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14

15 **UNITED STATES DISTRICT COURT**
CENTRAL DISTRICT OF CALIFORNIA

16 PARAMOUNT PICTURES CORPORATION,) Case No. 01-09358 FMC (Ex)
17 *et al.*,)
18 Plaintiffs,) **FIRST AMENDED COMPLAINT**
19 v.)
20 REPLAYTV, INC., *et al.*,)
21 Defendants.)
22 _____)
23 AND CONSOLIDATED ACTIONS.)

24 **INTRODUCTION**

25 1. This is a class action lawsuit seeking a declaration that no copyright infringement
26 occurs when consumers use the ReplayTV digital video recorder (“ReplayTV DVR”) to skip
27 commercials, send certain recorded programming between devices and record programming to
28 watch later or multiple times. The specific facts that give rise to this action include Defendants’

1 actions in bringing suit asserting secondary copyright infringement against the manufacturer of the
2 digital video recorder that allows these uses, and by doing so, both implicitly and expressly
3 threatening the use of that device by its customers; Defendants' repeated assertions, both in this
4 litigation and in public speeches widely covered by the press, that consumers are committing
5 copyright infringement when they use these devices; Defendants' efforts to obtain information
6 about consumer owners' use of ReplayTV DVRs and Defendants' failure to grant a covenant not to
7 sue consumer owners of ReplayTV DVRs.

8 2. The effect of Defendants' conduct has been to cast a pall over the use by consumers
9 of their expensive ReplayTV DVRs for those purposes, impairing the value of these devices both to
10 the current owners and in the resale market. It has also contributed to the bankruptcy through
11 litigation of the manufacturer of the ReplayTV DVR and the subsequent withdrawal of digital
12 video recorders with the features described below from the market by the current owner of the
13 ReplayTV assets. In the absence of any judicial clarification of the legality of the use of the
14 ReplayTV DVR, the legal uncertainty has created a chill over the creation of similar devices by
15 other manufacturers, thus depriving consumers of the benefits of these innovative technologies.

16 3. Plaintiffs in this case, Craig Newmark, Phil Wright, Glenn Fleishman and Thomas
17 White (collectively "Plaintiffs"), represent a class of consumer owners of ReplayTV DVRs who
18 use or wish to use their ReplayTV DVRs in a noncommercial manner. The ReplayTV DVRs have
19 three features that Defendants claim infringe their copyrights:

- 20 a) A "Commercial Advance" feature that permits users to skip through commercials;
- 21 b) "Space shifting" features that include both a "Send Show" feature that allows users
22 to transfer free, over the air, recorded television programs from one device owned or
23 used by them to another device or ReplayTV DVR, and a streaming functionality
24 that permits recorded or live television programming to be streamed between
25 networked ReplayTV DVRs or devices within a household; and
- 26 c) A "librarying" feature that allows a user to watch a time-shifted television program
27 more than once, or store the program for any period of time.

28 Hereinafter, these three features will be referred to collectively as the "Features." All of the

1 Features depend upon the continued support of the ReplayTV service by the owner of the
2 ReplayTV assets, since Plaintiffs are informed and believe that each of them could be removed
3 through a remote “downgrade” of the machine by the owner of the ReplayTV service.

4 4. Upon information and belief, all DVRs in the 4000, 4500 and 5000 series
5 manufactured or sold by ReplayTV, Inc. include these Features. Regardless of the particular model,
6 each such DVR is identified as a “ReplayTV DVR” herein. Owners of ReplayTV DVRs have been
7 publicly accused of “theft” of copyrighted materials, threatened with invasions of privacy and
8 ruinous litigation, and threatened with the loss of beneficial use of their ReplayTV DVRs by the
9 Defendants based upon their use of the Features.

10 5. Plaintiffs bring this Complaint and declaratory action to clarify the rights of
11 themselves and all other ReplayTV DVR owners to use the capabilities existing in those devices, to
12 ascertain which of the Features and uses of the Features of the ReplayTV DVR are lawful under
13 the Copyright Act, to ascertain which Features and uses of the Features cannot serve as a basis for
14 liability and damages against them, and to prevent the Defendants from interfering with Plaintiffs’
15 ongoing enjoyment and use of their ReplayTV DVRs either directly or through threats against,
16 discussions with or an understanding with the current owner of the ReplayTV service.

17 **JURISDICTION AND VENUE**

18 6. This court has subject matter jurisdiction over the federal claims pursuant to the
19 Copyright Act (17 U.S.C. §§ 101 et seq.), 28 U.S.C. §§ 1331 and 1338 and the Declaratory
20 Judgment Act (28 U.S.C. § 2201). This court has supplemental subject matter jurisdiction over
21 state law claims pursuant to 28 U.S.C. § 1367(a) in that the state law claims form part of the same
22 case or controversy as the federal claims.

23 7. Plaintiffs are informed, believe and thereon allege that defendants, and each of
24 them, have sufficient contacts with this district generally and, in particular, with the events herein
25 alleged, that each such defendant is subject to the exercise of jurisdiction of this court over the
26 person of such defendant and that venue is proper in this judicial district.

27 8. Plaintiffs are informed, believe and thereon allege that, based on the places of
28 businesses of the defendants identified above and/or on the national reach of defendants, and each

1 of them, a substantial part of the events giving rise to the claims herein alleged occurred in this
2 district and that defendants, and each of them, and/or an agent of each such defendant, may be
3 found in this district.

4 **PARTIES**

5 9. Plaintiff CRAIG NEWMARK is, and at all relevant times herein mentioned was, a
6 resident of the State of California and an owner of a ReplayTV DVR.

7 10. Plaintiff PHIL WRIGHT is, and at all relevant times mentioned herein was, a
8 resident of the State of California and the owner of a ReplayTV DVR.

