UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

THE HON. FLORENCE-MARIE COOPER, JUDGE PRESIDING

CRAIG NEWMARK, SHAWN HUGHES, KEITH OGDEN, GLENN FLEISHMAN AND PHIL WRIGHT,

Plaintiffs,

vs.

No. CV 02-4445 FMC(MANx)

TURNER BROADCASTING SYSTEM, INC.; DISNEY ENTERPRISES, INC.; PARAMOUNT PICTURES CORPORATION; NATIONAL BROADCASTING COMPANY, INC.; NBC STUDIOS, INC.,; SHOWTIME NETWORKS, INC.; THE UNITED PARAMOUNT NETWORK; ABC, INC.; VIACOM INTERNATIONAL, INC.; CBS WORLDWIDE, INC.; CBS BROADCASTING, INC.; TIME WARNER ENTERTAINMENT COMPANY, L.P.; HOME BOX OFFICE; WARNER BROS.; WARNER BROS. TELEVISION, TIME WARNER, INC.; NEW LINE CINEMA CORPORATION; CASTLE ROCK ENTERTAINMENT; THE WB TELEVISION NETWORK PARTNERS, L.P.; METRO-GOLDWYN-MAYER STUDIOS; ORION PICTURES CORPORATION; TWENTIETH CENTURY FOX FILM CORPORATION; UNIVERSAL CITY STUDIOS PRODUCTIONS, INC.; FOX BROADCASTING COMPANY; COLUMBIA PICTURES INDUSTRIES, INC.; COLUMBIA PICTURES TELEVISION, INC.; COLUMBIA TRISTAR TELEVISION, INC.; TRISTAR TELEVISION, INC.; REPLAYTV, INC.; AND SONICBLUE, INC.,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Monday, August 12, 2002

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LOS ANGELES, CALIF.; MONDAY, AUGUST 12, 2002; 10:14 A.M.

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THE CLERK: Calling civil case 02-4445 FMC, Craig Newmark, et al., vs. Turner Broadcasting, Inc., et al. Please state your appearances for the record.

MR. WHITE: Good morning, Your Honor. For the defendants in the Newmark case, Andrew White of the White O'Connor law firm representing the Paramount-Viacom defendants, the NBC defendants, and the Disney-ABC defendants.

I'm sorry. Defendants in that case but plaintiffs in the other. Thank you.

MR. ROTHKEN: Good morning, Your Honor. Ira Rothken for the plaintiffs. Thank you.

THE COURT: Good morning.

MR. COOPER: Good morning, Your Honor. Scott Cooper for the Fox, Universal, and MGM defendants.

MR. ROTSTEIN: Good morning, Your Honor. Robert Rotstein for the Columbia defendants.

MS. COHN: Good morning, Your Honor. Cindy Cohn of the Electronic Frontier Foundation for the plaintiff.

MR. SCHWARTZ: Good morning, Your Honor. Robert Schwartz for the Time Warner-Turner defendants. Thank you.

MR. STANTON: Good morning, Your Honor.

Emmett Stanton for the defendants SONICblue and ReplayTV.

MR. PULGRAM: Good morning. Laurence Pulgram, same parties.

THE COURT: Good morning.

All right. You may be seated.

The matter is on calendar this morning on a motion to dismiss. I have issued a tentative to deny the motion to dismiss, grant the request for a stay, and denying without prejudice the motion to consolidate.

Who would like to be heard?

MR. ROTHKEN: Your Honor, unless the defendants want to go first, I would like to be heard.

THE COURT: Okay. No one leaped up so you might as well.

MR. ROTHKEN: Okay. Clearly, I would be able to provide a much more meaningful discussion this morning after I've had an opportunity to hear their positions so I would appreciate it, if after they decide they want to say something, if I could have an opportunity to reply.

THE COURT: Certainly.

MR. ROTHKEN: Now, of course, Your Honor, we do indeed embrace your tentative ruling denying the entertainment companies' motion to dismiss and finding that there is a real case here, a real case or controversy in the United States Constitution.

And, Your Honor, I would ask -- what I'm going to spend most of my time on this morning is the portion of your tentative ruling regarding the issue of stay and consolidation.

Having found that my clients, indeed, have a real case or controversy, I would ask that you allow my clients' case to move forward, not be stayed, but to be consolidated into the Paramount case.

And there are numerous reasons for that; but I would like to start with the first reason; and, that is, basically, the Declaratory Judgment Act itself, in terms of if we're not able to move forward and if we do remain stayed, it may frustrate the purposes behind the Declaratory Judgment Act.

