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15 **UNITED STATES DISTRICT COURT**
16 **CENTRAL DISTRICT OF CALIFORNIA**
17

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

21 v.

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

CASE NO. CV 01-9358 FMC (Ex)
Hon. Florence-Marie Cooper

JOINT STIPULATION FOR THE
COPYRIGHT OWNER PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER

24 AND CONSOLIDATED ACTIONS.
25
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1 agenda is EFF's very public opposition to the Copyright Owner Plaintiffs' efforts
2 to obtain legislative protection for digital content, efforts that EFF decries as a
3 "cabal of Hollywood entertainment interests . . . conjuring this apocalyptic world."

4 Were these EFF lawyers to gain access through this litigation to "Highly
5 Restricted" information about, for example, Plaintiff MGM's business plan for
6 maximizing revenues from DVD distribution, or Plaintiff Time Warner's analysis
7 of the technical weaknesses of a proposed content security system, that information
8 would inform all of their future lobbying work for EFF. No matter how high their
9 professional integrity, these lawyers, because they are human, cannot forget what
10 they have learned and cannot erect ethical walls within their own brains. Leakage
11 of "Highly Restricted" information cannot be prevented for so long as these
12 lawyers continue in their roles as lobbyists and publicists for EFF's positions.

13 As protection, we seek merely to have EFF lawyers treated under the
14 existing Protective Order as if they were in-house counsel, and, even then, only as
15 to the most sensitive of the "Highly Restricted" information. That approach is fair,
16 reasonable and well tailored to the unique circumstances presented by EFF's
17 decision to add representation of the *Newmark* Plaintiffs to its strategic agenda. As
18 an organization that takes on representation only to advance its own political goals,
19 EFF is, in essence, the "real party in interest" and the three EFF lawyers—all EFF
20 employees—are, in essence, its "in-house counsel." Given EFF's admitted
21 strategy of using litigation as a strategic tool, it is neither hyperbolic nor
22 unreasonable to wonder whether a primary reason EFF joined the Rothken Law
23 Firm in representing the *Newmark* plaintiffs was to learn more about the inner
24 workings and plans of the "Hollywood cabal." Again, this is not meant as an
25 accusation, but a recognition of human reality. One who reads, for example, the
26 most confidential and guarded planning documents of Columbia Pictures will,
27 without ever distributing a single copy in overt violation of a Protective Order,
28 inevitably violate that Order by using what is learned to inform her arguments

1 before policy makers that, for example, a particular content security proposal is not
2 as important to Columbia Pictures as might appear.

3 The propriety of the limiting order we seek is well established in this Circuit.
4 Any lawyer—whether in-house or separately retained—whose non-litigation
5 activities create a reasonable likelihood that confidential information will be
6 disclosed should be barred from access to that confidential information. Under
7 *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1471 (9th Cir. 1992), this
8 Court cannot rely on assurances from the EFF lawyers or require the Copyright
9 Owner Plaintiffs to wait for evidence of actual disclosure. Rather, the Court is to
10 consider both: (1) “each individual counsel’s activities” to determine whether “an
11 unacceptable opportunity for inadvertent disclosure exists . . .” *U.S. Steel Corp. v.*
12 *United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984); and (2) “not only whether the
13 documents could be locked up in cabinets, but also whether . . . counsel [can] lock-
14 up trade secrets in [their] mind[s], safe from inadvertent disclosure . . . once [they
15 have] read the documents.” *Brown Bag, supra*, 960 F.2d at 1471. Permitting
16 EFF’s attorneys to have access to the Copyright Owner Plaintiffs’ most sensitive
17 proprietary information—information the other Plaintiffs’ in-house counsel are not
18 allowed to review—poses too great a risk because, as in *Brown Bag*, the ongoing
19 activities of EFF’s attorneys will “necessarily entail” assisting EFF and chosen
20 outside clients “in areas relating to [the Copyright Owner Plaintiffs’] trade
21 secrets.” *Id.*

22 We detail below the subcategories of documents already marked “Highly
23 Restricted” for which the Copyright Owner Plaintiffs seek special protection and
24 why that protection is warranted. (As noted, the *Newmark* Plaintiffs’ other counsel
25 has full access to all these documents.) We also demonstrate—all in EFF’s own
26 words—why the EFF lawyers’ job responsibilities necessitate protection for the
27 Copyright Owner Plaintiffs’ highly confidential information beyond that provided
28 by every bar member’s good word.

1 **Discovery at Issue**

2 The Copyright Owner Plaintiffs seek to treat EFF’s attorneys as “in-house”
3 counsel under the Protective Order, precluding them from gaining access to
4 “Highly Restricted” documents produced by the Copyright Owner Plaintiffs or
5 third parties within the specific categories identified below:

- 6 (i) The documents produced by the Copyright Owner Plaintiffs in
7 response to Defendants’ requests for documents produced to the
8 Department of Justice concerning the Department’s separate
9 investigations of “Movies.com” and “Movielink” (the “DOJ
10 Documents”);
11 (ii) The so-called “Lobbying Documents”;
12 (iii) The Copyright Owner Plaintiffs’ business plans;
13 (iv) Confidential financial documents; and
14 (v) Security and content protection information.

15 Categories (i) through (iv) were the subject of a motion to compel discovery
16 brought by the Defendants, and the Magistrate’s April 26 Order granting the
17 motion in part. The District Court affirmed the Magistrate’s April 26 Order with
18 respect to these categories of documents, in Section III of Judge Cooper’s order of
19 May 30, 2002.¹ (Cooper Decl., ¶ 7, Exh. D, Page 8:7-10.)

20 **The Copyright Owner Plaintiffs’ Contentions**

21 **Procedural Background**

22 On August 15, 2002, this Court granted the Newmark Plaintiffs’ motion to
23 consolidate the action titled Newmark, et al. v. Turner Broadcasting Network, et al.
24

25 ¹ Under the Stipulation and Protective Order dated September 19, 2002, the Copyright Owner Plaintiffs have
26 agreed to promptly identify to the Newmark Plaintiffs the specific Lobbying and DOJ Documents that are the
27 subject of this Motion. (Cooper Decl., ¶ 6, Exh. C.) The Copyright Owner Plaintiffs will also promptly identify
28 to the Newmark Plaintiffs by Bates number the specific business plans, confidential financial documents, and
security and content protection documents for which this protective order is sought.

1 (Case No CV 02-04445 FMC (Ex) (the “Newmark Action”) with the above-
2 captioned action (the “Replay Action”). In granting the order, the Court
3 acknowledged the Copyright Owner Plaintiffs’ concerns about EFF obtaining
4 unrestricted access to all of their production. While deciding not to deny
5 consolidation on that ground, Judge Cooper expressly left “the determination of the
6 precise scope of discovery [to which the Newmark Plaintiffs would be allowed
7 access] to the magistrate judge.” (Cooper Decl., ¶2, Exh. A.)

8 Immediately following the order, the Newmark Plaintiffs, through their
9 counsel Ira Rothken, requested that they be given access to all of the discovery
10 produced in the Replay Action, subject to the terms of the Protective Order. In
11 response, the Copyright Owner Plaintiffs attempted to negotiate with the Newmark
12 Plaintiffs certain restrictions and limitations on access to the discovery, including
13 an agreement that the Newmark Plaintiffs’ co-counsel, EFF, not be given access to
14 the most sensitive proprietary information produced by these companies.
15 Specifically, the Copyright Owner Plaintiffs asked that EFF’s review be subject to
16 the same agreed-upon limitations in place with respect to the parties’ in-house
17 counsel – that EFF be prohibited from viewing any documents designated as
18 “restricted” or “highly restricted” under the Protective Order. (Cooper Decl., ¶ 4,
19 Exh. B.)

20 Initially, the Newmark Plaintiffs *agreed* to the restrictions proposed by the
21 Copyright Owner Plaintiffs to limit EFF’s access to their most sensitive
22 documents, subject to preserving their right to bring a motion to lift such
23 restrictions on grounds that there existed a compelling reason that EFF’s attorneys
24 should have access to them. (Cooper Decl., ¶ 4, Exh. B.) However, the Newmark
25 Plaintiffs changed their minds and thereafter insisted that EFF be given blanket
26 access to all documents without regard to their substance. (Cooper Decl., ¶ 5.)

27 The parties met and conferred in an effort to find a middle ground.
28 However, those negotiations failed, necessitating this motion.

1 **EFF is an Organization Engaged in a Long-Term Struggle with the**
2 **Entertainment Industry – Including the Copyright Owner Plaintiffs –**
3 **Over Access to Content as well as Content Protection and Security**

4 Whether one agrees or disagrees with the politics and positions advocated by
5 the EFF, one cannot dispute that the EFF is, first and foremost, a political
6 organization with a very specific mission that pits them against the interests of the
7 Copyright Owner Plaintiffs in the judicial, legislative and public arenas, on the
8 very issues to which the documents in question relate. It is unavoidable that
9 allowing EFF’s attorneys access to the contents of those documents will result in
10 their use and disclosure, to the detriment of the Copyright Owner Plaintiffs.

11 EFF describes itself as “the leading civil liberties organization working to
12 protect rights in the digital world” which “actively encourages and challenges
13 industry and government to support free expression, privacy and openness in the
14 information society.” (Weiss Decl., ¶ 2, Exh. E.) In practice, EFF is beyond the
15 extreme end of the spectrum in its policy positions with respect to the copying and
16 use of copyrighted content distributed through the internet, digital cable, DVDs
17 and other recent technologies. EFF’s co-founder, present Vice-Chairman of the
18 Board, and former Grateful Dead lyricist, John Perry Barlow, predicted in 2000,
19 “There will be no property in cyberspace.” (Weiss Decl., ¶ 3, Exh. F.). EFF issues
20 the following call to arms on its website:

21 . . . governments and corporate interests worldwide are trying to
22 prevent us from communicating freely through new technologies, just
23 as when those in positions of power controlled the production and
24 distribution of – or even burned – books they did not want people to
25 read in the Middle Ages. . . .

26 [EFF] was created to defend our rights to think, speak, and share our
27 ideas, thoughts, and needs using new technologies, such as the
28 Internet and the World Wide Web. . . .

(Weiss Decl., ¶ 4, Exh. G.)

