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

16 CRAIG NEWMARK, SHAWN HUGHES,  
17 KEITH OGDEN, GLENN FLEISHMAN and  
18 PHIL WRIGHT,

19 Plaintiffs,

20 v.  
21

22 TURNER BROADCASTING SYSTEM, INC.;  
23 DISNEY ENTERPRISES, INC.; PARAMOUNT  
24 PICTURES CORPORATION; NATIONAL  
25 BROADCASTING COMPANY, INC.; NBC  
26 STUDIOS, INC.; SHOWTIME NETWORKS  
27 INC.; THE UNITED PARAMOUNT NETWORK;  
28 ABC, INC.; VIACOM INTERNATIONAL INC.;  
CBS WORLDWIDE INC.; CBS  
BROADCASTING INC.; TIME WARNER  
ENTERTAINMENT COMPANY, L.P.; HOME

**CASE NO.**

**COMPLAINT FOR  
COPYRIGHT  
DECLARATORY RELIEF**

1 BOX OFFICE; WARNER BROS.; WARNER  
2 BROS. TELEVISION; TIME WARNER INC.;  
3 NEW LINE CINEMA CORPORATION;  
4 CASTLE ROCK ENTERTAINMENT; THE WB  
5 TELEVISION NETWORK PARTNERS, L.P.;  
6 METRO-GOLDWYN-MAYER STUDIOS;  
7 ORION PICTURES CORPORATION;  
8 TWENTIETH CENTURY FOX FILM  
9 CORPORATION; UNIVERSAL CITY STUDIOS  
10 PRODUCTIONS, INC.; FOX BROADCASTING  
11 COMPANY; COLUMBIA PICTURES  
12 INDUSTRIES, INC.; COLUMBIA PICTURES  
13 TELEVISION, INC.; COLUMBIA TRISTAR  
14 TELEVISION, INC.; TRISTAR TELEVISION,  
15 INC.; REPLAYTV, INC.; and SONICBLUE, INC.

Defendants.

1 **JURISDICTION AND VENUE**

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

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

12 3. Plaintiffs are informed, believe and thereon allege that, based on the places  
13 of businesses of the defendants identified above and/or on the national reach of  
14 defendants, and each of them, a substantial part of the events giving rise to the  
15 claims herein alleged occurred in this district and that defendants, and each of them,  
16 and/or an agent of each such defendant, may be found in this district.

17 **INTRODUCTORY STATEMENT**

18  
19 4. Plaintiffs Craig Newmark, Shawn Hughes, Keith Ogden, Glenn Fleishman  
20 and Phil Wright are each a consumer owner of a Digital Video Recorder ("DVR") in  
21 the 4000 series manufactured and sold by ReplayTV, Inc. and SONICblue, Inc.  
22 (collectively "ReplayTV"). Regardless of the particular model, each such DVR is  
23 identified as a "ReplayTV 4000" herein. Owners of the ReplayTV 4000 unit have  
24 been publicly accused of "theft" of copyrighted materials, threatened with invasions  
25 of privacy and ruinous litigation, and threatened with the loss of beneficial use of  
26 their ReplayTV 4000s by the defendants other than ReplayTV (collectively  
27 identified as the "Entertainment Oligopoly defendants" herein). The Entertainment  
28 Oligopoly defendants have brought an action in this court, consolidated under the

1 name "Paramount Pictures Corporation *et. al.*, Plaintiffs, v. ReplayTV, Inc., *et. al.*,"  
2 Case No. CV 01-9358 FMC (Ex) ("ReplayTV case"), against Replay TV based upon  
3 the allegation that Plaintiffs and others similarly situated are infringing their  
4 copyrights. That action seeks injunctive relief that would directly and materially  
5 injure Plaintiffs in their use and enjoyment of their ReplayTV 4000 units, since it  
6 would prevent ReplayTV from providing support to the units and from "permit[ting]  
7 users" from sharing shows.

