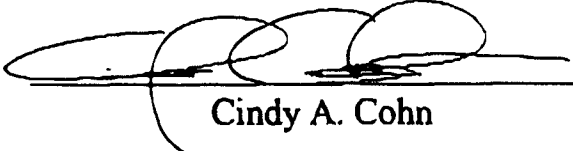
22          19.       On September 6, 2002, I spoke with Mr. Rader of O'Melveny & Myers,  
23 counsel for the AOL/ Time Warner plaintiffs, and Mr. Rotstein of McDermott, Will  
24 & Emery, counsel for the Columbia plaintiffs. They advised that they would oppose  
25 EFF's proposed ex parte application for relief but also suggested that we find a way  
26 to present this issue under Local Rule 37 rather than as an ex parte matter. I agreed.

27          20.       On September 16, 2002, Mr. Rader and Mr. Rotstein telephoned me  
28 and stated that the Entertainment Companies would be prepared to allow Mr.

1 Rothken access to *all* categories of produced documents if the EFF Attorneys would  
2 agree to sign an interim protective order and stipulation precluding EFF's access to  
3 all documents designated as "Restricted" and "Highly Restricted" under the existing  
4 Protective Order. This represented a change in the Entertainment Company  
5 Plaintiffs' position concerning access by Mr. Rothken. They also agreed to an  
6 expedited schedule for consideration of this matter by the Court.

7 21. In the interests of obtaining access for one of the Newmark Plaintiffs'  
8 counsel to review the documents produced before the cut-off for propounding  
9 further discovery and in presenting this matter to the Court in accordance with the  
10 Local Rules, EFF and Mr. Rothken agreed to sign the interim protective order and  
11 stipulation with the Entertainment Company Plaintiffs, which would allow Mr.  
12 Rothken to begin reviewing discovery materials. The interim stipulation, a copy of  
13 which is attached to Mr. Rothken's Declaration as Exhibit B, was signed by all  
14 parties and filed with the Court on September 20, 2002.

15 I declare under penalty of perjury that the foregoing statements are true and  
16 correct. I execute this declaration in San Francisco, California on September 30,  
17 2002.

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Cindy A. Cohn