1 Accordingly, EFF opposes virtually every piece of legislation and every
2 technological development or application intended to control unauthorized use or
3 copying of copyrighted content, on grounds that are neither legally nor logically
4 supportable. EFF's perspective does not allow for compromise and leads
5 inevitably to such EFF-sponsored campaigns as its effort to obtain repeal of the
6 Children's Internet Protection Act of 2000 -- legislation that requires federally
7 funded schools and libraries to maintain software on their computers to filter out
8 pornography.² (Weiss Decl., ¶ 5, Exh. H.)

9 EFF is most recently involved in campaigns to fight legislation and inter-
10 industry cooperation to develop uniform standards and methods for preventing
11 illegal use and copying of digital copyrighted content. EFF's strategy in these
12 matters, too, is guided by its view that security systems and devices employed by
13 copyright owners to prevent unauthorized use and copying of their digital
14 copyrighted works are anti-competitive and unconstitutionally impinge on "fair
15 use" of copyrighted content.

16 Among EFF's recent activities is its campaign to discredit the Broadcast
17 Protection Discussion Group ("BPDG") and the BPDG's effort to evaluate and
18 recommend proposals to secure digital broadcast programming from theft and
19 piracy. (Weiss Decl., ¶ 2, Exh. E.) The BPDG was formed in November, 2001 by
20 70 representatives of "consumer electronics, information technology, motion
21 picture, cable and broadcast industries." (Weiss Decl., ¶ I, Exh. I.) Participants
22 included all of the Copyright Owner Plaintiffs in this action. Consistent with its
23 opposition to all efforts by copyright owners and content providers to prevent
24

25 ² Nor does EFF propose any constructive or even viable alternatives to its absolutist views. At best, its solutions are
26 offered disingenuously. In challenging record company efforts to use the United States courts to block a China-
27 based web site that offered thousands of copyrighted songs free of charge, EFF attorney (and counsel for the
28 Newmark Plaintiffs) Fred Von Lohmann told a New York Times reporter, "Wouldn't it be better to get an injunction
from a Chinese court to punish the people behind this?" (Weiss Decl., ¶ B, Exh. P.) As Mr. Lohmann surely knows
from reading the New York Times, no such relief will be forthcoming from the Chinese courts.

1 unauthorized copying of their works, EFF was critical of the BPDG from the
2 outset, singling out the major studio participants in particular:

3 Well, Hollywood's at it again. This time, the entertainment giants are
4 meeting behind closed doors with key consumer electronics and
5 computer companies. Using the rubric of eliminating "piracy," this
6 semi-secret group will set the standards for the over-the-air broadcast
7 signals of digital television . . . Through the Broadcast Protection
8 Discussion Group . . . Hollywood is writing a "technical standard"
that will restrict digital television equipment . . . capable of receiving
digital TV broadcasts . . .

9 (Weiss Decl., ¶ 2, Exh. E.)

10 The BPDG issued a final report. EFF, consistent with its general opposition
11 to any content protection system, characterized the report as "Hollywood's attempt
12 to force an unconscionable government mandate restricting technology innovation
13 and the rights of digital television consumers." (Weiss Decl., ¶ 7, Exh. J.)³

14 EFF is also presently engaged in a public relations and lobbying campaign to
15 kill the "Consumer Broadband and Digital Television Promotion Act," introduced
16 by Senator Fritz Hollings in the last session of Congress. The proposed legislation
17 would establish a standardized security system to protect digital content
18 distribution from unauthorized use or copying, and its objectives are supported by
19 the Copyright Owner Plaintiffs. EFF, however, has issued public statements
20 attacking the effort as an "abridgement of freedom," and characterizing it as "a
21 cabal of Hollywood entertainment interests . . . cooking up a set of laws aimed at
22 conjuring this apocalyptic world into existence." (Weiss Decl., ¶ 9, Exh. L.)

23
24
25
26 ³ Among the copy protection methods endorsed by the BPDG is the so-called "broadcast flag" -- a potential
27 technological method of signaling copy protection of digital broadcast content. The teaser on EFF's website to the
28 press release concerning the Broadcast Flag reads: "FCC to Announce Hollywood's Controversial 'Broadcast Flag'
- Anti-Competitive Proposal Undermines Adoption of Digital TV." (Weiss Decl., ¶ 8, Exh. K.)

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EFF’s Litigation Activities Track its Organizational Mission

Although EFF is engaged in litigation as well as its other activities, its clients and cases are chosen based on their ability to further EFF’s organizational objectives. Robin Gross, an EFF staff attorney who is also one of the three EFF attorneys identified on the Newmark Plaintiffs’ complaint, articulated it well:

EFF is not spending years in court merely to exonerate one or two individuals, or to enable distribution of a limited software prototype. We are here to establish the principle that the anticircumvention provisions cannot be used to eliminate fair use broadly throughout society.

(Weiss Decl., ¶ 10, Exh. M.)

A few examples of the cases it has chosen to support make the point. EFF was co-counsel for defendants in Universal City Studios, Inc. v. Reimerdes in the unsuccessful appeal of a judgment against them in the Southern District of New York, for illegally posting on a website a computer program, DeCSS, capable of cracking the “CSS” decryption technology that the motion picture studios use to prevent the unauthorized viewing and copying of their DVDs. EFF has also offered its services as co-counsel to defendants in MGM Studios, Inc., et al v. Grokster, et al. (USDC Case No. CV 01-08541 SVW (PJWx), a case pending in this court in which the Defendants, like Napster, operate an internet website that fosters rampant piracy of copyrighted music and other content, and in Davidson & Associates, Inc. v. Internet Gateway, Inc. (USDC Case No. 4:02CV498 CAS), a case in the Eastern District of Missouri, in the defense of alleged copyright infringement involving unauthorized copying to play games over the internet without purchasing plaintiff’s software. (Weiss Decl., ¶ 11, Exh. N.)

1 **EFF’s Legal and Lobbying Activities Create an Unacceptable Risk that**
2 **its Attorneys Will Use or Disclose the Copyright Owner Plaintiffs’**
3 **Confidential Information.**

4 As the foregoing clearly demonstrates, EFF has assumed *co-counsel* duties
5 in this case on behalf of the Newmark Plaintiffs because it presents another
6 opportunity for EFF to advance its agenda. Whether or not EFF’s attorneys
7 become more than peripherally and sporadically involved in the lawsuit with The
8 Rothken Law Firm, their involvement should not provide EFF with a free pass to
9 obtain the Copyright Owner Plaintiffs’ most sensitive, proprietary information.
10 EFF is currently, and will be for the foreseeable future, involved in activities
11 adverse to “Hollywood” and these Copyright Owner Plaintiffs, making the
12 information at issue – including business plans, internal financial and budgeting
13 data, and security and content protection information – of more than passing
14 interest to EFF’s broader mission. The information produced by the Copyright
15 Owner Plaintiffs to SONICblue and Replay will inform EFF and influence its
16 strategies in taking on “Hollywood” in the future.

17 The courts have endorsed protective orders that restrict access to
18 confidential documents to *any* attorney – in-house or retained counsel – who may
19 be involved in “competitive decisionmaking”⁴ on behalf of her or his employer or
20 client. (*See, e.g., In re Pabst Licensing*, 2000 U.S. Dist. LEXIS 6374 (E.D.La.)
21 (Patent attorney granted access to confidential materials on condition that attorney
22 not prosecute patent applications on behalf of client for one year after conclusion
23 of litigation); *see also Motorola, Inc. v. Interdigital Technology Corp.*, 1994 U.S.
24 Dist. LEXIS 20714 (S. Del.)). The Ninth Circuit has expressly upheld protective
25 orders that prohibit in-house counsel from gaining access to confidential

26 _____
27 ⁴ Although EFF is not a commercial enterprise, it is in every other sense of the word a “competitor” of the
28 Copyright Owner Plaintiffs.

1 information produced by the adverse party, because their corporate responsibilities
2 created an unacceptable risk of disclosure of the information, even though
3 inadvertent. *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470-1472
4 (9th Cir. 1992). In *Brown Bag Software*, in upholding a protective order issued by
5 the magistrate that restricted plaintiff's in-house counsel from reviewing the
6 confidential information produced by the defendant, the court reasoned that the
7 risk of disclosure was simply too great, notwithstanding the well-intentioned
8 assurances of in-house counsel:

9 The magistrate expressly credited in-house counsel's integrity and
10 good faith. The magistrate had to consider, however, not only
11 whether the documents could be locked up in cabinets, but also
12 **whether Brown Bag's counsel could lock-up trade secrets in his**
13 **mind, safe from inadvertent disclosure to his employer once he**
14 **had read the documents.**

15 *Brown Bag Software v. Symantec Corp.*, *supra*, 960 F.2d at 1471 (emphasis added).

16 After reviewing evidence that that plaintiff's in-house counsel "was
17 responsible for advising his employer on a gamut of legal issues, including
18 contracts, marketing, and employment" (*Id.*), the court affirmed the conclusions of
19 the magistrate:

20 From this testimony, the magistrate reasonably concluded that Brown
21 Bag's counsel's employment would necessarily entail advising his
22 employer in areas relating to Symantec's trade secrets. Knowledge of
23 Symantec's trade secrets would place in-house counsel in the
24 "untenable position" of having to refuse his employer legal advice on
25 a host of contract, employment, and competitive marketing decisions
26 lest he improperly or indirectly reveal Symantec's trade secrets.

27 *Brown Bag Software v. Symantec Corp.*, *supra*, 960 F.2d at 1471.

28 In so ruling, the court was careful to point out that *retained* outside counsel,
as well as in-house counsel, may be prohibited from reviewing confidential
documents if such counsel are likely to utilize their knowledge of the confidential
information in providing legal advice in the future:

1 We turn to *U.S. Steel Corp. v. United States*, 730 F.2d 1465 (Fed. Cir.
2 1984), as the leading authority on protective orders distinguishing
3 between outside and in-house counsel. [Citations omitted.] The *U.S.*
4 *Steel* court cautioned against arbitrary distinctions based on type of
5 counsel employed, noting that in practice the risk of inadvertent
6 disclosure of trade secrets obtains equally for both kinds of counsel.
7 [Citation omitted.] The *U.S. Steel* court concluded that, to evaluate
8 the risk of inadvertent disclosure, a court should examine the factual
9 circumstances of *any* counsel’s relationship to the party demanding
10 access. . . .

11 Thus, proper review of protective orders in cases such as this requires
12 the district court to examine factually all the risks and safeguards
13 surrounding inadvertent disclosure by *any* counsel, whether in-house
14 or retained.

15 *Brown Bag Software v. Symantec Corp.*, *supra*, 960 F.2d at 1470.