9 11. Plaintiff GLENN FLEISHMAN is, and at all relevant times herein mentioned was, a
10 resident of the State of Washington and the owner of a ReplayTV DVR.

11 12. Plaintiff THOMAS WHITE is, and at all relevant times herein mentioned was, a
12 resident of the State of Virginia and the owner of a ReplayTV DVR.

13 13. Each Plaintiff has a personal stake in the issues involved in this litigation and has a
14 reasonable apprehension of being sued by the Defendants for copyright infringement for what they
15 pejoratively characterize as the “theft” of television shows. Each Plaintiff is participating in this
16 litigation to protect his own interests, and to protect the interests of other similarly situated
17 consumer owners of ReplayTV DVRs who are threatened by the actions of the Defendants.

18 14. Each Plaintiff will lose a significant amount of the value of his ReplayTV DVR
19 upon resale due to the chilling effect and apprehension of liability created by the Defendants’
20 claims of copyright infringement.

21 15. Each Plaintiff faces the direct risk of the loss of beneficial use of his personal
22 property, the ReplayTV DVR, if the new owner of the ReplayTV service disables the relevant
23 ReplayTV DVR Features under threat from, at the behest of, or as part of a negotiated agreement
24 with the Defendants.

25 16. Plaintiffs are informed, believe and thereon allege that defendant TURNER
26 BROADCASTING SYSTEM, INC. is a Georgia corporation with its principal place of business in
27 Atlanta, Georgia and that defendant TURNER BROADCASTING SYSTEM, INC. engages in
28 substantial business in this judicial district and maintains substantial contacts within this judicial

1 district.

2 17. Plaintiffs are informed, believe and thereon allege that defendant DISNEY
3 ENTERPRISES, INC. is a Delaware corporation with its principal place of business in Burbank,
4 California.

5 18. Plaintiffs are informed, believe and thereon allege that defendant PARAMOUNT
6 PICTURES CORPORATION is a Delaware corporation with a principal place of business in Los
7 Angeles, California.

8 19. Plaintiffs are informed, believe and thereon allege that defendant NATIONAL
9 BROADCASTING COMPANY, INC. is a Delaware corporation with studio facilities in Burbank,
10 California.

11 20. Plaintiffs are informed, believe and thereon allege that defendant NBC STUDIOS,
12 INC. is a New York corporation with its principal place of business in Burbank, California.

13 21. Plaintiffs are informed, believe and thereon allege that defendant SHOWTIME
14 NETWORKS INC. is a Delaware corporation with a principal place of business in New York, New
15 York and that said defendant engages in substantial business in this judicial district and maintains
16 substantial contacts within this judicial district.

17 22. Plaintiffs are informed, believe and thereon allege that defendant THE UNITED
18 PARAMOUNT NETWORK is a Delaware corporation with a principal place of business in Los
19 Angeles, California.

20 23. Plaintiffs are informed, believe and thereon allege that defendant ABC, INC. is a
21 New York Corporation with a principal place of business in New York, New York and that said
22 defendant engages in substantial business in this judicial district and maintains substantial contacts
23 within this judicial district.

24 24. Plaintiffs are informed, believe and thereon allege that defendant VIACOM
25 INTERNATIONAL INC. is a Delaware Corporation with a principal place of business in New
26 York, New York and that said defendant engages in substantial business in this judicial district and
27 maintains substantial contacts within this judicial district.

28 25. Plaintiffs are informed, believe and thereon allege that defendant CBS

1 WORLDWIDE INC. is a Delaware Corporation with a principal place of business in New York,
2 New York and that said defendant engages in substantial business in this judicial district and
3 maintains substantial contacts within this judicial district.

4 26. Plaintiffs are informed, believe and thereon allege that defendant CBS
5 BROADCASTING INC. is a New York Corporation with a principal place of business in New
6 York, New York and that said defendant engages in substantial business in this judicial district and
7 maintains substantial contacts within this judicial district.

8 27. Plaintiffs are informed, believe and thereon allege that defendant TIME WARNER
9 ENTERTAINMENT COMPANY, L.P. is a Delaware limited partnership with a principal place of
10 business in New York, New York and that said defendant engages in substantial business in this
11 judicial district and maintains substantial contacts within this judicial district.

12 28. Plaintiffs are informed, believe and thereon allege that defendant HOME BOX
13 OFFICE is a division of defendant TIME WARNER ENTERTAINMENT COMPANY and that
14 defendant HOME BOX OFFICE engages in substantial business in this judicial district and
15 maintains substantial contacts within this judicial district.

16 29. Plaintiffs are informed, believe and thereon allege that defendant WARNER BROS.
17 is a division of defendant TIME WARNER ENTERTAINMENT COMPANY and that defendant
18 WARNER BROS. engages in substantial business in this judicial district and maintains substantial
19 contacts within this judicial district.

20 30. Plaintiffs are informed, believe and thereon allege that defendant WARNER BROS.
21 TELEVISION is a division of defendant TIME WARNER ENTERTAINMENT COMPANY and
22 that defendant WARNER BROS. TELEVISION engages in substantial business in this judicial
23 district and maintains substantial contacts within this judicial district.

24 31. Plaintiffs are informed, believe and thereon allege that defendant TIME WARNER
25 INC. is a Delaware corporation with its principal place of business in New York, New York, an
26 affiliate of defendant TIME WARNER ENTERTAINMENT COMPANY and that defendant
27 TIME WARNER INC. engages in substantial business in this judicial district and maintains
28 substantial contacts within this judicial district.

1 32. Plaintiffs are informed, believe and thereon allege that defendant NEW LINE
2 CINEMA CORPORATION is a Delaware corporation with its principal place of business in Los
3 Angeles, California.

4 33. Plaintiffs are informed, believe and thereon allege that defendant CASTLE ROCK
5 ENTERTAINMENT is a California general partnership with its principal place of business in
6 Beverly Hills, California.