8 5. The Entertainment Oligopoly defendants' case against ReplayTV is  
9 predominantly based on secondary theories of liability (namely contributory  
10 infringement and vicarious liability). In order to prevail on these theories, the  
11 Entertainment Oligopoly defendants must prove that the activities of ReplayTV  
12 4000 owners constitute direct copyright infringement, since there can be no  
13 secondary liability in the absence of direct infringement. Accordingly, a victory by  
14 the Entertainment Oligopoly defendants in the ReplayTV case will necessarily  
15 require a determination that the activities of ReplayTV 4000 owners constitute direct  
16 copyright infringement. Plaintiffs are informed, believe and thereon allege that the  
17 ReplayTV case is intended by the Entertainment Oligopoly defendants in part to  
18 secure a legal precedent that can be used against the Plaintiffs and other similarly  
19 situated ReplayTV 4000 owners.

20 6. Further, the Entertainment Oligopoly defendants have accused Plaintiffs  
21 and others similarly situated, in newspapers, magazines, radio, television, court  
22 complaints, and discovery motions, of "stealing" and "theft" for using the  
23 commercial advance feature to avoid commercials while watching television shows,  
24 for space-shifting television shows, and time-shifting television shows. These  
25 accusations chill Plaintiffs' fair use rights and adversely impact their First  
26 Amendment rights. The Entertainment Oligopoly defendants have sought to use the  
27 Courts to get the names and contact information of Plaintiffs and other owners of the  
28

1 ReplayTV 4000 and have attempted to track their use in an effort to gather evidence  
2 of copyright infringement and damages.

3 7. Plaintiffs, having learned of the Entertainment Oligopolies' accusations of  
4 theft and copyright infringement against them in the press and in official court  
5 filings in the ReplayTV case, having learned of the attempt to track and record their  
6 personal viewing habits, and having learned of the attempt to learn the specific  
7 identities and addresses of ReplayTV 4000 users, have a reasonable apprehension  
8 that the Entertainment Oligopoly defendants intend to sue owners of the ReplayTV  
9 4000 units for copyright infringement and "theft" of television shows. As a result of  
10 these public claims against them, Plaintiffs have been chilled in their ongoing use of  
11 their ReplayTV 4000 units and fear imminent loss of use of their ReplayTV 4000  
12 units and exposure to litigation.

13 8. Moreover, having learned of the Entertainment Oligopolies prayer for  
14 broad injunctive relief in the ReplayTV case, Plaintiffs believe that the outcome of  
15 the ReplayTV case presents a realistic danger of creating a direct injury to them in  
16 their ongoing use and enjoyment of their ReplayTV 4000 units.

17 9. Accordingly, Plaintiffs bring this Complaint and declaratory action to  
18 clarify their rights, to ascertain which of their activities and functions of the  
19 ReplayTV 4000 unit are lawful under the Copyright Act and the First Amendment,  
20 to ascertain which activities and functions cannot serve as a basis for liability and  
21 damages against them, and to prevent Defendants from interfering with Plaintiffs'  
22 ongoing enjoyment and use of their ReplayTV 4000 units through, or as a result of,  
23 injunctive relief in the ReplayTV case. Plaintiffs reserve the right to amend the  
24 Complaint to enjoin the ReplayTV defendants from materially discontinuing support  
25 without restitution and notice to Plaintiffs and impacted consumers for features of  
26 the ReplayTV 4000 unit that were material inducements for purchases of the units  
27 by Plaintiffs and other owners and that were prominently displayed in past and  
28 continuing advertising as reasons to purchase the ReplayTV 4000 unit.

1 **PARTIES**

2 10. Plaintiff CRAIG NEWMARK is a resident of the State of California and  
3 the founder of the popular San Francisco Bay Area "craigslist.org" community  
4 website. Plaintiff Newmark uses his ReplayTV 4000 unit for viewing television  
5 programs at times other than when originally broadcast ("time-shifting") and wants  
6 to use the advertised features that would allow him to view recorded programs on his  
7 laptop computer while traveling and to utilize "commercial advance" to avoid  
8 watching commercials. He has tested the use of his ReplayTV 4000 to send shows  
9 between devices within his home and intends to use the send show feature to move  
10 programs to his laptop computer for his viewing while traveling. Notwithstanding  
11 the allegations of the Entertainment Oligopoly defendants in the ReplayTV case,  
12 plaintiff Newmark has not used the ReplayTV 4000 unit to violate Section 553 of  
13 the Communications Act by unauthorized interception or receipt of cable service or  
14 by assisting in unauthorized interception or receipt of cable service. All uses by  
15 plaintiff Newmark of the ReplayTV 4000 unit are intended to be lawful and plaintiff  
16 Newmark has not violated Section 605 of the Communications Act by unauthorized  
17 publication or use of encrypted communications transmitted over wire or by radio.