16 The rule enunciated in *U.S. Steel* and *Brown Bag Software* is not limited to
17 cases in which a company’s “trade secrets” are at stake. “Commercial information
18 such as marketing strategies and documents related to corporate structure” may
19 also be protected from disclosure to a party’s attorney where the attorney’s
20 activities could cause the attorney to “base future . . . decisions on the information
21 obtained during discovery.” *C.A. Muer Corp. v. Big River Fish Co.*, 1998 U.S.
22 Dist. LEXIS 12639 (E.D. Pa.)

23 The work performed by EFF’s attorneys in advancing EFF’s mission
24 “necessarily entail[s] advising [EFF and its clientele in matters] relating to
25 [Plaintiffs’ confidential information.] Knowledge of [Plaintiffs’] trade secrets
26 would place [EFF’s attorneys] in the ‘untenable position’ of having to refuse [EFF
27 and its clientele] legal advice on a host of . . . decisions lest [they] improperly or
28 indirectly reveal [Plaintiffs’] trade secrets.” *Brown Bag Software v. Symantec*
Corp., *supra*, 960 F.2d at 1471.

The five categories for which we seek protection of the sort ordered in
Brown Bag Software are described below.

1 (1) **The Confidential Business Plans**

2 The documents within this category include the Copyright Owner Plaintiffs
3 historical *and recent* high-level strategic business plans, marketing strategies, and
4 forecasts relating to each of the channels of distribution for the Copyright Owner
5 Plaintiffs' television and home video businesses, including commercial advertising
6 and alternative forms of advertising, broadcast television, syndication rights, pay-
7 per-view, barter arrangements, home video exhibition, and the distribution of
8 television programming and movies through broadband Internet connections,
9 video-on-demand, set-top boxes and other new media. These business plans
10 include competitively sensitive analyses and evaluations regarding the
11 performance of other studios and networks in the various channels of distribution.

12 Knowledge of the Copyright Owner Plaintiffs' current business plans, which
13 even the other Copyright Owner Plaintiffs' in-house attorneys are prevented from
14 seeing under the terms of the Protective Order, is at substantial risk of disclosure if
15 EFF is allowed to see them. Fred Von Lohmann, another of EFF's attorneys
16 identified as counsel in this case, recently authored an article in the *California*
17 *Lawyer* concerning this case which underscores why this information would be of
18 such keen interest to EFF. Von Lohmann stated:

19 It is hard to see why Hollywood's business models should be exempt
20 from the disruptive effects of innovation any more than the railroad
21 industry should have been rescued from the internal combustion
22 engine. But more significant, what's bad for today's Hollywood
23 executive will almost certainly be a boon to tomorrow's copyright
24 owners. A century of experience teaches that new technologies, no
25 matter how disruptive in the short run, have invariably expanded the
26 revenue pie for copyright owners in the long run.

27 (Weiss Decl., ¶ 12, Exh. O.)

28 The business plans and financial statements of the major studios and
television networks bear directly on Mr. Von Lohmann's position articulated in his
recent article. Because EFF is at least as involved in its public relations activities

1 as it is in actual litigation, EFF will undoubtedly assert again publicly that new
2 technologies will expand the copyright owners' "revenue pie." Should Mr. Von
3 Lohmann or his colleagues at EFF gain access to these business plans in the
4 meantime, it is unlikely that EFF will be able to speak on the subject without
5 drawing on the content of those plans, resulting in their use and disclosure.

6 At the same time, there is no compelling reason for EFF to see this
7 information in connection with this litigation. The Newmark Plaintiffs will not be
8 prejudiced if EFF is denied access to the information, as the Newmark Plaintiffs
9 will have access to the information through The Rothken Law Firm.

10 (2) **Confidential Financial Information**

11 The "Highly Restricted" financial information produced by the Copyright
12 Owner Plaintiffs includes comprehensive data tracking the specific revenue
13 sources (including commercial advertising sales, sponsorships, licenses,
14 subscriptions, and product placements), and similarly specific expense data,
15 annually and quarterly for each company, in each of the channels of distribution
16 for Plaintiffs' television and home video businesses (including free broadcast
17 television, basic subscription television, premium television, pay-per-view, and
18 videocassette and DVD sales and rentals), going back to 1984. These documents
19 also include information concerning market forecasts and budgets, and other
20 evaluative information and analysis.

21 Here, too, disclosure of some portion of this information is inevitable given
22 its relevance to EFF's assertion that the major motion picture studios are not
23 injured by the advent of new technologies for the distribution, viewing and
24 reproduction of copyrighted content. Again, there is no colorable argument that
25 the Newmark Plaintiffs will be prejudiced by an order limiting access to these
26 documents to *one* of the Newmark Plaintiffs' sets of lawyers.

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(3) **The DOJ Productions**

This category of documents is comprised of documents produced by the Copyright Owner Plaintiffs to the Department of Justice in connection with two “video on demand” ventures involving most of the major motion picture studios: Movies.com and Movielink/MovieFly. These documents reveal, among other things, some of the Copyright Owner Plaintiffs’ most innovative technology and strategies for “on demand” content deployment and channel distribution. The trade secrets and other proprietary information reflected in these documents are closely guarded and protected by the Copyright Owner Plaintiffs. In addition to hundreds of thousands of pages of correspondence and draft agreements generated by the Copyright Owner Plaintiffs and exchanged with other studios and networks regarding the corporate structure of potential joint ventures and terms of service, these productions include correspondence and draft agreements reflecting contemplated transactions with third parties to develop VOD solutions. Many of these third party negotiations were themselves the subject of non-disclosure agreements.

Included in these documents is information in areas in which EFF regularly opposes the interests of the Copyright Owner Plaintiffs: confidential licensing terms, security technologies and digital rights management. As co-counsel for the five individual ReplayTV 4000 users, EFF has no reason relevant to this litigation for having access to these documents. Of course, EFF’s attorneys have *every* reason to want to know and understand the contents of these documents in connection with EFF’s legislative and public relations activities. Even if EFF’s attorneys profess their determination not to reveal their contents to EFF or to its other clients, their continued participation in developing legislative and public relations strategy for EFF will “necessarily entail” the disclosure of the contents of the DOJ documents.

1 Finally, EFF's attorneys have no compelling reason to see the DOJ
2 documents in connection with this case in any event. The Newmark Plaintiffs do
3 not even assert the copyright misuse defense, which was the reason claimed by the
4 Replay and SONICblue Defendants for their relevance, and the basis for their
5 production. *Brown Bag Software v. Symantec Corp.*, *supra*, 960 F.2d at 1470.

6 (4) **The Lobbying Documents**

7 It is beyond dispute that EFF competes with the Copyright Owner Plaintiffs
8 and their representatives with respect to every topic for which the Magistrate has
9 ordered the Copyright Owner Plaintiffs to produce lobbying-related documents:
10 regulation of VCRs (video cassette recorders) and PVRs (Personal Video
11 Recorders such as the ReplayTV 4000), commercial skipping behavior of
12 consumers, and the Macrovision provisions enacted in the Digital Millennium
13 Copyright Act. (*See, e.g.*, Weiss Decl., Exhs. E, J, K and L.) Arming EFF's
14 attorneys with knowledge concerning the Copyright Owner Plaintiffs' legislative
15 strategies in these areas would be of enormous benefit to EFF (and an obvious
16 detriment to the Copyright Owner Plaintiffs). Again, it is inconceivable that such
17 knowledge would not, of necessity, inform EFF's lobbying activities in the future.

18 It would be particularly unfair to allow EFF access to confidential
19 documents about currently active legislative campaigns, particularly in light of
20 their questionable relevance in this case. Again, to the extent that there exists any
21 colorable argument of potential relevance, the Newmark Plaintiffs' interests are
22 more than adequately represented by their principal counsel, The Rothken Law
23 Firm. The Newmark Plaintiffs can also expect that the Replay and SONICblue
24 lawyers will exploit whatever value may be drawn from these documents. Because
25 there is no prejudice to the Newmark Plaintiffs, there is no reason to put at risk the
26 disclosure and use of this information in a manner which will cause substantial
27 injury to the Copyright Owner Plaintiffs outside of, and unrelated to, this litigation.

1 (5) **The Security and Content Protection Documents**

2 Although documents reflecting this information may be fewest in number,
3 they implicate important trade secrets and other proprietary information. Content
4 protection is a topic of great importance to EFF, which devotes a substantial
5 amount of time and energy to attempting to defeat new legislation that would assist
6 in implementation of content protection systems, and to repeal or strike down
7 existing legislation that protects content protection systems that are in place.
8 Indeed, EFF's attorneys have also represented defendants sued for attempting to
9 defeat security and content protection systems. (Weiss Decl., ¶ 11, Exh. N (*see,*
10 *e.g., Universal City Studios, Inc. v. Reimerdes*.) A report, for instance, that
11 provides a studio-perspective overview of the various content protection systems
12 available or in development, would be a source of important substantive
13 information concerning the systems themselves, and the strategic perspectives of
14 the studios. Its disclosure would be of great strategic benefit to EFF, and it is
15 highly improbable that EFF's attorneys will not be influenced by its content.

16 Once EFF's attorneys are granted access to the "Highly Restricted"
17 documents relating to the business plans and financial information, security and
18 content protection, "lobbying" documents and "DOJ" documents, the bell cannot
19 be unring. *Micron Technology, Inc. v. Mosel Vitelic Corporation*, 1999 WL
20 458168 at *6 (D. Idaho) ("[I]n determining the appropriateness of a protective
21 order is the realization that 'it is very difficult for the human mind to
22 compartmentalize and selectively suppress information once learned, no matter
23 how well-intentioned the effort may be to do so.'") Well after this case is resolved,
24 EFF's attorneys will be pursuing EFF's organizational mission, and, unless this
25 motion is granted, their strategy will be shaped, at least in part, by the information
26 that they glean from these documents, and their contents will be inevitably
27 disclosed outside of this litigation.

1 produced to the Department of Justice, irrespective of their content, are “Highly
2 Restricted” (Rothken Decl. ¶17).

3 And the ruling sought would reach far beyond simple document review. The
4 EFF Attorneys could not meaningfully participate in depositions, the propounding
5 of additional discovery or preparation of briefs or motions involving restricted
6 documents, and of course could not assist in trial preparation or the actual portions
7 of the trial involving these documents. The proposed restrictions would effectively
8 preclude EFF’s legal representation and would materially prejudice the Newmark
9 Plaintiffs, the consumers who are the real parties in interest in this case.