7 34. Plaintiffs are informed, believe and thereon allege that defendant THE WB
8 TELEVISION NETWORK PARTNERS, L.P. is a California limited partnership d/b/a The WB
9 Television Network and that defendant THE WB TELEVISION NETWORK PARTNERS, L.P.
10 engages in substantial business in this judicial district and maintains substantial contacts within this
11 judicial district.

12 35. Plaintiffs are informed, believe and thereon allege that defendant METRO-
13 GOLDWYN-MAYER STUDIOS is a Delaware corporation with its principal place of business in
14 Santa Monica, California.

15 36. Plaintiffs are informed, believe and thereon allege that defendant ORION
16 PICTURES CORPORATION is a Delaware corporation with its principal place of business in
17 Santa Monica, California.

18 37. Plaintiffs are informed, believe and thereon allege that defendant TWENTIETH
19 CENTURY FOX FILM CORPORATION is a Delaware corporation with its principal place of
20 business in Los Angeles, California.

21 38. Plaintiffs are informed, believe and thereon allege that defendant UNIVERSAL
22 CITY STUDIOS PRODUCTIONS, INC. is a Delaware corporation with its principal place of
23 business in Universal City, California.

24 39. Plaintiffs are informed, believe and thereon allege that defendant FOX
25 BROADCASTING COMPANY is a Delaware corporation with its principal place of business in
26 Los Angeles, California.

27 40. Plaintiffs are informed, believe and thereon allege that defendant COLUMBIA
28 PICTURES INDUSTRIES, INC. is a Delaware corporation with its principal place of business in

1 Culver City, California.

2 41. Plaintiffs are informed, believe and thereon allege that defendant COLUMBIA
3 PICTURES TELEVISION, INC. is a Delaware corporation with its principal place of business in
4 Culver City, California.

5 42. Plaintiffs are informed, believe and thereon allege that defendant COLUMBIA
6 TRISTAR TELEVISION, INC. is a Delaware corporation with its principal place of business in
7 Culver City, California.

8 43. Plaintiffs are informed, believe and thereon allege that defendant TRISTAR
9 TELEVISION, INC. is a Delaware corporation with its principal place of business in Culver City,
10 California.

11 44. Defendants TURNER BROADCASTING SYSTEM, INC.; DISNEY
12 ENTERPRISES, INC.; PARAMOUNT PICTURES CORPORATION; NATIONAL
13 BROADCASTING COMPANY, INC.; NBC STUDIOS, INC.; SHOWTIME NETWORKS INC;
14 THE UNITED PARAMOUNT NETWORK; ABC, INC.; VIACOM INTERNATIONAL INC.;
15 CBS WORLDWIDE INC.; CBS BROADCASTING INC.; TIME WARNER ENTERTAINMENT
16 COMPANY, L.P.; HOME BOX OFFICE; WARNER BROS.; WARNER BROS. TELEVISION;
17 TIME WARNER INC.; NEW LINE CINEMA CORPORATION; CASTLE ROCK
18 ENTERTAINMENT; THE WB TELEVISION NETWORK PARTNERS, L.P.; METRO-
19 GOLDWYN-MAYER STUDIOS; ORION PICTURES CORPORATION; TWENTIETH
20 CENTURY FOX FILM CORPORATION; UNIVERSAL CITY STUDIOS PRODUCTIONS,
21 INC.; FOX BROADCASTING COMPANY; COLUMBIA PICTURES INDUSTRIES, INC.;
22 COLUMBIA PICTURES TELEVISION, INC.; COLUMBIA TRISTAR TELEVISION, INC. and
23 TRISTAR TELEVISION, INC. are collectively identified as "the Defendants" herein.

24 **GENERAL ALLEGATIONS**

25 45. Article 1, § 8 of the United States Constitution provides that "The Congress shall
26 have Power ... To promote the Progress of Sciences and useful Arts, by securing for limited Times
27 to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
28 Pursuant thereto, Congress has enacted the Copyright Act of the United States of America, set forth

1 in Title 17 of the United States Code, and the Courts of the United States of America have rendered
2 decisions interpreting said Constitutional provision and said Copyright Act.

3 46. In the landmark decision *Sony Corporation of America v. Universal City Studios*,
4 464 U.S. 417, 429-430, 104 S.Ct. 774 (1984), the Supreme Court declared that "[t]he monopoly
5 privileges that Congress may authorize are neither unlimited nor primarily designed to provide a
6 special private benefit. Rather, the limited grant is a means by which an important public purpose
7 may be achieved. ... From its beginning, the law of copyright has developed in response to
8 significant changes in technology." Quoting from prior authority, the court reiterated the principle
9 that "[t]he limited scope of the copyright holder's statutory monopoly ... must ultimately serve the
10 cause of promoting the broad public availability of literature, music, and the other arts." (464 U.S.
11 at 431.) In the *Sony* case, the Court held that owners of copyrights on television programs could not
12 halt the manufacture and sale of a home videotape recorder ("VTR") on the strength of an
13 argument that such recorders could be used to infringe copyrights. One reason for the Court's
14 decision was that the VTR was used to shift the time for viewing from the time of original
15 broadcast to a time more convenient to the consumer, that "time-shifting merely enables a viewer
16 to see such work which he has been invited to witness in its entirety free of charge" and that time-
17 shifting was a "substantial noninfringing use" that could not be prohibited as an incident of the
18 copyright owner's monopoly (464 U.S. at 447-56). VTRs also traditionally offered consumers the
19 ability to fast forward past commercials, but the *Sony* Plaintiffs did not challenge this feature.