18 11. Plaintiff SHAWN HUGHES is a resident of the State of Georgia and the  
19 owner of an electrical contracting company. Plaintiff Hughes uses his ReplayTV  
20 4000 units to record educational and entertainment programs for his children and to  
21 control the advertising they are exposed to. He also uses them to send shows  
22 between his two units and between his units and his laptop computer for viewing  
23 outside his home. Notwithstanding the allegations of the Entertainment Oligopoly  
24 defendants in the ReplayTV case, plaintiff Hughes has not used the ReplayTV 4000  
25 unit to violate Section 553 of the Communications Act by unauthorized interception  
26 or receipt of cable service or by assisting in unauthorized interception or receipt of  
27 cable service. All uses by plaintiff Hughes of the ReplayTV 4000 unit are intended  
28 to be lawful and plaintiff Hughes has not violated Section 605 of the

1 Communications Act by unauthorized publication or use of encrypted  
2 communications transmitted over wire or by radio.

3 12. Plaintiff KEITH OGDEN is a resident of the State of California, the  
4 recipient of an MBA degree from Stanford University and a self-employed securities  
5 broker dealer in the San Francisco Bay Area. Plaintiff Ogden uses his ReplayTV  
6 4000 unit for purposes of time-shifting and avoidance of commercials.

7 Notwithstanding the allegations of the Entertainment Oligopoly defendants in the  
8 ReplayTV case, plaintiff Ogden has not used the ReplayTV 4000 unit to violate  
9 Section 553 of the Communications Act by unauthorized interception or receipt of  
10 cable service or by assisting in unauthorized interception or receipt of cable service.  
11 All uses by plaintiff Ogden of the ReplayTV 4000 unit are intended to be lawful and  
12 plaintiff Ogden has not violated Section 605 of the Communications Act by  
13 unauthorized publication or use of encrypted communications transmitted over wire  
14 or by radio.

15 13. Plaintiff GLENN FLEISHMAN is a resident of the State of Washington  
16 and a freelance journalist whose work has appeared in the *New York Times*, *Wired*  
17 *Magazine* and publications in the Seattle area. Plaintiff Fleishman uses his  
18 ReplayTV 4000 unit for purposes of time-shifting and avoidance of commercials.  
19 Notwithstanding the allegations of the Entertainment Oligopoly defendants in the  
20 ReplayTV case, plaintiff Fleishman has not used the ReplayTV 4000 unit to violate  
21 Section 553 of the Communications Act by unauthorized interception or receipt of  
22 cable service or by assisting in unauthorized interception or receipt of cable service.  
23 All uses by plaintiff Fleishman of the ReplayTV 4000 unit are intended to be lawful  
24 and plaintiff Fleishman has not violated Section 605 of the Communications Act by  
25 unauthorized publication or use of encrypted communications transmitted over wire  
26 or by radio.

27 14. Plaintiff PHIL WRIGHT is a resident of the State of California employed  
28 in the video editing technology industry. Plaintiff Wright uses his ReplayTV 4000

1 unit for purposes of time-shifting and avoidance of commercials. Notwithstanding  
2 the allegations of the Entertainment Oligopoly defendants in the ReplayTV case,  
3 plaintiff Wright has not used the ReplayTV 4000 unit to violate Section 553 of the  
4 Communications Act by unauthorized interception or receipt of cable service or by  
5 assisting in unauthorized interception or receipt of cable service. All uses by  
6 plaintiff Wright of the ReplayTV 4000 unit are intended to be lawful and plaintiff  
7 Wright has not violated Section 605 of the Communications Act by unauthorized  
8 publication or use of encrypted communications transmitted over wire or by radio.