For example, Your Honor, the Declaratory Judgment Act provides that it's designed to reduce apprehension of parties. It's designed to provide predictability in how they should conduct themselves and it's designed to provide closure as well as to settle disputes between the parties.

Your Honor, at this point, if we have to wait, my clients, each and every time they go ahead and click a button on their ReplayTV 4000, they don't know whether or not they are accruing more statutory damages.

They don't have predictability in how to conduct themselves. Their activities are, indeed, chilled, Your

Honor; and if the matter remains stayed, it will be chilled possibly for a very long time so I would ask the court to consider the policies behind the Dec Relief Act.

Now, Your Honor, as you pointed out in your tentative ruling -- and we agree -- the issue of stay, as well as the issue of consolidations, are within the sound discretion of the trial court; and, in this instance, it's you, Your Honor.

And as the Supreme Court pointed out and as you have cited in your tentative ruling in *Rickover*, as well as in *Wilton*, that the discretion must be implemented in a way that has reasons, good reasons for not allowing us to move forward.

And a distillation of the cases suggest that the discretion should look for what's in the interest of justice, what's in the public interest, and what's judicially efficient; and I'm going to address each one of those right now, Your Honor.

In looking at the interests of justice, one needs to take a step back to see what is really going on in this dynamic between these two cases.

What you have in the Paramount case is you have the entertainment companies suing SONICblue and suing SONICblue essentially for the acts of my clients.

Now, it's fair to say that my clients don't make

up all SONICblue device or ReplayTV device owners. But, certainly, common sense and reason would dictate that they make up a substantial majority of such users that their acts and their conduct; and what you have is a situation where the entertainment companies are suing SONICblue over the acts of my clients and my clients have absolutely no say at this point.

They are suing SONICblue to enjoin the uses of my clients in that case -- and my clients being the consumers -- and my clients don't have any say in stopping the injunction that they are asking for, in saying that they are allowed to continue to use the features and the services.

Your Honor, SONICblue, besides being a manufacturer of a good, when they sold the good to my clients, they also implicitly sold the service that goes along with that good. Because without SONICblue's servers and services, my clients' goods become worthless.

If an injunction, for example, is issued in the Paramount case, namely, the injunction that the entertainment companies are asking for in their lawsuits they filed, they are asking to stop the send-show feature. They are asking to stop the commercial-advance feature.

Those features, Your Honor, if they are cut off, would also cut off my clients' uses; and so, Your Honor,

what you have is a situation where the entertainment companies are essentially trying to cut off SONICblue's lifeline, their services and their server and the data they provide to my clients' devices which would render them either worthless or seriously impair and would impair their uses.

So, Your Honor, the interests of justice are such that by allowing my clients' case to move forward, by allowing the cases to be consolidated, you will have the benefit of the third party that's impacted in this case, namely, the consumers.

You'll have an opportunity to be able to hear their viewpoint, to determine in a holistic and consistent way in both cases simultaneously what the proper remedies should be.

If the Newmark case is consolidated and tried along with the Paramount case, you can take it to the consideration, the findings in both cases, to fashion a better equitable remedy that would take into consideration my clients' lawful, fair uses.

You'd have an advocate there for those lawful, fair uses on behalf of consumers so you can actually fashion a better equitable remedy; and equitable remedies, by their very nature, Your Honor, involve a balancing of all interests, not just the interests of Hollywood, not just the

interests of the manufacturer, but also the interests of the consumer in this context given especially the lifeline that this good requires to work.

Your Honor, we believe that this case, Newmark, moving forward would serve the public interest.

Consumers, Your Honor, are in the best position to argue fair use. Those are their fair uses, not SONICblue's, not any other manufacturer; and in a case like this that is very, very important, Your Honor, which by its very nature will resonate throughout society and the industry, consumers should be able to come forward and make arguments over their own fair use, not only so that they could have those fair uses adjudicated and to be shown to be lawful, but they also have the most intimate knowledge of their own fair use.

They're in the best position to know whether or not their uses are transformative, whether or not their uses are commercial versus noncommercial; and the court could take that into consideration again in fashioning its remedy in both cases in an integrated and consistent fashion.

Your Honor, the public interest is also impacted by the privacy issues in this case.

Now, I am mindful that the court has already issued an important order which seems to protect the consumers' privacy interests and for that we are very appreciative.