10 There is no basis in the case law or Federal Rule of Civil Procedure 26 for
11 the requested ruling. Instead, the Entertainment Companies seek to have this Court
12 extend the narrow “competitive business decision-maker” exception that has been
13 applied to specific in-house counsel well beyond its traditional border, to create a
14 de facto disqualification of a non-commercial lawfirm that is not a party to the case
15 and that does not compete with them in any relevant way.

16 The EFF is a member-supported registered 501(c)(3) nonprofit organization.
17 Its agenda includes representing individuals and organizations on a broad range of
18 issues involving technology and civil liberties, with specific focus on the First
19 Amendment, Fourth Amendment and privacy. It has served as counsel in cases
20 involving anonymous speech on the Internet, First Amendment protection for
21 computer code and prevention of government censorship on the Internet (Cohn
22 Decl. ¶6-7).

23 The obvious effect, if not goal, of the Entertainment Companies’ motion is
24 to impede the Newmark Plaintiffs’ pursuit of their case by reducing their counsel
25 of record from four attorneys to one. More generally, if successful, the
26 Entertainment Companies will set a precedent of preventing legal representation of
27 opposing parties in litigation based upon public statements by counsel of
28 philosophical views that are at odds with those of the Entertainment Companies.

1 In addition to the impact in the present case, the ruling sought by the Entertainment
2 Companies has disturbing implications for both the EFF and any organization that
3 engages in both public advocacy and client representation in litigation. This could
4 include other nonprofit legal services organizations such as the N.A.A.C.P.,
5 American Civil Liberties Union and the Pacific Legal Foundation, environmental
6 advocacy groups such as Sierra Club, trade organizations like the M.P.A.A. and the
7 R.I.A.A.⁵ and even law firms that provide legislative as well as litigation services
8 to their clients.⁶

9 In effect, this request seeks to set a precedent that restrains an organization's
10 ability to represent clients in litigation on the basis that it has exercised its First
11 Amendment rights to petition the government and to speak publicly on the same
12 topic. Because of the Entertainment Companies' express reliance on the EFF's
13 political speech as the basis for its motion here, the First Amendment also bars the
14 Entertainment Companies' request.

15 **ISSUES IN DISPUTE**

16 The Entertainment Companies seek to exclude EFF Attorneys' access to the
17 following categories of documents, by having them treated as "in-house counsel"
18 under the Protective Order issued in Case No. CV 01-9358 FMC (Ex) dated May
19 29, 2002, a true and correct copy of which is attached hereto as Exhibit 1:

21 ⁵ For instance, the M.P.A.A. and the R.I.A.A. both engage in lobbying activity before Congress and
22 are also counsel of record in the Morpheus/ MusicCity litigation currently before this Court (*MGM et al*
v. Grokster, Case No. CV 01-0851SVW consolidated with CV 01-09923 SVW).

23 ⁶ This would include the three firms representing the Entertainment Companies in the present case. For
24 instance, O'Melveny & Meyers LLP offers lobbying and legislative services entitled "Strategic
25 Counseling on Legislation and Policy":

<http://www.omm.com/webcode/navigate.asp?nodeHandle=675>;

26 Proskauer Rose LLP offers services entitled "Legislative Counseling and Government Liaison":

http://www.proskauer.com/practice_areas/areas/073 and McDermott, Will & Emery offers a

27 particularly comprehensive lobbying and "Intellectual Property Legislative Services" practice:

<http://www.mwe.com/area/legis006.htm>

- 1 1. Documents produced to the Department of Justice in relation to its
- 2 antitrust investigation into Entertainment Companies' efforts to create
- 3 the "Movielink" and "movies.com" video on demand services (the
- 4 "DoJ documents");
- 5 2. Lobbying Documents;
- 6 3. Business Plans;
- 7 4. Confidential financial documents; and
- 8 5. Security and content protection information

9 These documents represent 78% of the documents produced in this case and
10 a significant proportion of these appear to be directly relevant to the core issue of
11 whether the Newmark Plaintiffs' uses of the "Commercial Advance" and "Send
12 Show" features of the ReplayTV 4000 constitute "fair use" under 17 USC § 107.

13 NEWMARK PLAINTIFFS' CONTENTIONS

14 **I. The Entertainment Companies' Proposed Restrictions Are Materially** 15 **Prejudicial To The Newmark Plaintiffs**

16 **1. The proposed restriction is a de facto disqualification of Newmark** 17 **Plaintiffs' chosen counsel**

18 The burden on the Newmark Plaintiffs created by the proposed restrictions is
19 clear. Although the Entertainment Companies state that they seek "merely" to
20 preclude EFF Attorneys from access to "Highly Restricted" discovery materials,
21 the vast majority of the documents produced by the parties' fall into this category.
22 The proposed restriction would prevent access to approximately 79% or 83,500 of
23 the 105,750 pages produced to date. Rothken Decl.. ¶18-19. Without access to
24 these documents, the EFF Attorneys could not meaningfully participate in
25 depositions, document review, propounding of additional discovery or preparation
26 of motions involving restricted documents, much less engage in trial preparation or
27 participate at trial.

1 The Entertainment Companies themselves have provided a specific example
2 of how the proposed restrictions would make depositions “unworkable.” In their
3 Opposition to the Newmark Plaintiffs’ Motion to Consolidate (Page 10:17-21),
4 they note that the restriction would require EFF attorneys to leave the room
5 whenever a “Highly Restricted” document was produced during a deposition.

6 **2. The proposed restriction would materially hurt the Newmark**
7 **Plaintiffs’ ability to investigate and present their claim that their**
8 **actions are protected fair use**

9 The Entertainment Companies claim that the EFF Attorneys would have no
10 compelling reason to see the DoJ Documents and that there will be no prejudice
11 from precluding EFF Attorneys’ access to them. Copyright Owners’ Contentions at
12 15-16. These documents comprise the clear majority of the 82,600 “Highly
13 Restricted” documents produced (Rothken Decl. ¶19 and Exh. “E”, “F”. “G”).
14 They also deny prejudice from excluding access to the Entertainment Companies’
15 business plans, financial documents and lobbying documents, not because of
16 relevance, but because the one remaining attorney of record could view them.
17 They are wrong as to the first claim and disingenuous as to the second.

18 The core question presented by the Newmark Plaintiffs in this case is
19 whether their use of the Commercial Advance and SendShow features of their
20 ReplayTV 4000s are protected by the fair use doctrine. A key element of that claim
21 is the fourth factor of the fair use analysis under 17 U.S.C. § 107, consideration of
22 how these uses impact the current and potential future markets for the
23 Entertainment Companies’ movies and television programming. The DoJ
24 documents arise from a Department of Justice antitrust investigation into the

25 ⁷ The Entertainment Companies stated:

26 “If the actions are consolidated, however, the parties to the ReplayTV Litigation likely would have to
27 halt the depositions every few minutes in order to discuss whether the EFF Plaintiffs should be entitled
28 to access to discovery provided in the ReplayTV Litigation. This scenario is unworkable...”

1 Entertainment Companies' attempts to create a market for an Internet video on
2 demand service.

3 The lobbying documents include representations made to Congress about the
4 current and future impact on the markets for their works posed by various
5 challenges, including PVRs. The current and past financial information
6 demonstrate the existence (or nonexistence) of damage to the markets for the
7 Entertainment Companies' works by current ReplayTV users such as the Newmark
8 Plaintiffs and harm since 1984 from users of VCRs who fast-forwarded through
9 commercials - a harm to future markets that was alleged by the copyright owner
10 entities in *Universal Studios v. Sony Corp. of America*, 464 U.S. 417 (1984).
11 Finally, the business plans reflect future projected markets for the works of the
12 Entertainment Companies and presumably included forecasts of the impact of
13 PVRs on them.

14 Given the statutory basis for examining the market for the Entertainment
15 Companies' works in 17 U.S.C. §107, and the discovery standard that information
16 need be "likely to lead to the discovery of admissible evidence," this information
17 is clearly subject to discovery in this case and withholding it from the EFF
18 Attorneys will create prejudice to the Newmark Plaintiffs.⁸ If EFF Attorneys are
19 denied access to these categories of documents, there is no question it would be
20 materially prejudicial to the development of the core claims of Newmark Plaintiffs'
21 case.

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26 ⁸ Indeed, this Court has already considered and affirmed the relevance of these categories of documents
27 to the fair use calculus, in a set of detailed orders from the Magistrate Judge and from Judge Cooper
28 following a Motion for Reconsideration heard June 3, 2002, in the ReplayTV litigation prior to its
consolidation with this case.

1 **II. Procedural Background**

2 The Newmark Plaintiffs' counsel have been attempting to join the existing
3 Protective Order and obtain access to the documents produced in the ReplayTV
4 case since August 16, 2002. Details of the various communications between
5 counsel for the respective parties are contained in Mr. Rothken's declaration, ¶2-
6 14, filed herewith.

7 The Newmark Plaintiffs disagree with the Entertainment Companies'
8 description of events leading up to this application, in particular, their allegation
9 that the Newmark Plaintiffs initially agreed to a limitation on EFF's access to any
10 of the documents produced (Copyright Owners' Contentions at 5:20). The
11 proposed restriction was first raised in a telephone conversation between Mr.
12 Rothken and Mr. Cooper of Proskauer Rose on August 28. Mr. Rothken advised
13 Mr. Cooper at that time that this was not acceptable to Newmark Plaintiffs'
14 counsel, and confirmed this in a email to Mr. Cooper on September 2, 2002.
15 Rothken Decl. ¶7-8.

16 The parties reached an impasse on access issues in early September, leading
17 EFF Attorneys to prepare a draft ex parte application, and notify the Entertainment
18 Companies of their intent to seek ex parte relief on September 5, 2002. (Cohn
19 Decl. ¶15)). The Entertainment Companies indicated that they would oppose such
20 an application, and in the interests of obtaining access by one of Newmark
21 Plaintiffs' counsel to some of the documents before the discovery cut-off deadline
22 (since postponed), Newmark Plaintiffs' counsel entered into an interim stipulation
23 on September 17 and filed with this Court on September 19, (Rothken Decl. ¶13-
24 14, Exh.B; Cohn Decl.¶16-18).

25 The interim stipulation provided for access to all documents by Mr.
26 Rothken, set out agreed timeframes for this application and provided that the
27 Entertainment Companies would begin identifying documents that were
28 undesignated or designated "Confidential" or "Highly Confidential" and not the

1 subject of this protection application, which EFF Attorneys could review, on a
2 “rolling basis”.