9 15. Each Plaintiff has a personal stake in the issues involved in this litigation  
10 and has a reasonable apprehension of being sued by the Entertainment Oligopoly  
11 defendants for copyright infringement and “theft” of television shows. Each  
12 Plaintiff is participating in this litigation to protect his own interests, and to protect  
13 the interests of other owners of ReplayTV 4000 units who are threatened by the  
14 actions of the Entertainment Oligopoly defendants.

15 16. Each Plaintiff faces the direct risk of the loss of beneficial use of his  
16 personal property, the ReplayTV 4000, if the injunctive relief prayed for by the  
17 Entertainment Oligopoly defendants in the ReplayTV case is granted.

18 17. Plaintiffs are informed, believe and thereon allege that defendant  
19 TURNER BROADCASTING SYSTEM, INC. is a Georgia corporation with its  
20 principal place of business in Atlanta, Georgia and that defendant TURNER  
21 BROADCASTING SYSTEM, INC. engages in substantial business in this judicial  
22 district and maintains substantial contacts within this judicial district.

23 18. Plaintiffs are informed, believe and thereon allege that defendant DISNEY  
24 ENTERPRISES, INC. is a Delaware corporation with its principal place of business  
25 in Burbank, California.

26 19. Plaintiffs are informed, believe and thereon allege that defendant  
27 PARAMOUNT PICTURES CORPORATION is a Delaware corporation with a  
28 principal place of business in Los Angeles, California.



1       20. Plaintiffs are informed, believe and thereon allege that defendant  
2 NATIONAL BROADCASTING COMPANY, INC. is a Delaware corporation with  
3 studio facilities in Burbank, California.

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

7       22. Plaintiffs are informed, believe and thereon allege that defendant  
8 SHOWTIME NETWORKS INC. is a Delaware corporation with a principal place of  
9 business in New York, New York and that said defendant engages in substantial  
10 business in this judicial district and maintains substantial contacts within this judicial  
11 district.

12       23. Plaintiffs are informed, believe and thereon allege that defendant THE  
13 UNITED PARAMOUNT NETWORK is a Delaware corporation with a principal  
14 place of business in Los Angeles, California.

15       24. Plaintiffs are informed, believe and thereon allege that defendant ABC,  
16 INC. is a New York Corporation with a principal place of business in New York,  
17 New York and that said defendant engages in substantial business in this judicial  
18 district and maintains substantial contacts within this judicial district.

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

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

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

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

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

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

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

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

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

1 contacts within this judicial district.

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

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

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

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

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

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

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

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

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

1 COLUMBIA PICTURES INDUSTRIES, INC. is a Delaware corporation with its  
2 principal place of business in Culver City, California.

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

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

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

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

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

1 REPLAYTV, INC. is a Delaware corporation with its principal place of business in  
2 Mountain View, California. Plaintiffs are informed, believe and thereon allege that  
3 defendant REPLAYTV, INC. is a wholly-owned subsidiary of defendant  
4 SONICBLUE, INC.

5 47. Plaintiffs are informed, believe and thereon allege that defendant  
6 SONICBLUE, INC. is a Delaware corporation with its principal place of business in  
7 Santa Clara, California. Plaintiffs are informed, believe and thereon allege that  
8 defendant SONICBLUE, INC. is the parent company of defendant REPLAYTV,  
9 INC.

10 48. Plaintiffs are informed, believe and thereon allege that the Entertainment  
11 Oligopoly defendants, and each of them, is a plaintiff in one or more of the actions  
12 in this judicial district that have been consolidated under the name "Paramount  
13 Pictures Corporation *et. al.*, Plaintiffs, v. ReplayTV, Inc., *et. al.*," Case No. CV 01-  
14 9358 FMC (Ex), in which said plaintiffs allege that the ReplayTV has, through  
15 manufacture, sale, distribution and support of the ReplayTV 4000 unit, infringed  
16 copyrights held by plaintiffs and/or committed contributory copyright infringement  
17 and/or vicarious copyright infringement and/or violated Sections 553 and/or 605 of  
18 the Communications Act and/or engaged in Unfair Business Practices prohibited by  
19 California Business and Professions Code §§ 17200 *et seq.*

20 49. In the ReplayTV case complaints on file made available to the public and  
21 Plaintiffs herein, the Entertainment Oligopoly defendants accuse Plaintiffs of  
22 Copyright Infringement.