But, Your Honor, in anticipation of what is likely going to evolve in this case is the notion that it's very likely that the entertainment companies are either going to say to you, Your Honor, we'd like you to shut off the send-show feature, we would like you to shut off the commercial-advance feature; and if SONICblue is able to make a good argument why it shouldn't be completely shut off in total, they're going to come back and say, fine, we want you to track the users. They may use a clued word called digital-rights management.

The digital-rights management in its extreme form has enormous privacy implications; and it could be very, very intrusive on users' privacy.

That is not an issue that should be litigated only between Hollywood and the manufacturer. Consumers should have a voice in it; and even if that voice is one where it's in a consolidated case, it will still supply a better remedy, an one that has -- takes into consideration everybody's viewpoints, Your Honor.

Your Honor, I'm going to sum up by discussing judicial efficiency on this point; and I saved this for last because I think to a certain extent when you noted that these cases were, indeed, related.

There is some recognition, obviously, that these cases have enormous common areas of law, in fact; that these

cases are intimately intertwined; that the fair use arguments that my clients will be making in their case will be intimately intertwined with the fair-use arguments that we made in Paramount.

And, Your Honor, unlike in the *Wilton* case where the Supreme Court discussed the calculus, where you had to look at a parallel case to make a decision as to whether or not to stay a case asking for dec relief, in that case, in *Wilton*, you had a parallel state case in a different jurisdiction.

Here, these cases are related both before you in the exact same courthouse, not in two different federal courts even, but both before you. Convenience is exceptional.

We even have parties who submitted to jurisdiction here in front of you who are from out of state from Georgia and from Washington State to help maximize judicial efficiency. There are no issues of comity or federalism like there was in *Wilton*.

Your Honor, as you acknowledged in your tentative ruling in a footnote, you indicated that this case is early on. Discovery has not gone on in any meaningful fashion.

I was just downstairs in the hall where I heard Mr. Cooper and Mr. Stanton and Mr. Pulgram having a conversation trying to agree upon how to do discovery in

this case and they're on a scheduling order to show you later.

I'm mindful that not a single deposition has been taken yet; and I don't think, Your Honor, that we would add any more depositions except for the obvious notion that they would take our clients' depositions and except for the obvious notion that we would provide data from their machines.

But I don't think -- I would be very surprised if we had to ask the entertainment companies for a single quantum of additional information because our market impact analysis is going to be nearly identical to the market impact analysis that ReplayTV is going to do and the information that they are going to get regarding market impact.

We will be beneficiaries of the documents they have already asked for today. We have, of course, agreed to be bound by a protective order; and to the extent the protective order calls for attorney's eyes only, we are willing to follow that.

The case is in its early stages, Your Honor. Discovery is in its early stages. We're going to agree to the scheduling order. There are common issues of law and fact. No additional judicial resources will be needed, Your Honor, for our case to move forward.

We're not going to delay the case and, in fact, Your Honor, the obvious point is that allowing us to move forward and be consolidated would actually reduce the multiplicity of cases.

So distilled to it's essence, Your Honor, we're asking you, after a finding in your tentative ruling that we have a real case, we're asking you to allow us to move forward, forward in the interests of justice, for the public interests, and for judicial efficiency.

If you have any other questions, Your Honor, I would like to be able to answer them; and I also, of course, would like to be able to respond to anything the entertainment companies say.

THE COURT: Okay. I don't have any questions at this time.

MR. ROTHKEN: Thank you, Your Honor.

MR. SCHWARTZ: Good morning, Your Honor. May I, on behalf of the defendants, respond to the arguments made on the stay part of your tentative; and perhaps, at the end of that, address some issues of concern I had with respect to the motion to dismiss that we've made as well.

The plaintiffs' basic argument is that under the Declaratory Judgment Act they are entitled to proceed; that a stay is not appropriate. They speak about desires for closure and predictability.

But, really, that is an irrelevant issue because the absence of predictability or closure would be there pending the litigation even if the case were permitted to proceed.

What is important is the question the court asked which is whether there is a lack of sufficient overlap of issues such that the litigation of the Replay case will resolve the issues that are raised in the Newmark case.

THE COURT: Let me just stop you for a second and tell you. What concerns me after listening to plaintiffs' argument is the right of the plaintiffs to participate.

I mean, certainly, they will be affected by whatever decision the court reaches in this case; and is it appropriate for them not to be participants where it is certainly possible that the court would issue either injunctive orders -- certainly not damages orders against the individual plaintiffs but injunctive orders -- that could affect them and shouldn't they have a say in the proceedings as they go along?