3 **III. Both FRCP 26 And The First Amendment Must Be Met Before The**
4 **Requested Order Can Be Granted**

5 **1. The Entertainment Companies have failed to meet their burden**
6 **under FRCP 26 to prove that good cause exists for the extension**
7 **of the Protective Order**

8 FRCP 26(c) requires the party moving for a protective order to show: (1)
9 “disclosure will work a clearly defined and very serious injury”; and (2) there “will
10 indeed be harm by disclosure.” *Cuno, Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.
11 N.Y., 1987). “The party seeking protection bears the burden of showing specific
12 prejudice or harm will result if no protective order is granted If a court finds
13 particularized harm will result from disclosure of information . . . , then it balances
14 the public and private interests to decide whether a protective order is necessary.”
15 *Phillips v. GMC*, 289 F. 3d 1117, 1121 (9th Circ., 2002) (emphasis added). *See*
16 *also San Jose Mercury News, Inc. v. United States Dist. Crt.*, 187 F. 3d 1096, 1103
17 (9th Circ., 1999); “Broad allegations of harm, unsubstantiated by specific
18 examples” do not support a showing of good cause. *U.S. v. Dentsply International,*
19 *Inc.*, 187 F.R. D. 152, 158 (D.Del., 1999).

20 Here, the Entertainment Companies have failed to identify the “specific
21 prejudice” or “clearly defined and serious injury” which would result should
22 protection not be granted. Although the Entertainment Companies have devoted
23 over 7 of their 14 page statement of contentions to detailing the alleged
24 shortcomings of EFF’s public statements about copyright law and technology
25 policy, they have made only vague, generalized statements about the nature of
26 harm that might befall them from disclosure.

27 First, the Entertainment Companies assert that there is “an unacceptable
28 risk” of inadvertent use or disclosure of knowledge by EFF Attorneys (Copyright

1 Owners' Contentions at 10, 13-15,) but do not specify what the risk is or what
2 harm or consequence to their business of selling movies and television
3 programming would result.⁹

4 Second, they repeatedly assert that EFF as an organization would be
5 interested in the confidential information, presumably to bolster their assertion that
6 EFF is somehow a "competitor" because it represents clients in matters adverse to
7 the Entertainment Companies and (like many law firms¹⁰) participates in the
8 political process by providing comments to Congress (For instance, see Id, at 15:
9 "Of course, EFF's attorneys have every reason to want to know", page 17:
10 "disclosure [of content protection documents] would be of great strategic benefit to
11 EFF".) Neither of these generalized assertions sheds any light on specific harm
12 that would befall the Entertainment Companies from disclosure.

13 Third, none of the specific policy issues that the Entertainment Companies
14 cite in relation to EFF's advocacy role are at issue in this litigation. This case does
15 not involve "legislation [or] . . . technological development[s] or application[s]
16 intended to control unauthorized use or copying of copyrighted content."
17 Copyright Owners' Contentions at 7. It does not involve "uniform standards and
18 methods for preventing illegal use and copying of digital copyrighted content."
19 Copyright Owners' Contentions at 7. It does not involve Internet filtering.
20 Copyright Owners' Contentions at 7. It does not involve "the Broadcast Protection
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22 ⁹ For example, the Entertainment Companies quote Mr. von Lohmann's statement in the press that
23 "centuries of experience" have shown that new technologies have increased the revenue pie for
24 copyright holders. It then asserts, rather hazily, that "it is unlikely that EFF will be able to speak on
25 the subject without drawing on the content of the plan, resulting in their use and disclosure." At 14:4-
26 5. How the EFF would "draw on" the content of the Entertainment Companies' business plans is never
explained. More importantly, there is no showing that such statements would result in business harm:
reduction in the sales of movies and television programming.

27 ¹⁰ See fn 6, page 20 of this document, for lobbying and legislative services offered by O'Melveny &
28 Meyers LLP; Proskauer Rose LLP and McDermott, Will & Emery.

1 Discussion Group[’s] . . . effort to evaluate and recommend proposals to secure
2 digital broadcast programming.” Copyright Owners’ Contentions at 7. It does not
3 involve the “Consumer Broadband and Digital Television Promotion Act.”
4 Copyright Owners’ Contentions at 8. And it does not involve CSS encryption
5 technology, peer-to-peer networking, or game playing on the Internet. Copyright
6 Owners’ Contentions at 9.

7 Finally, the “harm” hinted at by the Entertainment Companies is not
8 “business competition” harm, which is the focus of protection under Rule 26. The
9 in-house counsel restriction recognized in Rule 26 case law is aimed at the
10 competitor who would secretly, even if inadvertently, use confidential discovery
11 information to scoop the market and supplant demand for the competitor’s product.
12 But that rationale does not apply to EFF. EFF is not a competitor and as the
13 Entertainment Companies themselves recognize, the only way in which EFF could
14 use confidential information to its benefit would be to disclose it in a public
15 advocacy context. EFF could never cause harm of the inadvertent or unnoticeable
16 “using –a - trade secret” variety.

17 The Entertainment Companies have not demonstrated that their businesses –
18 selling movies and television programming –would be reduced by review by EFF
19 Attorneys of the disputed documents. At best, they have alleged a potential
20 detriment to their political and policy positions. Their examples of EFF’s
21 “competition” with them make this point clear. They include EFF’s public
22 opposition to proposed copyright-related legislation that the Entertainment
23 Companies support (8:14-22) and EFF’s statements about an ad hoc standards
24 group for digital television in which both the Entertainment Companies and the
25 EFF participate (7:16-8:13) and public statements about the historical interaction
26 between technology and copyright revenues. (Copyright Owners’ Contentions at
27 14:2-5). These disputes are not competitive business disputes in any sense of the
28 phrase. They are political and policy differences presented in the public

1 marketplace of ideas. This attempt to extend the limited exception for
2 “competitive business harms” to potential unspecified disadvantage in public
3 debates about legal policy is not only unfounded, as articulated more fully below, it
4 would have grave implications for the First Amendment.

5 **2. Restricting EFF’s ability to represent its clients on the basis of its**
6 **participation in the political process implicates the First**
7 **Amendment**

8 The Entertainment Companies must do more than carry the normal burden
9 under Rule 26(c) to establish good cause by showing that “specific prejudice or
10 harm *will* result” if EFF is not excluded from access. *Phillips v. GMC*, 289 F.3d
11 1117, 1121 (9th Circ. 2002) (emphasis added). Because they seek to have the
12 Court restrict EFF’s ability to represent the Newmark Plaintiffs on the basis of
13 EFF’s political activities in petitioning the government and public statements, the
14 Entertainment Companies must also satisfy the far more demanding strictures of
15 the First Amendment.

16 Public-interest litigation is a form of public-interest advocacy protected by
17 the First Amendment. *NAACP v. Button*, 371 U.S. 415, 429 (1963) (“Litigation is
18 thus a form of political expression.”); *ibid* (“Abstract discussion is not the only
19 species of communication which the Constitution protects; the First Amendment
20 also protects vigorous advocacy, certainly of lawful ends, against governmental
21 intrusion.”); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508,
22 510 (1972) (“The right of access to the courts is indeed but one aspect of the right
23 of petition.”)

24 At issue here are the First Amendment speech, petition, and association
25 rights of EFF and its attorneys, as well as the speech, petition, and association
26 rights of the Newmark clients to associate with EFF for political purposes and to
27 choose EFF’s attorneys as the instrument by which to shape and present their
28 message to the Court in this action. The Entertainment Companies, in seeking to

1 deny access to discovery materials by, and thereby de facto disqualify, those of
2 plaintiffs' counsel who are EFF attorneys, seek to force EFF, and its clients, to
3 choose among these First Amendment rights and sacrifice some as the price of
4 exercising others.¹¹ EFF may represent public-interest clients in litigation or EFF
5 may engage in vigorous advocacy, but it cannot (the Entertainment Companies
6 say) do both.

7 The Entertainment Companies' attempt to de facto disqualify EFF as
8 counsel in this case because of its advocacy on other issues must be assessed on
9 traditional First Amendment standards. In an analogous context, the Supreme
10 Court has refused to apply the antitrust laws to petitioning activities because

11 "it would be destructive of rights of association and of petition to hold
12 that groups with common interests may not, without violating the
13 antitrust laws, use the channels and procedures of state and federal
14 agencies and courts to advocate their causes and points of view
15 respecting resolution of their business and economic interests *vis-a-vis*
16 their competitors."

17 *California Motor Transport Co.*, 404 U.S. at 510-11. Interpreting Rule 26 as
18 authorizing the use of protective orders to effectively disqualify counsel on the
19 basis of counsel's non-litigation political advocacy would similarly harm First
20 Amendment rights.

21 Accordingly, the Entertainment Companies must first show that this action is
22 necessary to achieve a compelling state interest. Such a showing must be concrete,
23 not merely hypothetical. In *Button*, the state could not baldly assert "that the
24 purpose of these regulations [of lawyer conduct] was merely to insure high
25 professional standards and not to curtail free expression." *NAACP v. Button*, 371

26 ¹¹ EFF is *not* asserting that it has a First Amendment right to use or disclose confidential discovery
27 materials outside this litigation. Rather, it is defending its right to advocate in both the legislative and
28 the judicial arenas while carefully respecting the limits of the protective order and avoiding disclosure
of the material designated under it.

1 U.S. at 438-439. As the Supreme Court noted, “[t]here has been no showing here
2 of professionally reprehensible conflicts of interest.” *Id.* at 442-443.

3 The Entertainment Companies must also show that its proposed restriction
4 satisfies the First Amendment’s requirement of precision. *Id.* at 438 (citation
5 omitted) (“Broad prophylactic rules in the area of free expression are suspect.
6 Precision of regulation must be the touchstone in an area so closely touching our
7 most precious freedoms.”). The precision requirement is especially important here
8 because the existing self-designating “blanket” Protective Order allows the
9 Entertainment Companies to protect documents against disclosure without meeting
10 its good-cause burden as to any specific document, and the Entertainment
11 Companies have made a “blanket” designation that all DoJ Documents are “Highly
12 Restricted” and hence would not accessible by EFF Attorneys. Rothken Decl. ¶17;
13 See *San Jose Mercury News, Inc. v. United States Dist. Court*, 187 F.3d 1096,
14 1103 (9th Cir. 1999) (in a blanket protective order, “the party resisting disclosure
15 generally has not made a particularized showing of good cause with respect to any
16 individual document”). Granting a broad, unreviewable ability for one party to
17 limit access to discoverable documents by the other party certainly fails the First
18 Amendment "narrow tailoring" test. And the Entertainment Companies have made
19 no attempt to demonstrate that they could not protect any specific, identified pieces
20 of information through less restrictive means, including, as noted above, the
21 normal mechanism of a protective order backed by court sanction.