- 23 a. For example, it is alleged in the ReplayTV case that the Auto-Skip  
24 feature of the ReplayTV defendant's ReplayTV 4000 unit "enables  
25 and induces their customers to make **unauthorized** digital copies of  
26 plaintiffs' copyrighted television programming for the purpose of, at  
27 the touch of a button, viewing the programming with all commercial  
28 advertising automatically deleted." *Paramount Pictures Corp., et al.*

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

4 b. In paragraph 4 of the Amended Paramount Complaint, it is further  
5 alleged that “the ‘Send Show’ feature of the ReplayTV defendant’s  
6 ReplayTV 4000 unit makes it “a breeze” to make perfect digital  
7 copies of plaintiffs’ copyrighted programs, including entire  
8 theatrical motion pictures, and distribute them to other people --  
9 even many other people -- through high-speed Internet connections.  
10 This **unlawful activity** likewise deprives plaintiffs of the means of  
11 payment for, and diminishes the value of, their copyrighted works.”  
12 *Id.* at lines 14-21 (emphasis added).

13 c. Likewise, paragraph 5 of the original complaint states “[ReplayTV]  
14 assure[s] **their customers that using the ReplayTV 4000 to**  
15 **infringe copyrights** will be effortless: “[W]ith its broadband  
16 connectivity, sending and receiving programs [with the ReplayTV  
17 4000] is a breeze.” *Paramount Pictures Corp., et al. v. ReplayTV,*  
18 *Inc. and SonicBlue, Inc.*, CV 01-09358-FMC (Ex) (complaint dated  
19 Oct. 31, 2001), at 8, lines 23-25 (emphasis added).

20 50. In section 2, page 6, of “Plaintiffs’ Supplemental Memorandum of Law in  
21 Support of Their Motion to Compel” in the ReplayTV case, the Entertainment  
22 Oligopoly defendants represented that there is a small community of approximately  
23 5,000 ReplayTV 4000 users who tend to communicate with each other. The  
24 Entertainment Oligopoly defendants further admitted and acknowledged the  
25 apprehension and fear that they have injected into the hearts and minds of ReplayTV  
26 4000 owners, declaring that “...given the widespread publicity about this lawsuit,  
27 customers might fear that candid answers [about their ReplayTV 4000 use] might  
28 lead to personal liability for them—and thus decline to give such answers.”

1           51.           Additionally, the relief sought in the ReplayTV case will materially  
2 affect the Plaintiffs herein in their use and enjoyment of their ReplayTV 4000s.  
3 Plaintiffs are informed and believe, and based upon such information and belief  
4 allege, that ReplayTV can technically impair Plaintiffs' ability to continue to use the  
5 "commercial advance" and "send show" features of their ReplayTV 4000 units. In  
6 the ReplayTV complaint the Entertainment Oligopoly defendants seek injunctive  
7 relief to:

8                   a. Prevent ReplayTV from engaging in "any provision, use, or **support**  
9                   **of the 'AutoSkip' or 'Send Show' functions or any similar**  
10                   **functions**, or from licensing any other person to do the same.”

11                   *Paramount Pictures Corp., et al. v. ReplayTV, Inc. and SonicBlue, Inc.,*  
12                   CV 01-09358-FMC (Ex) (amended complaint dated Nov. 21, 2001), at  
13                   31, lines 1-13.

14                   b. Preventing ReplayTV from "encourag[ing] or **permit[ting] users** to  
15                   transmit copies of such programming to other persons." *Id.* at lines 14-  
16                   19.

17                   c. Plaintiffs further reasonably fear that as part of an injunction granted  
18                   (or settlement reached) in the ReplayTV case, the Entertainment  
19                   Oligopoly defendants will require ReplayTV to "push down" a  
20                   software “downgrade” onto their ReplayTV 4000 units, thus  
21                   disabling the commercial advance and send show features on their  
22                   units.