20 47. "Space-shifting"—the practice of reproducing copyrighted works that have been
21 lawfully acquired in order to experience them in other locations—also properly falls outside of the
22 copyright monopoly so long as such activity falls within the scope of the "fair use" doctrine set out
23 in 17 U.S.C. 107. Plaintiffs' use of the "send show" and streaming features of their ReplayTV
24 DVRs for space-shifting of televised programming fall squarely within the scope of the fair use
25 doctrine.

26 48. The ReplayTV DVR duplicates the substantial noninfringing uses of the VTRs that
27 were the subject of the *Sony* decision. VTRs allowed "librarying" of recorded television. Since the
28 *Sony* decision, VTR manufacturers have developed and marketed commercial-skipping features.

1 VTRs have, in addition, always facilitated "space-shifting" insofar as VTR users are able to record
2 a tape in one unit and play it back in any other compatible VTR. Unlike a VTR, however, the
3 ReplayTV DVR records television signals in digitized form on a "hard drive" similar to that found
4 on personal computers. The digital storage provides consumers with the same essential
5 functionality of the VTR but with greater flexibility and control over the viewing of televised
6 programs.

7 49. Plaintiffs are informed and believe, and thereupon allege, that the ReplayTV series
8 4000, 4500 and 5000 DVRs allow their owners to use the Features.

9 50. The Defendants have declared that ReplayTV DVR owners who utilize the Features
10 violate the Copyright Act. They have requested that further distribution of the ReplayTV DVR
11 with the Features be enjoined and that all support currently rendered to ReplayTV DVR owners for
12 use of the Features, including Plaintiffs, also be enjoined.

13 51. Plaintiffs are informed, believe and thereon allege that each of the Defendants has
14 agreed with each other such defendant to perform the acts herein alleged to have been carried out
15 by the Defendants or any of them. Plaintiffs are informed, believe and thereon allege that each of
16 the Defendants, as a principal, authorized each other such defendant to act as an agent on behalf of
17 said principal and each such agent so acted pursuant to such authorization. Plaintiffs are informed,
18 believe and thereon allege that each Defendant ratified the acts of each of the other Defendants.
19 Plaintiffs are informed, believe and thereon allege that each of the Defendants provided substantial
20 assistance to each of the other Defendants in performing the acts herein alleged with knowledge
21 thereof.

22 **FACTUAL ALLEGATIONS GIVING RISE TO THIS ACTION**

23 **A. Defendants' Lawsuit against ReplayTV, Inc. and SONICblue, Inc.**

24 52. Defendants initiated this dispute by bringing four lawsuits in this court against the
25 manufacturers of the ReplayTV DVR units, SONICblue, Inc, and its subsidiary ReplayTV, Inc.,
26 consolidated under the name "Paramount Pictures Corporation et. al., Plaintiffs, v. ReplayTV, Inc.,
27 et. al.," Case No. CV 01-9358 FMC (Ex) ("ReplayTV action"), alleging that ReplayTV, Inc. and
28 SONICblue, Inc. have, through manufacture, sale, distribution and support of the ReplayTV DVR,

1 infringed copyrights held by the plaintiffs in that case and/or committed contributory copyright
2 infringement and/or vicarious copyright infringement and/or violated Sections 553 and/or 605 of
3 the Communications Act and/or engaged in Unfair Business Practices prohibited by California
4 Business and Professions Code §§ 17200 et seq.

5 53. Plaintiffs are informed, believe and thereon allege that the Defendants, and each of
6 them, were a plaintiff in one or more of the actions. The ReplayTV action was premised on the
7 allegation that Plaintiffs and others similarly situated are infringing the Defendants' copyrights.
8 The action was dismissed voluntarily after SONICblue, Inc. and ReplayTV, Inc. filed for
9 bankruptcy protection and sold the ReplayTV assets and technology out of bankruptcy to Digital
10 Networks North America, Inc.

11 54. The ReplayTV action was predominantly based on secondary theories of liability
12 (namely contributory infringement and vicarious liability). In order to prevail on these theories, the
13 Defendants would have been required to prove that the activities of ReplayTV DVR owners
14 constitute direct copyright infringement, since there can be no secondary liability in the absence of
15 direct infringement. Accordingly, a victory by the Defendants in the ReplayTV case would
16 necessarily have required a determination that the activities of ReplayTV DVR owners constitute
17 direct copyright infringement.

18 55. The ReplayTV action sought injunctive relief that would have directly and
19 materially injured Plaintiffs in their use and enjoyment of their ReplayTV DVRs, since it would
20 have prevented ReplayTV from providing support to the units and from "permit[ting] users" to
21 share television programming.

22 56. In their Complaints in the ReplayTV action, the Defendants publicly accused
23 Plaintiffs of Copyright Infringement.

24 a. For example, it was alleged in the ReplayTV action that the "Auto-Skip" feature
25 (more commonly known as "Commercial Advance") of the ReplayTV DVR "enables and induces
26 their customers to make unauthorized digital copies of plaintiffs' copyrighted television
27 programming for the purpose of, at the touch of a button, viewing the programming with all
28 commercial advertising automatically deleted." Paramount Pictures Corp., et al. v. ReplayTV, Inc.

1 and SonicBlue, Inc., CV 01-09358-FMC (Ex) (amended complaint dated Nov. 21, 2001)
2 (hereinafter the “Amended Paramount Complaint”), at 3, lines 6-13 (emphasis added).

3 b. In paragraph 4 of the Amended Paramount Complaint, it was further alleged that
4 “the ‘Send Show’ feature of the ReplayTV defendant’s ReplayTV DVR makes it “a breeze” to
5 make perfect digital copies of plaintiffs’ copyrighted programs, including entire theatrical motion
6 pictures, and distribute them to other people -- even many other people -- through high-speed
7 Internet connections. This unlawful activity likewise deprives plaintiffs of the means of payment
8 for, and diminishes the value of, their copyrighted works.” Id. at lines 14-21 (emphasis added).