22 Finally, the Court must also consider the broader ramifications for other
23 cases of imposing the proposed restrictions in this case. *NAACP v. Button*, 371
24 U.S. at 431 (“The threat of sanctions may deter their exercise almost as potently as
25 the actual application of sanctions. Because First Amendment freedoms need
26 breathing space to survive, government may regulate in the area only with narrow
27 specificity.”) (citations omitted). The ruling sought by the Entertainment
28 Companies would have an adverse impact on any client whose attorney represents

1 it not only in the courts, but before Congress and in the press, a category that
2 includes the many public-interest organizations that both advocate and litigate,
3 such as the ACLU, the Sierra Club, the Natural Resources Defense Council, the
4 Pacific Legal Foundation, and the N.A.A.C.P.

5 **IV. EFF Is Not “In Competition” With The Entertainment Companies And**
6 **EFF Attorneys Are Not “In-House Counsel”**

7 **1. The “in-house counsel” rule is limited to the situation of business**
8 **competitors**

9 Even if the Entertainment Companies had met their burden to demonstrate
10 "specific prejudice" here and that the First Amendment tests were met, the EFF
11 Attorneys simply do not fit into the category of "business competitor in-house
12 counsel" established by the Ninth Circuit.

13 Protective orders limiting disclosure of confidential information to specified
14 in-house counsel have only been upheld in situations where: (1) the parties to
15 litigation are business competitors; and (2) the in-house counsel is engaged in
16 “competitive decision making” or scientific research. *Brown Bag Software v.*
17 *Symantec Corp.*, 960 F. 2d 1465 (9th Circ., 1992); *Motorola Inc. v. Interdigital*
18 *Tech Corp*, 1994 U.S. Dist LEXIS 20714 (D.Del). Since scientific research is not
19 at issue here, for the Court to find that EFF Attorneys can be treated as “in-house”
20 counsel for the purpose of excluding their access to discovery materials, the
21 Entertainment Companies must show that: (1) the EFF is a business competitor of
22 the Entertainment Companies, and (2) EFF Attorneys are engaged in “competitive
23 decision making” about products which compete with those of the Entertainment
24 Companies.

25 The Entertainment Companies state that they “need protection beyond that
26 afforded by the existing Protective Order for a simple reason, ***one recognized by***
27 ***the Ninth Circuit in comparable situations*** as deserving special judicial treatment:
28 The three EFF lawyers primarily operate as public advocates, in the media and

1 before public policy makers.” (Copyright Owners’ Contentions. 1: 20-24),
2 (emphasis added). They have not cited any authority supporting this proposition.
3 Instead, all of the cases that they have cited involve counsel employed by, or
4 representing, business or commercial competitors.¹² Even if one accepts the
5 Entertainment Companies’ characterization of EFF attorneys as “primarily .. public
6 advocates,” EFF is not, even by the Entertainment Companies own terms, a
7 *business competitor*, and is not in a “comparable situation” to any recognized by
8 any court as a basis for limiting access

9 **2. EFF is not a “competitor” of the Entertainment Companies**

10 Nor have the Entertainment Companies provided any evidence to show why
11 EFF should be considered analogous to a business or commercial competitor.
12 First, they appeal to the hazy notion that access to their confidential information
13 would be appealing to the EFF based on its public advocacy of copyright law
14 interpretations and law reform that are *politically* adverse to the Entertainment
15 Companies (See, for instance, Copyright Owners’ Contentions at 10: EFF
16 “involved in activities adverse to Hollywood”). Second, they make out-of-context
17 quotations from the *Brown Bag* case, discussing the possibility of inadvertent
18 disclosure of trade secrets, which is an assessment made by the Court only where
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21 ¹² *Brown Bag Software v. Symantec Corp*, 960 F 2d 1465 (9th Circ., 1992) (in-house counsel precluded
22 from accessing competitor computer company’s trade secrets); *U. S. Steel Corp. v. U.S.*, 730 F 2d
23 1465 (Fed Circ, 1984)(on appeal from CIT ruling precluding disclosure to in-house counsel because of
24 mere possibility of inadvertent disclosure; held” mere status as in-house counsel doesn’t alone serve as
25 basis for denial of access, must look at factual circs of individual counsel), *C.A. Muer Corp v. Big
26 River Fish Co.*, 1998 WL 488007 (E.D. Pa) (trademark infringement, restaurant business competitors,
27 attorney who controlled competitor excluded from AEO); *Micron Technology, Inc. v. Mosel Vitelic
28 Corporation*, 1999 WL 458168 (D. Idaho)(in-house counsel, patent infringement, semiconductor
competitors); *In re Papst Licensing*, 2000 U.S. Dist. LEXIS 6374 (E.D. La) (patent infringement,
competing manufacturers of computer disk drives); *Motorola Inc. v. Interdigital Tech. Corp*, 1994 U.S.
Dist LEXIS 201714 (D. Del., 1994)(patent infringement, mobile telephone industry, restriction on
outside counsel with dual patent infringement and prosecution role)

1 an attorney may have been involved in “competitive decision making” for a
2 business competitor (Id, at 11, *Brown Bag*, 960 F. 2d 1471).

3 Their only treatment of this key threshold question for “in-house” counsel
4 analysis is contained in a footnote that enigmatically asserts “*Although EFF is not*
5 *a commercial enterprise, it is in every other sense of the word a ‘competitor’ of the*
6 *Copyright Owner Plaintiffs*” (Copyright Owners’ Contentions at 10 fn 4), and the
7 blanket self-serving assertion that:

8 “It is *beyond dispute* that EFF competes with the Copyright Owner
9 Plaintiffs and their representatives with respect to every topic for
10 which the Magistrate has ordered the Copyright Owner Plaintiffs to
11 produce lobbying-related documents: regulation of VCRs (video
12 cassette recorders) and PVRs (Personal Video Recorders such as the
13 ReplayTV 4000), commercial skipping behavior of consumers, and
the Macrovision provisions enacted in the Digital Millennium
Copyright Act.”

14 *Id.*, at 16, emphasis added.

15 This is neither a correct statement of the law nor an accurate characterization
16 of the EFF. The Entertainment Companies produce and sell motion pictures and
17 television programming. To the extent they are involved in the public discussion of
18 VCRs, PVRs, commercial skipping and Macrovision, it is presumably to further
19 the sales of their products. The Entertainment Companies have not demonstrated,
20 nor could they, that the EFF competes in the sales of movies and television
21 programming. They have not even demonstrated that the EFF's political and
22 policy activities have had a demonstrable impact on their sales of movies or
23 television. EFF does not create products that compete or interact with the
24 Entertainment Companies’ products (such as VCRs and PVRs).¹³ By representing
25

26 ¹³ EFF is not even active *politically* in two of the four topics listed above. EFF had no involvement in
27 the Entertainment Companies' unsuccessful attempt to ban the VCR in the 1970s and 1980s and is not
28 actively involved in any public discussion of the Macrovision provisions of the DMCA.

1 consumers who own such devices in the present action, and advocating for
2 consumer's fair use rights and technological innovation in the marketplace of
3 ideas, EFF is *legally and politically adverse* to the Entertainment Companies, but
4 is not thereby a commercial competitor or even roughly analogous to a commercial
5 competitor.¹⁴

6 The EFF is a twelve-year-old, member-supported public interest law firm
7 that employs five full time attorneys. EFF's Board includes several leading law
8 professors (Professor Lawrence Lessig of Stanford Law School and Professor
9 Pamela Samuelson from Boalt Hall School of Law, University of California at
10 Berkeley) and one of the acknowledged "fathers" of the Internet, Professor David
11 Farber of the University of Pennsylvania. Cohn Decl. ¶11. Previous Board
12 members included some of the founders of leading technology companies (Lotus,
13 Apple) and even a current Vice-President of Defendant AOL Time-Warner, Mr.
14 Vradenberg. Cohn Decl. ¶11. For its entire history, EFF has represented clients in
15 litigation, including a wide range of issues involving the First Amendment, Fourth
16 Amendment and the protection of privacy online. Cohn Decl. ¶6.

17 While EFF is nonprofit, it otherwise operates like many lawfirms. Like
18 many law firms, including those representing the Entertainment Companies in this
19 case, it participates in both public advocacy and lobbying before legislative and
20 administrative bodies. Cohn Decl. ¶9. It is true that EFF has represented clients who
21 are adverse to the Entertainment Companies in this and other pending litigation. It
22 is also true that EFF has ended up on the opposing side to the Entertainment
23 Companies and their legal representatives in other government fora on occasion,
24 most particularly in representations it has made to Congress on law reform and

25
26 ¹⁴ The Entertainment Companies' other two examples demonstrates the direct relevance of the
27 categories from which they seek to exclude EFF to the Newmark Plaintiffs' case and the burden that
28 would be imposed by granting their request. It is difficult to imagine categories more relevant to the
present case than documents concerning PVRs and commercial skipping by consumers.

1 proposed legislation concerning how the copyright bargain should adapt to new
2 technologies. However, participation in the political process and public discussion
3 has never served as a basis for limiting access to confidential documents. Indeed,
4 as noted above, any ruling on that basis would create a disturbing precedent with
5 potential Constitutional implications in this and other cases.

6 **3. EFF Attorneys are not engaged in “competitive decision making”**
7 **as defined in the case law**

8 The “in-house counsel” rule only limits disclosure under a protective order
9 where an in-house counsel is involved in “competitive decision making” about the
10 entity’s products. See *Volvo Penta v. Brunswick Corp.*, 187 F.R.D. 240 (E.D. Va.
11 1999); *Amgen, Inc. v. Elanex Pharmaceuticals, Inc.*, 160 F.R.D. 134 (W.D. Wa.
12 1994); *Fluke Corp. v. Fine Instruments Corp.*, 32 U.S.P.Q.2d 1789 (W.D. Wa.
13 1994). Courts have found competitive decision making where counsel *advises* and
14 *participates* in the client’s decisions about pricing, marketing or product design
15 that are “made in light of similar or corresponding information about a
16 competitor.” *U.S. Steel*, supra, at 1468, n.3; followed in *Brown Bag Software*,
17 supra, at 1470, and where in-house counsel would have a difficult time in
18 compartmentalizing his or her knowledge if he or she saw information about
19 competitor products. *United States v. Dentsply International, Inc.*, 187 F.R.D. 152,
20 159-160 (D.Del., 1999)., citing *Motorola, Inc. v. Interdigital Technology Corp.*,
21 1994 U.S. Dist. LEXIS 207A, at *10 (D. Del., 1994).

