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12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14
15
16 CRAIG NEWMARK, *et. al.*,
17 Plaintiffs,

18 v.

19 TURNER BROADCASTING
SYSTEM, INC., *et. al.*,
20 Defendants.
21

CASE NO. CV 02-04445 FMC (Ex)
**PLAINTIFFS' REQUEST FOR
JUDICIAL NOTICE IN OPPOSITION
TO ENTERTAINMENT COMPANIES'
MOTION TO DISMISS COMPLAINT
OR, ALTERNATIVELY, TO STAY
PROCEEDINGS**

22 Hearing Date: August 12, 2002
23 Time: 10:00 a.m.
24 Courtroom: No. 750, Los Angeles - Roybal
25 Judge: Hon. Florence-Marie Cooper
26
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1 Pursuant to Federal Rule of Evidence 201, Plaintiffs herein request that the
2 court take judicial notice of the position of the Entertainment Company defendants
3 herein as stated in a Joint Stipulation for Plaintiffs' Motion to Compel signed by the
4 parties to the *Paramount Pictures* case on or about April 5, 2002, at 19:11-20:12. The
5 pertinent extracts, including the cover page, page i of the Table of Contents and the
6 signature pages, are attached hereto as Exhibit A.

7
8 Dated: July 29, 2002

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9
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17 [Full counsel appearances on signature page]

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

20 PARAMOUNT PICTURES
21 CORPORATION *et al.*,

22 Plaintiffs,

23 v.

24 REPLAYTV, INC. *et al.*,

25 Defendants.

26 AND CONSOLIDATED ACTIONS.
27

Case No. CV 01-9358 FMC (Ex)

**JOINT STIPULATION FOR
PLAINTIFFS' MOTION TO
COMPEL**

Discovery Cutoff: May 31, 2002

Pretrial Conference: July 29, 2002

Trial Date: August 20, 2002

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1 infringements.^{6/} Plaintiffs are entitled to explore fully the facts and circumstances
2 behind these potent factual admissions by Defendants.

3
4 If, on the other hand, Defendants' claims that they prevent certain types of
5 infringements are *untrue* -- because Defendants know and intend that the purported
6 restrictions can easily be circumvented -- Plaintiffs are entitled to learn about that
7 too. Without a full production of the documents about the design, development,
8 and testing of the ReplayTV 4000, however, Plaintiffs (and the Court) will remain
9 in the dark about these core issues.

10 2. Documents relating to *alternative* designs for the ReplayTV 4000.

11 The ReplayTV 4000 is not like a toaster (or a VCR, for that matter) that is
12 fixed and unchangeable once it is sold to consumers. Just the opposite: the
13 Defendants have the ability to *transform the functionality of the ReplayTV 4000*
14 *simply by delivering new software over the Internet to their customers.* There is no
15 dispute as to this fact: Defendants' web site, for example, advises customers that
16 Defendants "reserve [] the right to automatically add, modify, or disable any
17 features in the operating software when [a] ReplayTV 4000 connects to our
18 server."^{7/}

19
20
21 ^{6/} Defendants' decisions about whether to encourage or discourage certain
22 types of infringements by their customers are relevant both to whether Defendants
23 "materially contribute[]" to those infringements (a key element of contributory
24 infringement, *see A & M Records, Inc. v. Napster*, 239 F.3d 1004, 1022 (9th Cir.
25 2001)), and to whether Defendants have the ability to control or supervise the
26 infringing capabilities of the ReplayTV 4000 (one of the two elements of vicarious
infringement, *see, e.g. Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262 (9th
Cir. 1996). In addition, the extent to which Defendants actively assist their
customers in copying and distributing Plaintiffs' copyrighted works is relevant to
the direct infringement claims brought by several Plaintiffs. *See, e.g., RCA/Ariola
Int'l Inc. v. Thomas & Grayston Co.*, 845 F.2d 773, 781 (8th Cir. 1988).

27 ^{7/} *See* SONICblue website, Technical Specs, at
28 http://www.sonicblue.com/video/replaytv/replaytv_4000_tech.asp (visited Mar. 25,
2002).

1 Defendants' ability to modify the ReplayTV 4000 to prevent particular types
2 of unlawful behavior, while leaving other functions of the ReplayTV 4000 intact, is
3 extraordinarily relevant. For example, Plaintiffs and the Court need to know if
4 Defendants' documents show that they considered -- but elected to discard -- a
5 design that would have prevented some or all of the conduct that Plaintiffs believe
6 is unlawful, while permitting other activities that Defendants contend are benign.^{8/}
7

8 The existence of such alternative designs is not merely a hypothetical
9 possibility. In mid-March 2002, Defendants announced for the first time that they
10 had implemented technology -- presumably through an online software download --
11 to prevent consumers from using the "Send Show" feature to transmit *any* Pay-Per-
12 View programming.^{9/} Plaintiffs are entitled to discover how many other such
13 alternative designs Defendants have considered -- or are considering now. Do
14 Defendants know how to prevent their customers from using "Send Show" to
15 distribute copies of subscription-only premium programming (such as Showtime or
16 HBO programs) or costly over-the-air or basic cable programming (such as
17 programs on ABC, CBS, Fox, NBC, UPN, WB, TNT, FX, SoapNet, or The Movie
18 Channel) to third parties? If Defendants are allowed to continue blocking
19 Plaintiffs' inquiry into these crucially relevant matters, neither Plaintiffs nor the
20 Court will ever know.
21

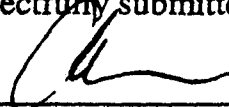
22 ^{8/} See, e.g., *Napster*, 239 F.3d at 1021-22 (relying partly on Napster's ability to
23 "block access to the system by suppliers of the infringing material" and its
24 "fail[ure] to remove the material" to support a conclusion "that sufficient
25 knowledge exists to impose contributory liability") (citations omitted); see also
26 *Playboy Enters., Inc. v. Webbworld, Inc.*, 991 F. Supp. 543, 553 (N.D. Tex. 1997)
27 (finding bulletin board operator liable for direct infringement and noting, in
28 relevant part, that defendant "might simply have refrained from conducting
business *until it had developed software or a manual system of oversight to prevent,
or at least to minimize the possibility of, copyright infringement.*"), *aff'd*, 168 F.3d
486 (5th Cir. 1999) (emphasis added).

^{9/} Joint Stipulation for Plaintiffs' Motion for Protective Order at 32 (filed Mar.
___, 2002) (Defendants' Contentions) (provided to Plaintiffs on Mar. 13, 2002).

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Dated: April 5, 2002.

Respectfully submitted,

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1 Dated: April 4, 2002

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