9 c. Likewise, paragraph 5 of the original Paramount complaint states “[ReplayTV]
10 assure[s] their customers that using the ReplayTV 4000 to infringe copyrights will be effortless:
11 ‘[W]ith its broadband connectivity, sending and receiving programs [with the ReplayTV 4000] is a
12 breeze.’” Paramount Pictures Corp., et al. v. ReplayTV, Inc. and SonicBlue, Inc., CV 01-09358-
13 FMC (Ex) (complaint dated Oct. 31, 2001), at 8, lines 23-25 (emphasis added).

14 57. In section 2, page 6, of “Plaintiffs’ Supplemental Memorandum of Law in Support
15 of Their Motion to Compel” in the ReplayTV action, the Defendants represented that there is a
16 small community of approximately 5,000 ReplayTV 4000 users who tend to communicate with
17 each other. The Defendants further admitted and acknowledged the apprehension and fear that they
18 have injected into the hearts and minds of ReplayTV 4000 owners, declaring that “...given the
19 widespread publicity about this lawsuit, customers might fear that candid answers [about their
20 ReplayTV 4000 use] might lead to personal liability for them—and thus decline to give such
21 answers.”

22 58. Additionally, the relief sought in the ReplayTV case would have materially affected
23 the Plaintiffs herein in their use and enjoyment of their ReplayTV DVRs. Plaintiffs are informed
24 and believe, and thereupon allege, that the owner of the ReplayTV assets (currently Digital
25 Networks North America, Inc.) can, through remote software downloads to their ReplayTV DVRs,
26 technically impair Plaintiffs’ ability to continue to use the Features. In the ReplayTV complaint the
27 Defendants sought injunctive relief to:

28 a. Prevent ReplayTV from engaging in "any provision, use, or support of the

1 'AutoSkip' or 'Send Show' functions or any similar functions, or from licensing any other person to
2 do the same." Paramount Pictures Corp., et al. v. ReplayTV, Inc. and SonicBlue, Inc., CV 01-
3 09358-FMC (Ex) (amended complaint dated Nov. 21, 2001), at 31, lines 1-13.

4 b. Preventing ReplayTV from "encourag[ing] or permit[ing] users to transmit copies
5 of such programming to other persons." Id. at lines 14- 19.

6 **B. Defendants' Public Statements about Plaintiffs' Use of ReplayTV DVRs**

7 59. Apart from their allegations against ReplayTV DVR owners in the ReplayTV case,
8 the Defendants have accused Plaintiffs and others similarly situated, in newspapers, magazines,
9 radio, television, court complaints, and discovery motions, of "stealing" and "theft" for using the
10 Commercial Advance feature to avoid commercials while watching television programming, for
11 space-shifting television programming, and time-shifting television programming. These
12 accusations chill the fair use rights of ReplayTV DVR owners and adversely impact their First
13 Amendment rights.

14 60. The Defendants have sought to use the Courts and further information obtained in
15 the ReplayTV action, to obtain the names and contact information of Plaintiffs and other owners of
16 the ReplayTV DVRs and have attempted to track their use in an effort to gather evidence of alleged
17 copyright infringement and damages by these individual consumers.

18 61. Plaintiffs are informed, believe and thereon allege that officers for the Defendants
19 have declared that viewing a recorded television program by means of a ReplayTV DVR without
20 viewing the commercials is theft. For example, Plaintiffs are informed, believe and thereon allege
21 that Jamie Kellner, then Chief Executive Officer of defendant Turner Broadcasting System, Inc.,
22 stated in an interview in Cableworld magazine that avoiding advertisements in programs amounts
23 to "theft" and "stealing." Specifically, Kellner is reported to have declared: "the ad skips.... It's
24 theft.... Any time you skip a commercial or watch the button you're actually stealing the
25 programming." Cableworld, Monday, April 29, 2002. See
26 <http://www.inside.com/product/product.asp?entity=CableWorld&pf_ID=7A2ACA71 -FAAD-
27 41FC-A100-0B8A11C30373>.

28 62. Mr. Kellner's assertions that ReplayTV users are engaging in "theft" and "stealing"

1 have been widely circulated in the mainstream and internet press:

2 a. http://forbesbest.com/home_europe/2002/05/03/0503sonicblue.html

3 b. http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1986000/1986616.stm

4 63. In an article published by Time magazine (part of the AOL Time Warner
5 conglomerate that includes the Time Warner defendants), owners of the ReplayTV DVR have been
6 identified as "Pirates of Prime Time."
7 <<http://www.time.com/time/business/article/0,8599,203498,00.html>>.

8 64. An article published in the Los Angeles Times on November 9, 2003 at
9 [http://www.latimes.com/technology/la-na-piracy9nov09,1,2121383.story?coll=la-headlines-](http://www.latimes.com/technology/la-na-piracy9nov09,1,2121383.story?coll=la-headlines-technology)
10 [technology](http://www.latimes.com/technology/la-na-piracy9nov09,1,2121383.story?coll=la-headlines-technology) reported that Defendants instructed the Motion Picture Association of America in
11 September 2003 to begin preparations for lawsuits against persons who record and share recorded
12 television programming through file-sharing networks, which may implicate use of the Features of
13 the ReplayTV DVR.

14 C. **Defendants' Attempts to Discover the Identities of ReplayTV Owners who**
15 **Send Shows**

16 65. In the ReplayTV action, the Defendants sought information about consumer usage
17 of ReplayTV DVRs, including information stored on consumer owners' ReplayTV DVR hard
18 drives.

19 66. Plaintiffs are further informed, believe and thereon allege that in the course of a
20 third-party deposition in this action, the Defendants demanded preservation of information
21 including the identities of ReplayTV owners who used a website for discussions of the ReplayTV
22 DVR, called planetreplay.com. The planetreplay.com website is an online forum where users of
23 ReplayTV DVRs can obtain information about use of their devices and in engage in conversations
24 with other owners of ReplayTV DVRs.