22 Courts have stated that the rationale for denying access to in-house counsel
23 in certain circumstances is based on an assessment of a higher risk of inadvertent
24 disclosure. Whether an unacceptable opportunity for inadvertent disclosure exists
25 must be assessed by a court on a counsel-by-counsel basis, based on a review of
26 “the factual circumstances surrounding each individual counsel’s activities,
27 association, and relationship with a party.” *U.S. Steel*, supra, at 1468. The crucial
28 factor in this risk assessment is whether counsel is involved in “competitive

1 decision making” for a competitor. *Id.*; *Brown Bag Software*, 960 F. 2d at 1470,
2 1472. In making this assessment the courts have carefully considered the factual
3 circumstances, roles and responsibilities of individual counsel. For instance, courts
4 have been prepared to deny access to some in-house counsel based on direct
5 involvement in pricing and marketing decision, while permitting access to another
6 in-house counsel in the same company, who although a 10 year employee, was not
7 engaged in the relevant sort of competitive decision making. *Carpenter Tech Corp.*
8 *v. Armcolac*, 132 F.R.D. 24 (E.D. Pa., 1990).

9 In *Brown Bag Software*, supra, the court found that the in-house general
10 counsel was engaged in competitive decision-making because he was the sole legal
11 advisor and personnel manager for the company, and was responsible for advising
12 his employer on a wide range of legal issues, including contracts, employment and
13 marketing. In that situation, in-house counsel’s knowledge of the competitor’s
14 trade secrets would put him in the “‘untenable position’ of having to refuse his
15 employer legal advice on a host of contract, employment, and competitive
16 marketing decision lest he improperly or indirectly reveal ... trade secrets.” *Brown*
17 *Bag Software*, supra, at 1471.¹⁵

18 Under these tests, the EFF Attorneys cannot be credibly characterized as
19 engaging in anything even remotely analogous to “competitive decision making”
20 about “products”. As noted above, the EFF does not produce “products” that
21 compete with those of the Entertainment Companies; the EFF Attorneys do not
22 advise and are not involved in any pricing, marketing or product design decisions
23

24 ¹⁵ As the Entertainment Companies note (Copyright Owner Plaintiffs’ Contentions, at 10:17-24), Courts
25 have been prepared to extend the “in-house” counsel restrictions to outside counsel who have been
26 found to be engaged in competitive decision making for a client, particularly in the context of access to
27 sensitive technical information in the patent prosecution arena, (See *Motorola, Inc. v. Interdigital*
28 *Corp.* (1994, E. D. La, overturned on other grounds in 1997); *Micron Technology, Inc. v. Mosel Vitelic*
Corp. (1999 D.Idaho). However, this has always been limited to retained counsel for clients who are
business competitors.

1 that compete with the Entertainment Companies' movies and television
2 programming. Moreover, the Entertainment Companies have made no attempt to
3 describe any specific job duties or tasks of EFF Attorneys that assist in the creation
4 of competing "products" and that would be made "untenable" by access to the
5 disputed documents.

6 **4. The Entertainment Companies have failed to show that EFF**
7 **Attorneys present an increased risk of inadvertent disclosure of**
8 **confidential information over other attorneys who are routinely**
9 **adverse to the Entertainment Companies**

10 Finally, even if the Entertainment Companies had met their burden to prove
11 that the EFF Attorneys were involved in competitive commercial decisionmaking
12 about products, or that participation in public discussion about political issues can
13 be equated with commercial competition, they have not demonstrated that the EFF
14 Attorneys meet the wider rationale for curtailing disclosure of discovery – an
15 assessment of increased risk of inadvertent or accidental disclosure – as enunciated
16 in *Brown Bag Software*, 960 F. 2d at 1470. They have failed to demonstrate that
17 there is a greater risk of inadvertent disclosure of confidential information by an
18 EFF Attorney here than there would be for any other attorney of a law firm
19 engaged in ongoing work in a specialized area of law who is routinely adverse to
20 the same parties in litigation. For instance, the same risk would be present for an
21 attorney who works in insurance defense or coverage and who was exposed to
22 confidential documents concerning its design and testing of defective product, an
23 environmental lawyer who reviews confidential information about particular toxic
24 goods, or the in-house counsel of the Recording Industry Association of America,
25 who as counsel of record have seen the confidential business plans of several peer-
26 to-peer software entities in litigation currently pending in this District.

27 Nor does the EFF itself present any increased factual risk based upon past
28 misbehavior. Neither the EFF nor any of its attorneys have ever been found to
have violated the terms of any protective order, misused the discovery process to

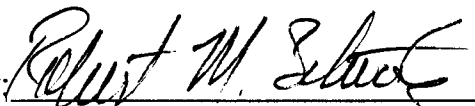
1 obtain confidential information or otherwise disclosed confidential information in
2 any way. (Cohn Decl. ¶ 10). To the contrary, the EFF Attorneys have been
3 opposing counsel to the Entertainment Companies in two other large litigation
4 matters without such incident. EFF was counsel for the Defendants and so adverse
5 to all eight of the major motion picture studios from 2000-2002 in *Universal v.*
6 *Corley* 273 F.3d 429 (2nd Cir. 2001) before the Southern District of New York and
7 2nd Circuit Court of Appeals. EFF is currently counsel to MusicCity/Streamcast,
8 Inc and so adverse to twenty-eight major movie and recording studios (plus five
9 music publishers) in *MGM v. Grokster*, Case No. CV 01-0851 SVW consolidated
10 with CV 01-09923 SVW, currently pending in this court before Judge Wilson. In
11 both of these cases EFF has entered into protective orders with the studios in order
12 to protect their confidential business records during the discovery process. In both
13 of those cases confidential business records of the studios have been reviewed by
14 EFF Attorneys and stored at EFF's offices without improper disclosure. (Cohn
15 Decl. ¶8-9).

16 In neither the *Universal v. Corley* case, nor the *MGM v. Grokster* case have
17 the Studios made any allegation that EFF misused the confidential information of
18 the movie studios or entered into or conducted these litigations in order to gain
19 access to confidential information. In addition to cases where EFF has been
20 adverse to the Entertainment Companies, EFF is currently under a protective order
21 in a California trade secrets case with an organization created by the movie studios,
22 DVD CCA. In that case, EFF, as counsel for the Defendant, has been given access
23 to highly confidential information concerning the protection scheme for DVD
24 movies. *DVD CCA v. Bunner et. Al.*, (6th Dist. 2001) 94 Cal.App.4th 648, rev.
25 granted 117 Cal.Rptr.2d 167 (February 20, 2002). Again, there has been no claim
26 that EFF has misused confidential information in that case. (Cohn Decl. ¶ 8, note
27 1).).

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DATED: October 1, 2002


O'MELVENY & MYERS, LLP

By: 
Robert M. Schwartz

Attorneys for Plaintiffs Time Warner Entertainment Company, L.P. Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., Turner Broadcasting System, Inc., New Line Cinema Corporation, Castle Rock Entertainment, and The WB Television Network Partners L.P.

DATED: October 1, 2002

PROSKAUER ROSE LLP

By: 
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DATED: October 1, 2002

MCDERMOTT, WILL & EMERY

By: Robert Rotstein
Robert H. Rotstein

Attorneys for Plaintiffs Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar Television, Inc.

DATED: October 1, 2002

ELECTRONIC FRONTIER FOUNDATION

By: _____
Cindy A. Cohn

Attorneys for Plaintiffs Craig Newmark, Shawn Hughes, Keith Ogden, Glenn Fleishman and Phil Wright

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DATED: October , 2002

MCDERMOTT, WILL & EMERY

By: _____
Robert H. Rotstein

Attorneys for Plaintiffs Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar Television, Inc.

DATED: October 1, 2002

ELECTRONIC FRONTIER FOUNDATION

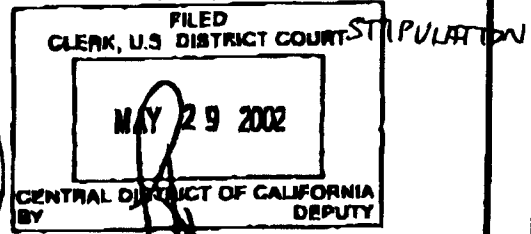
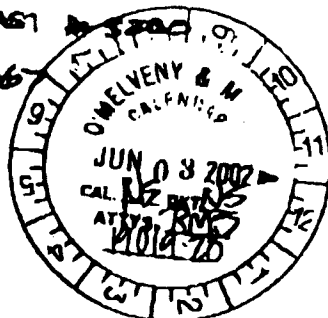
By: 
Cindy A. Coon

Attorneys for Plaintiffs Craig Newmark, Shawn Hughes, Keith Ogden, Glenn Fleishman and Phil Wright

EXHIBIT 1

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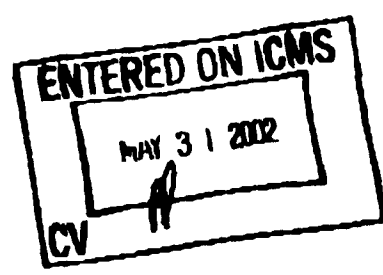
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

OR. FILE

11 PARAMOUNT PICTURES CORPORATION; et al,
12
13 Plaintiff,
14 v.
15 REPLAYTV, INC. and SONICBLUE INC.,
16 Defendant.

Case No. CV 01-09358 FMC (Ex)
Hon. Florence-Marie Cooper
STIPULATION AND ~~PROTECTIVE~~
PROTECTIVE ORDER

17 AND CONSOLIDATED ACTIONS.



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SERVED ON US BY MAIL
POSTMARKED ???

PROOF OF SERVICE
DATED

1 **STIPULATION AND [PROPOSED] PROTECTIVE ORDER**

2
3 Good cause appearing therefor, the following stipulation of the parties in the above-captioned
4 actions, as evidenced by the signatures of counsel of record appearing below, is hereby ordered.