MR. SCHWARTZ: Well, I guess under the case law the question is where do you draw the line, Your Honor? There are lots of groups of people or individuals who will be affected by the outcome of this case no matter which way you decide it.

And if we wanted to bring before the court or if

the court felt that before it could resolve these issues it needed to hear from all those people or it ought to permit all of those people who want to be heard to come before the court, then perhaps we need to bring in all the writers and directors and producers of TV programming and motion pictures who will be adversely affected in the future if this device becomes widespread and it has the uses that we -- and the effects that we believe that it will have.

And the appropriate place to draw the line is between the litigants who are most directly involved in the dispute.

There is no question, Your Honor but that SONICblue and Replay intend to defend all of these issues quite vigorously. They are not rolling over on anything. And, indeed, I think, as counsel for the Newmark plaintiffs just said -- I couldn't have said it any better -- their market analysis, their analysis of harm to our works which is at the core of the fair-use defense is going to be the same as the ReplayTV defendants. So they add nothing.

Now, does that mean that they have a -- therefore, even though they add nothing, they will cause us to need to do more discovery, they have a right to be heard?

The answer is no. They don't have a right to be heard in our view. Their rights are being carried by the entity from whom they purchased their product who is doing,

I think, a stand-up job in articulating those positions and attempting to defend the rights of their consumers to use this device so that they can sell more of them. They have a greater motive to prosecute that.

Frankly, I think the rest of the issues are adequately dealt with in our papers. I don't want to repeat arguments. But I do want to talk about the motion to dismiss because I am concerned that, if put in the hands of someone else or sought to be applied to another dispute and taken out of context, it could have unintended consequences, consequences that the court did not intend.

And so if I can sort of somewhat take it from the top, I think we agree with one another, that is, the defendants and the court, on the standard for whether a case or controversy exists here; and, that is, under the *Societe de Conditionnement* case, is there a real and reasonable apprehension that the plaintiffs will be sued?

And we agree that that must be based -- that apprehension must be based on the objective conduct of the defendant.

Where I think we depart from the court is in two respects, and they are important.

One, the court says in its tentative at page 5, line 17 and 18, that no actual threat of litigation is required; and we believe that in the context of those cases

such as the *Chesebrough-Ponds* case and the *Aluminum* case, *Societe Aluminum* case, when they talk about an actual threat and whether an actual threat is meant, it means something different when you apply it to a case like this.

And what they are really talking about is maybe a direct threat need not be made. Maybe an indirect will suffice in certain cases. But, Your Honor, in --

THE COURT: Does this case qualify as an indirect threat, however, when an accusation is made of vicarious infringement? And these people are obviously the infringers. I mean, it sounds like an indirect threat to me.

MR. SCHWARTZ: Well, that's what's important, Your Honor, because, as the court knows, in order for us to state a claim for contributory and vicarious infringement, we have to allege a direct infringement which we have done; and we have no choice in that.

And if this is the rule such that in -- anytime a contributory or vicarious copyright infringement plaintiff files a lawsuit, this principle would entitle anyone, any direct infringer anywhere in the country, to assert a claim for declaratory relief, the substance of which is to say the plaintiff ought not to win its case for contributory and vicarious liability.

And that means that we then become deprived of our

right to decide what we want to sue over, whom we want to sue, and where we want to sue them; and there is certainly nothing in the jurisprudence, nothing in the copyright law context that says that we should be deprived of that right.

And, indeed, the case law tells us that the mere pendency of another lawsuit against somebody else does not supply the reasonable and real apprehension of suit; is not sufficient to state a case or controversy.

And that, if I can point the case out to the court, *Indium Corporation*, from -- I believe it's the Federal Circuit says that at 781 F.2d at page 883.

In any event, Your Honor, the facts of this case make it even less appropriate. This case has been pending for eight months. We have never sued these people. We have never had any contact with these people. We don't even know who they are. We have told the court in the other case we don't want to know who they are. So nothing could have given them that apprehension.

The second area of disagreement, Your Honor, is drilling down a little further, more case specific. I believe that the interpretation of the tentative ruling of some of the key cases does not -- is not -- I say respectfully -- is not consistent with the facts of those cases and if I could point that out and invite the court to review that.