25 67. Prior to the deposition of Mr. Chad Little, the website manager and operator of the
26 planetreplay.com site in January 2003, planetreplay.com contained a particular forum where
27 registered users could post requests for television programs that they had been unable to record
28 with their ReplayTV to be sent to them by the owner of another ReplayTV device with the Send

1 Show feature.

2 68. Plaintiffs are informed, believe and allege thereon, that, in the course of the
3 Entertainment Companies' deposition of Mr. Little, Defendants asserted to Mr. Little that he was
4 legally obligated to preserve SendShow forum users' information stored in his website's database
5 during the pendency of the ReplayTV lawsuit so that the Defendants could obtain it.

6 **D. Newmark Plaintiffs' Consumer Owners' Action**

7 69. On June 6, 2003, five consumer plaintiffs, including Plaintiffs Newmark, Fleishman
8 and Wright, brought a declaratory relief action against the Defendants, SONICblue, and
9 ReplayTV, previously identified as Newmark et al. v. Turner Broadcasting System, Inc, et al (Case
10 No. CV 02-04445 FMC (Ex)) (the "Newmark action"). The Newmark action was consolidated
11 with the ReplayTV action by order of this Court on August 15, 2002.

12 70. About 7 months after consolidation, and while this case was still in discovery,
13 ReplayTV, Inc. and SONICblue, Inc. filed for bankruptcy protection in the Bankruptcy Court of
14 the Northern District of California on March 21, 2003. This court subsequently stayed this case on
15 March 24, 2003.

16 71. Plaintiffs are informed, believe and thereon allege that ReplayTV, Inc. and
17 SONICblue, Inc., sold the ReplayTV asset out of bankruptcy to Digital Networks North America,
18 Inc. ("DNNA"). Plaintiffs further are informed, believe and thereon allege that after of the
19 ReplayTV asset and technology to DNNA, discussions occurred between the Defendants and
20 DNNA that the Defendants have characterized as "settlement communications."

21 72. On June 10, 2003, DNNA announced that it had disabled the Send Show and
22 Commercial Advance features in the new 5500 model ReplayTV DVR, to meet copyright owners'
23 concerns. DNNA's press release stated:

24 "ReplayTV also announced that it would address concerns of content copyright holders by
25 removing the Send Show feature in the new ReplayTV 5500. The company is also removing
26 the Automatic Commercial Advance® feature in the new ReplayTV 5500", (See
27 <http://www.sonicblue.com/company/press.asp?ID=595>)

28 73. A large number of other consumer owners of ReplayTV DVRs who have been

1 chilled in their ongoing use of their devices and fear exposure to litigation from the Defendants
2 have sought to join the Newmark action. On September 16, 2003, Newmark Plaintiffs' asked the
3 Defendants whether they would be prepared to grant a covenant not to sue to all consumer owners
4 of ReplayTV DVRs. The Defendants have failed to do so.

5 74. Plaintiffs and other owners of the ReplayTV DVR have been placed in realistic
6 danger of sustaining a direct injury by being named as defendants in lawsuits filed by the
7 Defendants, including lawsuits alleging copyright infringement and/or violations of the
8 Communications Act. Plaintiffs do not agree with the Defendants that watching commercials is a
9 condition of watching time-shifted television programming and that violation of this condition
10 results in copyright infringement liability. Plaintiffs similarly disagree with the Defendants who
11 claim that consumers have no right to time-shift, space-shift, or communicate free, over the air
12 televised content using the ReplayTV DVR. Plaintiffs further disagree with the Defendants that
13 watching a time-shifted program more than once, or storing it for more than a brief time,
14 constitutes copyright-infringing "librarying" rather than fair use "time shifting" under the *Sony*
15 case.

16 75. Plaintiffs are seeking a remedy from such fear and apprehension and relief from the
17 uncertainty, insecurity, and controversy that gives rise to this proceeding. Plaintiffs are in
18 apprehension and fear of being sued by the Defendants since such litigation will likely cause
19 financial ruin in attorneys' fees alone even if the case would not succeed, not to mention potential
20 liability for statutory damages, actual damages and the attorneys fees of the opposition. And given
21 the onerous nature of statutory damages under the Copyright Act, Plaintiffs cannot afford to guess
22 incorrectly about where the fair use-infringement line is drawn, should they be named as
23 defendants.

24 76. Until the parties' respective legal rights, duties, and responsibilities are determined
25 by this Court, Plaintiffs and other ReplayTV DVR users will be chilled in the exercise and
26 enjoyment of their fair use rights—which rights are intimately intertwined with First Amendment
27 rights—as they attempt to avoid the unknown line of when fair use becomes infringement.

28 77. Notwithstanding the dismissal of former Defendants SONICblue, Inc. and

1 ReplayTV, Inc., Plaintiffs further face a realistic danger of sustaining a direct injury, including full
2 or partial monetary loss, should the purchaser of the ReplayTV assets, Digital Networks North
3 America (DNNA), suspend support for ReplayTV DVR Features at the behest of the Defendants.
4 Plaintiffs and other consumers paid in excess of \$500 dollars for each ReplayTV DVR device with
5 the reasonable expectation that certain material functions at issue would be operational. To the
6 extent that Defendants' conduct results in DNNA suspending support for ReplayTV DVR Features,
7 such result would materially impair Plaintiffs' enjoyment of their ReplayTV DVRs.