23           52.           Plaintiffs are informed, believe and thereon allege that each of the  
24 Entertainment Oligopoly defendants has agreed with each other such defendant to  
25 perform the acts herein alleged to have been carried out by the Entertainment  
26 Oligopoly defendants or any of them. Plaintiffs are informed, believe and thereon  
27 allege that each of the Entertainment Oligopoly defendants, as a principal,  
28 authorized each other such defendant to act as an agent on behalf of said principal

1 and each such agent so acted pursuant to such authorization. Plaintiffs are informed,  
2 believe and thereon allege that each Entertainment Oligopoly defendant ratified the  
3 acts of each of the other Entertainment Oligopoly defendants. Plaintiffs are  
4 informed, believe and thereon allege that each of the Entertainment Oligopoly  
5 defendants provided substantial assistance to each of the other Entertainment  
6 Oligopoly defendants in performing the acts herein alleged with knowledge thereof.

7  
8 **GENERAL ALLEGATIONS**

9 53. Article 1, § 8 of the United States Constitution provides that "The  
10 Congress shall have Power ... To promote the Progress of Sciences and useful Arts,  
11 by securing for limited Times to Authors and Inventors the exclusive Right to their  
12 respective Writings and Discoveries." Pursuant thereto, Congress has enacted the  
13 Copyright Act of the United States of America, set forth in Title 17 of the United  
14 States Code, and the Courts of the United States of America have rendered decisions  
15 interpreting said Constitutional provision and said Copyright Act.

16 54. In the landmark decision *Sony Corporation of America v. Universal City*  
17 *Studios*, 464 U.S. 417, 429-430, 104 S.Ct. 774 (1984), the Supreme Court declared  
18 that "[t]he monopoly privileges that Congress may authorize are neither unlimited  
19 nor primarily designed to provide a special private benefit. Rather, the limited grant  
20 is a means by which an important public purpose may be achieved. ... From its  
21 beginning, the law of copyright has developed in response to significant changes in  
22 technology." Quoting from prior authority, the court reiterated the principle that  
23 "[t]he limited scope of the copyright holder's statutory monopoly ... must ultimately  
24 serve the cause of promoting the broad public availability of literature, music, and  
25 the other arts." (464 U.S. at 431.) In the *Sony* case, the Court held that owners of  
26 copyrights on television programs could not halt the manufacture and sale of a home  
27 videotape recorder ("VTR") on the strength of an argument that such recorders could  
28 be used to infringe copyrights. One reason for the Court's decision was that the



1 VTR was used to shift the time for viewing from the time of original broadcast to a  
2 time more convenient to the consumer, that "time-shifting merely enables a viewer  
3 to see such work which he has been invited to witness in its entirety free of charge"  
4 and that time-shifting was a "substantial noninfringing use" that could not be  
5 prohibited as an incident of the copyright owner's monopoly. (464 U.S. at 447-56.)

6 55. "Space shifting"—the practice of reproducing copyrighted works that have  
7 been lawfully acquired in order to experience them in other locations—also properly  
8 falls outside of the copyright monopoly so long as such activity falls within the  
9 scope of the "fair use" doctrine set out in 17 U.S.C. 107. Plaintiffs' use of the "send  
10 show" features of their ReplayTV 4000s for space-shifting of televised programming  
11 fall squarely within the scope of the fair use doctrine.

12 56. The ReplayTV 4000 duplicates the substantial noninfringing uses of the  
13 VTRs that were the subject of the *Sony* decision. Since the *Sony* decision, VTR  
14 manufacturers have developed and marketed commercial-skipping features. VTRs  
15 have, in addition, always facilitated "space-shifting" insofar as VTR users are able to  
16 record a tape in one unit and play it back in any other compatible VTR. Unlike a  
17 VTR, however, the ReplayTV 4000 records television signals in digitized form on a  
18 "hard drive" similar to that found on personal computers. The digital storage  
19 provides consumers with greater flexibility and control over the viewing of televised  
20 programs. In addition, a ReplayTV 4000 unit is Internet-accessible so as to provide  
21 a consumer automatically with functionally useful information transmitted over the  
22 Internet and a means to operate the ReplayTV 4000 unit from a place distant from  
23 the unit itself.