First, the tentative says at page 7, lines 8 through 13, that direct communication with the plaintiffs is not required; and the tentative cites the *Hal Roach* case for the proposition in a parenthetical that a letter to a third party is sufficient to create a reasonable apprehension on the part of the declaratory relief plaintiff.

In fact, that is not what happened in that case. The Ninth Circuit in *Hal Roach* did not find that a letter sent to a third party would be sufficient.

In the *Hal Roach* case, what was at issue there was the defendant in the declaratory relief case sent a letter directly to the plaintiff in the declaratory relief case and said, "After X date, you will have no further rights in our copyrighted works, you will have no right to distribute them, and we trust that the rumors that you will continue to distribute them are false."

And the Ninth Circuit said, look, when you are communicating directly with the other side in a way that could be reasonably interpreted as a threat to take legal action after a certain date, that would be sufficient. But communications to a third party, not even at issue in the case, Your Honor.

Similarly, the *K-Lath* case does not state that no actual threat is necessary. In fact, I believe the case comes to a different conclusion. There, the declaratory

relief plaintiff *K-Lath* had obtained a patent on a certain stucco lathing product.

The plaintiff had said that the patent was invalid and that the defendant's enforcement of it would deprive it of the ability to enter markets and was a violation of the antitrust laws.

For an extended period of time, the lawyers -- parties, lawyers were exchanging letters staking out legal positions, asserting their rights and the like; and, lo and behold, the plaintiff comes in seeking declaratory relief of noninfringement.

And in this courthouse, Judge Cooper says that's not enough; merely having the lawyer sending letters to one another is not sufficient to create a threat, a reasonable apprehension of litigation.

And, finally, *Chesebrough-Ponds*, the Ninth Circuit case, again, it does not say, as we believe, that no actual threat of litigation is required. There, the plaintiff applies to register a trademark. The defendant in the declaratory relief action opposes the trademark. It says that your trademark is likely to cause confusion with ours. That is a touchstone as we all know of the Lanham Act claim.

The parties at that point are really already in litigation because when you oppose a trademark, it commences an automatic interparties proceeding; and there, given the

fact that the parties were litigating one another over whether the trademark was likely to cause confusion, the Ninth Circuit said that, although it may not be a specific threat to commence a lawsuit, that is sufficient.

That's not in this case, Your Honor. Again, we have never met these people, we don't know who they are, we haven't sued them in eight months of litigating over ReplayTV.

On those facts, there is not a single case that would support jurisdiction; and I urge the court to consider the ramifications of this for all contributory and vicarious liability plaintiffs.

Because if the mere filing of that lawsuit is sufficient to give a reasonable apprehension of suit, then we are vulnerable to having to litigate our case in a multiplicity of actions at any location of any choosing by people we have never desired to sue, don't know who they are; and that, to me, is a dangerous policy, a dangerous road to go down; and, for that reason, I would urge the court to reconsider its tentative on the motion to dismiss and elect, in fact, to grant the motion.

Thank you.

THE COURT: Thank you.

You wish to respond?

MR. ROTHKEN: Yes, I do. Thank you, Your Honor.

First, I would like to respond very briefly to the arguments regarding the case or controversy; and then, also, I will respond to the stay arguments.

Regarding the case or controversy, we actually, again, agree with your tentative ruling. When you look at *Societe* and you look at *Chesebrough* and you look at *Hal Roach*, the lessons that you learn are that you don't have to have a direct threat of litigation; that the plaintiffs' reasonable apprehension is the standard for determining whether or not there is a case or controversy, not the defendants' intentions but what the plaintiffs perceive.

That could even happen, Your Honor, through third parties. So when you distill all that down, what you have here is a situation that this case is more compelling for a case of controversy, because unlike a phone call or a letter that somebody may learn about where there -- where they may have liability, here in this case you have multiple complaints with the Rule 11 pleading requirements that bring integrity to what must go into this complaint with the manifestation that these allegations show which is that this conduct is ongoing, where there are very, very, very few users, and they make no exceptions at all for any of the users.

They don't just sue for vicarious liability and

point out that ten people who are doing something bad. They basically indict all send-show users, all commercial-advance users and ask you, on that basis, to enjoin it completely.

They acknowledge in a moment that, in one of their discovery motions, that Replay owners will be chilled to discuss this case because they may be afraid, of course, of being sued; and that was in our Complaint as well.

So, Your Honor, when you look at *Societe* and you look at *Chesebrough* and you look at *Hal Roach*, I think that when you marry the rules that are distilled out of those cases to what was said under Rule 11 in their Complaints, my clients did have a reasonable apprehension they would be subject to liability.