8 78. Because of Defendants' accusations of theft and copyright infringement against
9 consumers made in the press and in official court filings in the ReplayTV case, their attempt to
10 track and record the personal viewing habits of ReplayTV DVR owners, their attempt to learn the
11 specific identities and addresses of ReplayTV DVR users, and their failure to grant a covenant not
12 to sue to the thousands of ReplayTV owners other than the five Newmark Plaintiffs, ReplayTV
13 DVR owners have been chilled in their ongoing use of their ReplayTV DVRs and have a
14 reasonable apprehension that Defendants intend to sue the consumer owners of the ReplayTV
15 DVRs for copyright infringement and "theft" of television programs.

16 79. Moreover, Defendants' prayer for broad injunctive relief in the ReplayTV case, the
17 dismissal of the bankrupt ReplayTV parties without prejudice, and the discontinuance by DNNA of
18 the Commercial Advance and Send Show Features in the current models of ReplayTV DVRs,
19 means that ReplayTV owners remain at risk of suit from the Entertainment Companies for their
20 past, present, and future use of their ReplayTV DVRs in a manner that the Entertainment
21 Companies maintain is copyright infringement, and at risk of imminent loss of use of their
22 ReplayTV DVRs through actions that may be taken by DNNA at the behest of Defendants.

23 80. Accordingly, Plaintiffs bring this Complaint and declaratory action to clarify their
24 rights and the rights of all other ReplayTV owners, to ascertain which of the activities and
25 functions of the ReplayTV DVR are lawful under the Copyright Act, to ascertain which activities
26 and functions of the ReplayTV DVR cannot serve as a basis for liability and damages against them,
27 and to prevent the Defendants from interfering with the ongoing enjoyment and use by ReplayTV
28 owners of their ReplayTV DVRs through, or as a result of, action taken by DNNA as part of an

1 agreement with the Entertainment Companies. Plaintiffs reserve the right to amend the Complaint
2 to add DNNA as a party and to seek injunctive relief against to prohibit it from materially
3 discontinuing without restitution and notice to Plaintiffs and ReplayTV DVR owners its support
4 for Features of the ReplayTV DVRs that were material inducements for purchases of the units by
5 Plaintiffs and other owners and that were prominently displayed in advertising as reasons to
6 purchase the ReplayTV DVRs.

7 **CLASS ACTION ALLEGATIONS**

8 81. For the purposes of all relief sought in this case, Plaintiffs Newmark, Wright,
9 Fleishman, and White bring this action on behalf of themselves and all members of the following
10 class pursuant to Federal Rule of Civil Procedure 23:

11 All persons (excluding Defendants, SONICblue, Inc., ReplayTV, Inc. and Digital
12 Networks North America Ltd, and parents and subsidiaries of those entities) who
13 own digital video recorders manufactured by ReplayTV, Inc., or sold bearing the
14 name “ReplayTV” that include the Features described in ¶3 above, specifically
15 “Commercial Advance,” personal use “space shifting,” and librarying.

16 82. This action is brought and may be properly maintained as a class action pursuant to
17 Federal Rule of Civil Procedure 23(a) and (b)(2).

18 83. Members of the Class are so numerous and geographically disparate that joinder of
19 all members is impracticable. While the exact number of Class members is not known to the
20 Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe
21 that there are more than 5000 members of the Class.

22 84. Common questions of law and fact exist as to all members of the Class, because all
23 Class members face a reasonable apprehension of liability for their past, present and future use of
24 their ReplayTV devices in a manner that the Defendants through their conduct, and their public
25 statements, claim constitutes copyright infringement. The common questions of law and fact
26 predominate over any questions affecting solely individual members of the Class. The common
27 questions of law and fact include, but are not limited to:

- 28 a) Whether Class members’ ownership of their respective ReplayTV DVR is lawful;
b) Whether Class members’ use of their respective ReplayTV DVR to *record*
television programming for later viewing or multiple viewings by the Class member

1 and members of their respective households, in a private venue for non-commercial
2 purposes constitutes copyright infringement;

3 c) Whether Class members' use of the ReplayTV DVR to *store* recorded television
4 programming for later viewing or multiple viewings by the Class member or a
5 member of their respective households, in a private venue for non-commercial
6 purposes, constitutes copyright infringement.

7 d) Whether Class members' use of the "Commercial Advance" feature of the Class
8 member's ReplayTV DVR during playback in a private venue of recorded television
9 programming for non-commercial purposes, constitutes copyright infringement;

10 e) Whether Class members' use of the "space shifting" function -- including either the
11 streaming functionality or the "Send Show" feature of their ReplayTV DVR -- to
12 view television programming recorded on a different device or ReplayTV DVR
13 owned by the Class member or a member of the Class member's household, in a
14 private venue for non-commercial purposes, constitutes copyright infringement;

15 f) Whether the use by Class members of the "Send Show" feature of their ReplayTV
16 DVR to transfer free to air broadcast television programming to devices or
17 ReplayTV DVRs owned by others, for viewing in a private venue for non-
18 commercial purposes, constitutes copyright infringement.

19 85. Plaintiffs' claims are typical of the claims of other members of the Class, all of
20 whom own ReplayTV DVRs. Plaintiffs each have a reasonable apprehension of liability for their
21 past, present, and future use of their ReplayTV devices in a manner that the Defendants claim
22 constitutes copyright infringement. The Defendants' public statements and conduct towards the
23 Class, consisting in, or manifested by Defendants' statements in various public forums, including
24 in pleadings in the Defendants' consolidated lawsuit against ReplayTV, Inc. and SONICblue, Inc.,
25 that Class members' use of their ReplayTV DVRs' Features is copyright infringement creates for
26 all members of the Class a similar threat of copyright liability and a similar need for declaratory
27 relief.

28 86. The Plaintiffs can and will fairly and adequately protect the interests of the members

1 of the Class. Plaintiffs will be adequate representatives of the Class in that all of the relevant
2 questions of fact and law applicable to the Class, also apply to them, their interests are not adverse
3 or antagonistic to the interests of the members of the Class, and the Plaintiffs have retained counsel
4 competent and experienced in class action litigation.