24 57. Plaintiffs are informed and believe, and based upon such information and  
25 belief allege, that the presently-configured ReplayTV 4000 unit allows an owner—  
26 as it relates to Entertainment Oligopoly defendants' television programs—to: (1)  
27 use a "Commercial Advance" feature to automatically avoid most of the  
28 commercials appearing in a television program and to manually avoid commercials

1 with the push of a button similar to an analog VCR; (2) view or transfer recorded  
2 programs over the consumer's networked personal computers or other ReplayTV  
3 4000 units via an "Ethernet" connection typically found on computers with  
4 broadband connections to the Internet and thus enjoy "space-shifting" without  
5 having to physically move recorded media (the "Ethernet features"). The  
6 Entertainment Oligopoly defendants have requested that further distribution of the  
7 ReplayTV 4000 be enjoined and that all support currently rendered to ReplayTV  
8 4000 owners, including Plaintiffs, also be enjoined. They have declared that  
9 ReplayTV 4000 owners who utilize its commercial advance and "send show"  
10 features violate the Copyright Act.

11 58. Plaintiffs are informed, believe and thereon allege that officers for the  
12 Entertainment Oligopoly defendants have declared that viewing a recorded television  
13 program by means of a ReplayTV 4000 unit without viewing the commercials is  
14 theft. For example, Plaintiffs are informed, believe and thereon allege that Jamie  
15 Kellner, the Chief Executive Officer of defendant Turner Broadcasting System, Inc.,  
16 recently stated in an interview in *Cableworld* magazine that avoiding advertisements  
17 in programs amounts to "theft" and "stealing." Specifically, Kellner is reported to  
18 have declared: "the ad skips.... It's theft.... Any time you skip a commercial or watch  
19 the button you're actually stealing the programming." *Cableworld*, Monday, April 29,  
20 2002. See  
21 <[http://www.inside.com/product/product.asp?entity=CableWorld&pf\\_ID=7A2ACA71](http://www.inside.com/product/product.asp?entity=CableWorld&pf_ID=7A2ACA71-FAAD-41FC-A100-0B8A11C30373)  
22 [-FAAD-41FC-A100-0B8A11C30373](http://www.inside.com/product/product.asp?entity=CableWorld&pf_ID=7A2ACA71-FAAD-41FC-A100-0B8A11C30373)>.

23 59. Mr. Kellner's assertions that ReplayTV users are engaging in "theft" and  
24 "stealing" have been widely circulated in the mainstream and internet press:

- 25 a. [http://forbesbest.com/home\\_europe/2002/05/03/0503sonicblue.html](http://forbesbest.com/home_europe/2002/05/03/0503sonicblue.html)
- 26 b. [http://news.bbc.co.uk/1/hi/english/sci/tech/newsid\\_1986000/1986616.st](http://news.bbc.co.uk/1/hi/english/sci/tech/newsid_1986000/1986616.st)  
27 m

28 60. In an article published by *Time* magazine (part of the AOL Time Warner

1 conglomerate that includes the Time Warner defendants), owners of the ReplayTV  
2 4000 unit have been identified as "Pirates of Prime Time."

3 <<http://www.time.com/time/business/article/0,8599,203498,00.html>>.

4 61. In the ReplayTV case, the Entertainment Oligopoly defendants obtained an  
5 order requiring the ReplayTV defendant to collect and provide to the Entertainment  
6 Oligopoly defendants information about consumers who access ReplayTV websites,  
7 that may include, Plaintiffs are informed, believe and thereon allege, personally  
8 identifying information, as well as so-called "anonymous information" (which may  
9 be later linked to personally identifying information) collected by ReplayTV  
10 website(s).

11 62. Plaintiffs are further informed, believe, and thereon allege that the  
12 Entertainment Oligopoly defendants have in the ReplayTV case alleged that  
13 watching a time-shifted television program more than once, or storing such a show  
14 for any extended period of time, constitutes prohibited "librarying" that violates the  
15 Copyright Act.