Now, Your Honor, there is no risk in your maintaining your ruling because the court does indeed have discretion, enormous discretion in allowing litigants in and out.

In fact, to be quite candid with Your Honor, we don't even have to bring a motion for you to have us hear a declaratory relief. You could do that *sua sponte*. You could have parties joined in and not joined in *sua sponte*. You look at Rules 19 and 24 and 21, and the court could join people in and out *sua sponte*.

Your Honor, what is very, very interesting -- and this is a good segue to the stay issue -- is this.

Mr. Schwartz, on behalf of the entertainment companies, was saying that we add absolutely nothing, that Replay and SONICblue can make arguments for us. But, Your Honor, what is really missing here, I think, is the fact that we're missing an entire category of argument.

We have Hollywood, we have the device manufacturer, but we don't have a single advocate for consumers.

I have to say, Your Honor, that the ability of parties to be heard in this case would go down if there was at least an advocate presenting the consumers' viewpoint so that their interests are heard; so that they have an adequate representative who doesn't have a conflict of interest.

And your exercise of discretion at that point to stop the floodgates of people trying to come in could be used to control the litigation. But right now, Your Honor, we don't have a consumer advocate at all in this case. Consumers' rights will be impaired if you give them what they are asking you under Rule 11 in their Complaint.

There is also one more issue here, Your Honor, that I should just point out to the court that was raised actually by the entertainment companies in responding to one of the motions in this case and, that is, they attached the terms of use to the services provided by ReplayTV.

But they didn't attach all the terms of use. If you look at it carefully, you'll see how they have missed a page; and in that page, it says that "Consumers will need to indemnify SONICblue and ReplayTV for any type of copyright infringement, any type of wrongful behavior or unlawful behavior." They agree to indemnify, defend, and hold harmless SONICblue and pay their cost of defense.

Now, Your Honor, we already have established the notion that if you cut off the lifeline to the consumers' boxes in this case, they will wither away; and that is a substantial interest they have in this case.

But I also point out to you the fact that at least by contract there are other interests where the consumers, in a sense, are acting as de facto insurers in the event that something happens to SONICblue.

Your Honor, again, unless you have any questions, I would ask that you embrace your tentative ruling regarding the motion to dismiss. The clients do have a substantial risk of liability and they were reasonable in their apprehension when they read about it in Complaints filed in the Paramount case and that you consolidate these cases so that we can get the best os possible remedy and so that the consumers' voice can be heard.

THE COURT: Thank you.

Anything further on this?

MR. PULGRAM: Your Honor, our clients are defendants in both cases; and as we support a consolidation of the first four cases, we support the consolidation of the fifth case as well.

We don't want to have multiple actions occurring sequentially and we don't want to have to do the discovery in multiple actions multiple times which appears to be the objective of those parties who are opposing doing one set of discovery for all the actions.

Now, in we could play out the scenarios here that might happen in the first case and then what the impact will be on the second case. It seems to me we have three possible scenarios.

The first is that the plaintiffs lose and ReplayTV wins in the first case; and in that scenario, Your Honor upholds the device and those uses that ReplayTV has defended.

However, that will not dispose of the additional and separate claims that the Newmark plaintiffs have with respect to the other uses that they make such as the transfer from their device to PCs.

THE COURT: Hold on one second.

Yes?

MR. SCHWARTZ: Your Honor, on behalf of the defendants, I object to this. I mean, they are not the

moving party in this. They filed a reply brief without authority as a nonmoving party, and I believe this is inappropriate.

They are a nominal defendant at best in the Newmark action. They filed nothing on the issue of the motion to dismiss. They filed no answer, no responsive pleading; and this is just inappropriate surreply or surrebuttal to a position they have no right to assert in the first place; and I don't think it really addresses the issue before the court as to whether the action should be stayed or the action should be dismissed.

MR. PULGRAM: I'm not speaking to the dismissal. I'm not speaking to the motion to dismiss at all. I'm speaking to whether or not the case in which we're a party should be stayed or whether or not the case in which we are a party as a defendant should be consolidated which we clearly have an interest in.

MR. SCHWARTZ: They may, Your Honor; but there is no declaration of rights vis-a-vis those parties as being sought in this case. There is a declaration of the Newmark plaintiffs against us about whether their conduct constitutes fair use.

But Replay, at most, is a stalking horse or place holder in the Newmark action; and I am very concerned at what this highlights or foreshadows is activity that

unnecessarily seeks to complicate both cases to our detriment and a prompt adjudication of our rights.