5 87. This action is properly maintained as a class action. The questions of law and fact
6 common to the members of the class predominate over any questions affecting only individual
7 members, and a class action is superior to other available means for the fair and efficient
8 adjudication of these claims. Plaintiffs know of no difficulty to be encountered in the management
9 of this action that would preclude its maintenance as a class action.

10 88. Because only declaratory relief is sought, the expense and burden of litigating
11 individual lawsuits makes it virtually impossible for members of the Class to individually seek
12 declaratory relief on the basis of the facts alleged herein. Class action treatment will result in
13 substantial benefits to the litigants, and will permit the Court to address and resolve these claims in
14 a judicially efficient manner.

15 89. The prosecution of separate actions by individual members of the Class would
16 create a risk of inconsistent or varying adjudications, establishing incompatible standards of
17 conduct for Defendants as well as for different Class members.

18 **FIRST CLAIM FOR RELIEF**
19 **REQUEST FOR DECLARATORY JUDGMENT**

20 90. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding
21 paragraphs of this complaint.

22 91. There is a real and actual controversy between Plaintiffs and Defendants regarding
23 whether the use of the ReplayTV DVR Features by Plaintiffs and other members of the Class
24 constitutes copyright infringement.

25 92. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 and Federal
26 Rule of Civil Procedure 57 for the purpose of determining and adjudicating questions of actual
27 controversy between the parties.

28 93. Plaintiffs contend as it relates to the Defendants and their copyrighted television

1 programming that, consistent with the Copyright Act of the United States of America, including
2 those laws prohibiting direct, contributory or vicarious infringement, the Communications Act,
3 laws protecting fair use and the First Amendment to the United States Constitution, and judicial
4 decisions construing such laws, doctrines, and provisions:

- 5 a) Each Plaintiff and Class members' ownership of their respective ReplayTV DVR is
6 lawful;
- 7 b) Each Plaintiff and Class member can lawfully use their respective ReplayTV DVR
8 to *record* television programming for later viewing or multiple viewings by the
9 Class member and members of their respective households, in a private venue for
10 non-commercial purposes;
- 11 c) Each Plaintiff and Class member can lawfully use the ReplayTV DVR to *store*
12 recorded television programming for later viewing or multiple viewings by the
13 Class member or a member of their respective households, in a private venue for
14 non-commercial purposes;
- 15 d) Each Plaintiff and Class member can lawfully use the "Commercial Advance"
16 feature of the Class member's ReplayTV DVR during playback of recorded
17 television programming in a private venue for non-commercial purposes;
- 18 e) Each Plaintiff and Class member can lawfully use the "space shifting" function,
19 including either the streaming functionality or the "Send Show" feature of their
20 ReplayTV DVR, to view television programming recorded on a different device or
21 ReplayTV DVRs owned by the Class member or a member of the Class member's
22 household, in a private venue for non-commercial purposes;
- 23 f) Each Plaintiff and Class member can lawfully use the "Send Show" feature of their
24 ReplayTV DVR to transfer free-to-air broadcast television programming to devices
25 or ReplayTV DVRs owned by others, for viewing in a private venue for non-
26 commercial purposes.

27 94. Plaintiffs are informed, believe and thereon allege that the Defendants contend the
28 contrary of each of above-stated propositions (a) through (f).

1 95. Wherefore, Plaintiffs request that the court determine and adjudge that each and
2 every of the above-stated propositions states the law applicable to the facts involved in this action.

3 **PRAYER FOR RELIEF**

4 WHEREFORE, the Plaintiffs pray for judgment for themselves and all others similarly
5 situated as follows:

6 1. A declaratory judgment that that as it relates to the Defendants and their television
7 programs that

- 8 a) Each Plaintiff and Class members' ownership of their respective ReplayTV DVR is
9 lawful;
- 10 b) Each Plaintiff and Class member can lawfully use their respective ReplayTV DVR
11 to *record* television programming for later viewing or multiple viewings by the
12 Class member and members of their respective households, in a private venue for
13 non-commercial purposes;
- 14 c) Each Plaintiff and Class member can lawfully use the ReplayTV DVR to *store*
15 recorded television programming for later viewing or multiple viewings by the
16 Class member or a member of their respective households, in a private venue for
17 non-commercial purposes;
- 18 d) Each Plaintiff and Class member can lawfully use the "Commercial Advance"
19 feature of the Class member's ReplayTV DVR during playback of recorded
20 television programming in a private venue for non-commercial purposes;
- 21 e) Each Plaintiff and Class member can lawfully use the "space shifting" function,
22 including either the streaming functionality or the "Send Show" feature of their
23 ReplayTV DVR, to view television programming recorded on a different device or
24 ReplayTV DVRs owned by the Class member or a member of the Class member's
25 household, in a private venue for non-commercial purposes;
- 26 f) Each Plaintiff and Class member can lawfully use the "Send Show" feature of their
27 ReplayTV DVR to transfer free to air broadcast television programming to devices
28 or ReplayTV DVRs owned by others, for viewing in a private venue for non-

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commercial purposes.

2. Injunctive relief restraining the Defendants, their agents, servants, employees, successors and assigns, and all others in concert and privity with them, from bringing any lawsuit or threat against Plaintiffs or a member of the Class for copyright infringement of the Defendants' television programs in connection with the Plaintiff's or Class member's use of the ReplayTV DVR Features, described above.

3. Attorneys fees pursuant to the Copyright Act, on a Private Attorney General basis, or otherwise as allowed by law;

4. Plaintiffs' costs and disbursements within; and

5. Such other and further relief as the Court shall find just and proper.

Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

DATED: November 24, 2003

ELECTRONIC FRONTIER FOUNDATION

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