16 63. Plaintiffs and other owners of the ReplayTV 4000 have been placed in  
17 realistic danger of sustaining a direct injury as a result of being named as defendants  
18 in lawsuits filed by the Entertainment Oligopoly defendants, including lawsuits  
19 alleging copyright infringement and/or violations of the Communications Act.  
20 Plaintiffs do not agree with the Entertainment Oligopoly defendants that a condition  
21 of watching time-shifted television shows is a requirement that Plaintiffs must also  
22 watch all included commercials and that violation of this condition results in  
23 copyright infringement liability. Plaintiffs similarly disagree with the Entertainment  
24 Oligopoly defendants who claim that consumers have no right to time-shift, space-  
25 shift, or communicate using the ReplayTV 4000 in their homes. Plaintiffs further  
26 disagree with the Entertainment Oligopoly defendants that watching a time-shifted  
27 program more than once, or storing it for more than a brief time, constitutes  
28 infringing "librarying."



1       69. Plaintiffs contend as it relates to the Entertainment Oligopoly defendants  
2 and their television programs that, consistent with the Copyright Act of the United  
3 States of America, including those laws prohibiting direct, contributory or vicarious  
4 infringement, the Communications Act, laws protecting fair use and the First  
5 Amendment to the United States Constitution, and judicial decisions construing such  
6 laws, doctrines, and provisions:

- 7           a. Each Plaintiff's ownership of a ReplayTV 4000 unit is lawful;
- 8           b. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully  
9 record television programs broadcast free or paid for by a member  
10 of the Plaintiff's household for later viewing by the Plaintiff and  
11 members of Plaintiff's household;
- 12           c. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully  
13 utilize the commercial advance features provided with the unit;
- 14           d. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully  
15 use the Ethernet features provided with the device for purposes of  
16 viewing by the Plaintiff or members of the Plaintiff's household of  
17 any television program broadcast free or paid for by a member of the  
18 Plaintiff's household no matter where the viewer is located; and
- 19           e. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully  
20 use the Ethernet features provided with the device for the purpose of  
21 facilitating the viewing by one or more specific individuals of any  
22 television program broadcast free so long as said Plaintiff does not  
23 receive any compensation or direct commercial benefit thereby.

24       70. Plaintiffs are informed, believe and thereon allege that the Entertainment  
25 Oligopoly defendants contend the contrary of each of above-stated propositions (a)  
26 through (e).

27       71. Wherefore, Plaintiffs request that the court determine and adjudge that  
28 each and every of the above-stated propositions states the law applicable to the facts

1 involved in this action.

2 WHEREFORE, Plaintiffs pray for judgment as follows:

- 3
- 4 1. A declaration that as it relates to the Entertainment Oligopoly defendants
- 5 and their television programs that:
- 6 a. Each Plaintiff's ownership of a ReplayTV 4000 unit is lawful;
- 7 b. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully
- 8 record television programs broadcast free or paid for by a member of
- 9 the Plaintiff's household for later viewing by the Plaintiff and members
- 10 of Plaintiff's household;
- 11 c. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully
- 12 utilize the commercial advance features provided with the unit;
- 13 d. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully use
- 14 the Ethernet features provided with the unit for purposes of viewing by
- 15 the Plaintiff or members of the Plaintiff's household of any television
- 16 program broadcast free or paid for by a member of the Plaintiff's
- 17 household;
- 18 e. Each Plaintiff, as an owner of a ReplayTV 4000 unit, can lawfully use
- 19 the Ethernet features provided with the unit for the purpose of
- 20 facilitating the viewing by one or more specific individuals of any
- 21 television program broadcast free so long as said Plaintiff does not
- 22 receive any compensation or direct commercial benefit thereby;
- 23 2. Attorney fees pursuant to the Copyright Act, Private Attorney General
- 24 basis, or otherwise as allowed by law;
- 25 3. Plaintiffs' costs and disbursements within; and
- 26 4. Such other and further relief as the court shall find just and proper.
- 27 Plaintiffs hereby request a jury trial for all issues triable by jury including, but
- 28 not limited to, those issues found in any amended complaint or consolidated
- action.

1  
2 Dated: June 6, 2002

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