That's what I wanted to point out.

THE COURT: Okay. Well, I'm willing to hear argument from you. You are certainly a named defendant in the case and have an interest in the issue of stay or consolidation, and so you may address the court.

MR. PULGRAM: Okay. So I was discussing options, or outcome No. 1, ReplayTV prevails. There are still additional issues that need to be determined as to uses that are advocated by the Newmark plaintiffs that Replay hasn't defended.

And in that ongoing litigation that would then happen, if the cases aren't consolidated, the discovery that has already happened in the prior case won't even be the discovery for the new action. It will start over.

It seems to me not particularly efficient.

The second possibly outcome, it would seem to me, is that there is some sort of voluntary or consensual resolution in which ReplayTV and the plaintiffs figure out a way to resolve the case.

Now, in that circumstance, that doesn't necessarily resolve the Newmark case either; and so, again, the Newmark case proceeds ahead without the benefit of the discovery that has already been accomplished in the ReplayTV

case.

The third option, as unlikely as we feel it is, is that the plaintiffs prevail against ReplayTV; and in that situation Your Honor issues some sort of injunction that limits the features or functions that ReplayTV can provide.

Now, in that situation, one of two things will happen. Either the plaintiffs will claim in the Newmark case that the Newmark -- I'm sorry -- either the defendants, the entertainment companies, will claim in the Newmark case that the Newmark claims are mooted because Replay can't provide the services anymore and, therefore, there is no more issue for Your Honor to resolve.

Now, in that situation, the Newmark plaintiffs have had their rights decided without ever having an opportunity to speak.

The other scenario is that Your Honor issues an injunction against us and it's not binding on the Newmark plaintiffs because they weren't parties; and, again, the Newmark plaintiffs go forward with their own lawsuit and their own declaratory relief.

So under all of these various scenarios, I think Your Honor's decision in terms of consolidation is: Do those potentialities of inefficiency from lack of consolidation counterbalance the potential efficiencies of consolidation?

In other words, how much difficulty is the joinder of the additional plaintiffs in the Replay case going to be?

And it's going to be minimal because the depositions haven't happened, because we're reaching a new schedule that is going to, as Your Honor has seen, put this out over a time period in which the Newmark plaintiffs would not be any interference at all and because the issues so substantially overlap.

My clients don't want two lawsuits going two times against them. They want them all disposed of at one time. And so we believe that rather than staying and requiring a set second of discovery, we should do it all at once.

THE COURT: Thank you.

Mr. Schwartz?

MR. SCHWARTZ: Yes. Believing as we do in the division of labor, this morning on the way in, I agreed to discuss the issue of dismissal and stay and Mr. Cooper agreed to discuss the issue of consolidation.

If I can just focus on the former, I'll defer to Mr. Cooper on the latter.

There are two premises of the argument we just heard that are erroneous. One, there is always discussion about rights of the Newmark defendants being adjudicated without their being here and so on and so forth.

The question is what rights do they have? I mean,

yes, they bought a device and, yes, they would like to keep that device and keep features. But as to -- between them and us, the fact is they really have no rights merely because they can articulate a theory by which they might be affected by the outcome of the litigation.

Every shareholder in America is affected by every lawsuit against every corporation. It does not mean that any of them have the right to intervene or seek declaratory relief. It's not enough. And it's not enough there. It's not enough here.

The second is the notion that we would somehow be subjecting the Replay defendants -- Replay and SONICblue -- to multiple lawsuits and multiple discovery.

The fact is no relief is sought against them in the Newmark case. There would be no second lawsuit against them. The only litigation that would proceed -- in the event the court did not, at the conclusion of the ReplayTV litigation, decide that there was no more case or controversy in the Newmark case -- would involve us and only us because they would want some additional adjudication.

And, therefore, they have no leg -- or no standing to complain about that prospect because it doesn't even really apply to them.

But, finally, I ask: What is the claim? What is the use? We hear theories, but we don't hear examples or

anything concrete. What is the use that would be adjudicated -- left aside in the Replay case for the SONICblue, Newmark -- excuse me -- for just the Newmark defendants to adjudicate on a declaratory relief basis?

I can't think of what it is.

We have sued over three features or three aspects of the unit: Send show, commerce skip, and the librarying function. Those features are going to be resolved in this litigation and, thereafter, we are done.

We are not interested in engaging in academic debate with public policy organizations or anyone else about what other things that we're not interested may or may not constitute copyright infringement or may or may not constitute fair use.

They're going to be litigated in this case in the ReplayTV case and it's going to be over. Therefore, there is no supplemental discovery, there is no issue here.

And if there is nothing else the court had questions about with respect to the arguments articulated on the motion to dismiss or stay, I would defer to Mr. Cooper on the issues of consolidation.

THE COURT: Thank you.

MR. COOPER: Good morning, Your Honor.

THE COURT: Good morning.

MR. COOPER: One of the disadvantages of doing

this kind of labor division is I'm not sure what is left for me to address; and, obviously, the court recognized the overlap between the two motions in fashioning this ruling.

I think one thing is worth clarifying because something that Mr. Rothken said in his opening argument struck me as odd.

This case has been brought by five individuals. We understand that there are 5500 or more Replay owners. I'm not sure what he meant by the reference to a substantial majority of the owners being represented here; but the fact is it's less than 1/111th of those we knew about at an early stage of the case and, obviously, that number is growing. So it's a very small group of individuals and it is just a small group of individuals. It is not a representative group.

Moreover, the discovery in this action that has occurred in the Replay action that has occurred so far obviously relates to the interest between two directly interested parties over the sale of a consumer electronics device; and it is that device and what it does with respect to our clients' interests that we are focused on in the Replay case. That is a direct issue for adjudication before you in that litigation.

The discovery that has been allowed both by the court and Magistrate Judge Eick has been fashioned with

SONICblue as the recipient of that material.

It's a mass of material. It's well over half a million pages so far of the most highly confidential financial and other information that the entertainment companies possess.

It's provided with a very carefully fashioned, four-level protective order that contemplates certain kinds of documents being given to outside counsel for SONICblue and Replay that won't even be given to the in-house counsel at the various entertainment companies.

It's a very complex set of negotiations and rulings by the court, all of which would have to be entirely reexamined if you were looking at a situation where five individuals with no more contact with the case than what you have heard about this morning were endeavoring to get their hands on the same documents without any additional arguments to be made from those documents that SONICblue and Replay wouldn't already be making.

And it is at that crux that we focus in our papers with respect to the consolidation motion, that and the enormous additional difficulty of trying to advance the case with these individuals and a public policy thrust of their arguments, not the interests of the five people, but a broader policy consideration that the attorneys representing them want to bring to the case, has to bring to the process

of trying to advance the Replay litigation.

That's been our focus in the motion for consolidation, and we believe that the court already understands that based on the ruling.

THE COURT: Very briefly. Okay?

MR. ROTHKEN: Thank you, Your Honor.

First of all, I think it is very interesting that Mr. Cooper, on behalf of the entertainment company, said that what their case is about is essentially suing a device.

We respectfully disagree with that. You are suing the uses that people make of that device; and our clients are best situated to discuss those fair uses, Your Honor.

The notion that we cannot get documents because of the confidential nature of them, I would like to believe is not a big issue considering that there can always be an attorney's eyes only order.

And, in fact, Your Honor, these plaintiffs are competitors of one the another; and they probably have a lot more to lose about sharing documents with each other than giving it over to my law firm. We don't compete at all with them, and we would honor the integrity of the order.

Your Honor, in terms of the point that was made by Mr. Schwartz, I think what it does, it stands for the proposition -- when he was talking about the fact they just want to be done after this litigation -- it stands for the

proposition, again, that they want to go ahead and adjudicate extremely important issues involving my clients.

They want to stop my clients' uses by shutting off the lifeline and my not being heard.

It alarms me, and I think maybe that's even the crux of this whole problem; that they don't want to allow us to have our day in court. They want to have it first shut off; and then if our stay gets lifted, then what are we left with?

The ability for us to adjudicate our fair use rights in parallel and symmetry alongside allows the court to make the best possible equitable ruling taking into account each stakeholder's viewpoints.

Thank you, Your Honor.

THE COURT: Thank you.

All right. Well, as usual, you have presented me with some very interesting issues; and I will take this under submission.

Okay. Let me take a recess, Alicia, and then come in and see me about the next matter.

THE CLERK: Yes, Your Honor.

The court stands in recess.

(At 11:01 a.m., proceedings were adjourned.)

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CERTIFICATE

I hereby certify that pursuant to Section 753, Title 28, United States Code, the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter.

Date: August 16, 2002

PAT CUNEO, U.S. COURT REPORTER
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