5 DATE: 5/29/02

6
7 
8 The Honorable Florence-Marie Cooper *CHARLES F. EICK*
United States District Court Judge *MAGISTRATE JUDGE*

9 **STIPULATED TERMS OF PROTECTIVE ORDER**

10 Pursuant to Fed. R. Civ. P. 26(c), IT IS HEREBY STIPULATED AND AGREED by the
11 undersigned counsel for Paramount Pictures Corporation, Disney Enterprises, Inc., National
12 Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks Inc., The United Paramount
13 Network, ABC, Inc., Viacom International Inc., CBS Worldwide Inc., CBS Broadcasting Inc.,
14 plaintiffs in Case No. CV 01-09358, Time Warner Entertainment Company, L.P., Home Box Office,
15 Warner Bros., Warner Bros. Television, Time Warner Inc., Turner Broadcasting System, Inc., New
16 Line Cinema Corporation, Castle Rock Entertainment, and The WB Television Network Partners,
17 L.P., plaintiffs in former Case No. CV 01-09693, Metro-Goldwyn-Mayer Studios Inc., Orion Pictures
18 Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions, Inc., Fox
19 Broadcasting Company, plaintiffs in the former Case No. CV 01-09801, Columbia Pictures
20 Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar
21 Television, Inc., plaintiffs in former Case No. CV-01-10221 (collectively "Plaintiffs"), and
22 defendants ReplayTV, Inc. and SONICblue Incorporated (collectively "Defendants") that discovery
23 in, and litigation of, the Consolidated Actions, as hereinafter defined, necessarily will involve the
24 production of information which the parties consider to be highly sensitive, confidential, or
25 proprietary and the disclosure of which would create a risk of significant injury to the producing
26 party's business.

27 The parties believe that a protective order restricting the use and dissemination of such
28 confidential, proprietary, and competitively sensitive information is necessary and appropriate to

1 facilitate discovery in and litigation of the Consolidated Actions among the parties. The parties also
2 believe that such an order is necessary and appropriate to enable the parties to conduct discovery of
3 non-parties that may have similar concerns regarding their proprietary or sensitive information.

4 ACCORDINGLY, IT IS HEREBY STIPULATED AND AGREED that:

5 1. All "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted"
6 Information, hereinafter defined, produced or exchanged in the course of this litigation, shall be
7 treated in accordance with the terms of this Order and shall be used solely for the purpose of
8 litigation, arbitration or mediation of the following four actions, Paramount Pictures Corporation, et
9 al. v. ReplayTV, Inc., et al., Case No. CV 01-09358, Time Warner Entertainment Company, L.P., et
10 al. v. ReplayTV, Inc., et al., former Case No. CV 01-09693, Metro-Goldwyn-Mayer Studios, Inc., et
11 al. v. ReplayTV, Inc., et al., former Case No. CV 01-09801, and Columbia Pictures Industries, Inc., et
12 al. v. ReplayTV, Inc., et al., former Case No. CV 01-10221 (collectively, the "Consolidated
13 Actions"), and of any Related Litigation, and for no other purpose, including but not limited to,
14 business and other litigation purposes. "Related Litigation," as used in the preceding sentence, is
15 litigation that (a) arises from the same or substantially identical transactions, happenings or events as
16 the Consolidated Actions; and (b) involves one or more of the parties to the Consolidated Actions (or
17 their parents, subsidiaries, or affiliates), and no other persons or entities.

18 2. The term "Information" as used herein shall include any document, deposition
19 testimony, electronic data, interrogatory response, response to requests for admissions, response to
20 requests for production of documents, audiotape, videotape, recording, or other information disclosed
21 or produced by or on behalf of a party (or any of its attorneys or other agents) in the Consolidated
22 Actions, or by or on behalf of a non-party (or any of its attorneys or other agents), and all information
23 derived therefrom.

24 3. Any Information concerning trade secrets or other confidential research, development,
25 commercial, marketing, or financial subjects may be designated by the producing party as
26 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" within the meaning of
27 this Stipulation and Protective Order. The producing party shall designate Information
28 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" only when the producing

1 party has a reasonable, good faith belief that the Information so designated is a trade secret or is
2 otherwise confidential within the meaning of Rule 26(c)(7) of the Federal Rules of Civil Procedure.
3 In the case of Information designated as "Highly Confidential," the producing party must have a
4 reasonable good faith belief that disclosure of the Information to employees of any other party, other
5 than in-house counsel, would create an undue risk of significant injury to the producing party's
6 business that would not exist in the absence of such disclosure. In the case of Information designated
7 as "Restricted," a producing party-Plaintiff must have a reasonable good faith belief that disclosure of
8 the Information to any employee of, or in-house counsel for, another Plaintiff, or any employees of
9 Defendants, other than in-house counsel for Defendants, would create an undue risk of significant
10 injury to the producing party-Plaintiff's business that would not exist in the absence of such
11 disclosure. In the case of Information designated as "Highly Restricted," the producing party must
12 have a reasonable good faith belief that disclosure of the Information to any employee of, or in-house
13 counsel for, any other party would create an undue risk of significant injury to the producing party's
14 business that would not exist in the absence of such disclosure. Any Information not designated as
15 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" in accordance with the
16 procedures set forth herein shall not be covered by this Stipulation and Protective Order.

17 4. "Confidential" Information, except with the prior consent of the producing party or
18 upon prior order of this Court, shall not be disclosed by any party to any person other than the
19 following:

- 20 (a) outside counsel for the parties in the Consolidated Actions, their secretaries, legal
21 assistants, or other support personnel as reasonably necessary to assist outside counsel
22 in the Consolidated Actions (collectively, "Outside Counsel");
- 23 (b) In-House Counsel for the parties in the Consolidated Actions, their secretaries, legal
24 assistants, or other support personnel as reasonably necessary to assist In-House
25 Counsel in the Consolidated Actions ("In-House Counsel");
- 26 (c) current employees of each of the parties, including their parents, subsidiaries, and
27 affiliates, who are reasonably necessary to assist Outside Counsel in the Consolidated
28 Actions;

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- (d) outside experts, consultants, and/or litigation support vendors who are not employees of any party, or of their parents, subsidiaries, or affiliates, and who are expressly retained to assist Outside Counsel, including, but not limited to, statisticians, economists and other experts, and the employees of such persons (collectively, "Outside Litigation Assistants");
- (e) the Court and Court personnel, and court reporters and videographers who are retained to transcribe or videotape testimony in the Consolidated Actions;
- (f) any person who prepared, assisted in preparing, or received the document designated "Confidential";
- (g) during depositions only, any person who appears, based upon the document itself or testimony in a deposition, to have knowledge of the contents of the document designated "Confidential" or the specific events, transactions, discussions, or data reflected in the document;
- (h) mediators or other individuals engaged or consulted in settlement of the litigation; and
- (i) any other person as to whom the parties may agree in writing.

5. "Highly Confidential" Information, except with the prior consent of the producing party or upon prior order of this Court, shall not be disclosed by any party to any person other than the following:

- (a) Outside Counsel;
- (b) In-House Counsel;
- (c) Outside Litigation Assistants;
- (d) the Court and Court personnel, and court reporters and videographers who are retained to transcribe or videotape testimony in the Consolidated Actions;
- (e) any person who prepared, assisted in preparing, or received the document designated "Highly Confidential";
- (f) during depositions only, any person who appears, based upon the document itself or testimony in a deposition, to have knowledge of the contents of the document

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designated "Highly Confidential" or the specific events, transactions, discussions, or data reflected in the document;

- (g) mediators or other individuals engaged or consulted in settlement of the litigation; and
- (h) any other person as to whom the parties may agree in writing.

6. "Restricted" Information, except with the prior consent of the producing party or upon prior order of this Court, shall not be disclosed by any party to any person other than the following:

- (a) Outside Counsel and In-House Counsel for Defendants;
- (b) Outside Litigation Assistants;
- (c) the Court and Court personnel, and court reporters and videographers who are retained to transcribe or videotape testimony in the Consolidated Actions;
- (d) any person who prepared, assisted in preparing, or received the document designated "Restricted";
- (e) during depositions only, any person who appears, based upon the document itself or testimony in a deposition, to have knowledge of the contents of the document designated "Restricted" or the specific events, transactions, discussions, or data reflected in the document; and
- (f) mediators or other individuals engaged or consulted in settlement of the litigation; and
- (g) any other person as to whom the parties may agree in writing.

7. "Highly Restricted" Information, except with the prior consent of the producing party or upon prior order of this Court, shall not be disclosed by any party to any person other than the following:

- (a) Outside Counsel;
- (b) Outside Litigation Assistants;
- (c) the Court and Court personnel, and court reporters and videographers who are retained to transcribe or videotape testimony in the Consolidated Actions;
- (d) any person who prepared, assisted in preparing, or received the document designated "Highly Restricted";

1 (e) during depositions only, any person who appears, based upon the document itself or
2 testimony in a deposition, to have knowledge of the contents of the document
3 designated "Highly Restricted" or the specific events, transactions, discussions, or data
4 reflected in the document;

5 (f) mediators or other individuals engaged or consulted in settlement of the litigation; and

6 (g) any other person as to whom the parties may agree in writing.

7 8. Any person entitled to receive confidential information pursuant to Paragraph 4,
8 subparagraphs (d) or (i), Paragraph 5, subparagraphs (c) or (h); Paragraph 6, subparagraphs (b) or (g),
9 or Paragraph 7, subparagraphs (b) or (g), shall, prior to being given any "Confidential," "Highly
10 Confidential," "Restricted," or "Highly Restricted" information, read this Stipulation and Protective
11 Order, and shall execute an undertaking in the form annexed hereto as Exhibit A indicating that he or
12 she has read this Stipulation and Protective Order and will abide by its terms. Persons to whom
13 confidential information is shown or disclosed pursuant to Paragraph 4(g), Paragraph 5(f), Paragraph
14 6(e), or Paragraph 7(e) shall, prior to being given any "Confidential," "Highly Confidential,"
15 "Restricted," or "Highly Restricted" information, be given a copy of and asked to read this
16 Stipulation and Protective Order and shall be bound by its terms, and shall not disclose such
17 information to any other persons, except as provided for by the terms of this Stipulation and
18 Protective Order.

19 9. A party shall designate documents as either "Confidential," "Highly Confidential,"
20 "Restricted," or "Highly Restricted" by affixing a stamp with such words on the document before
21 copies of the documents are delivered to another party.

22 10. Any deposition transcript or videotaped deposition containing "Confidential," "Highly
23 Confidential," "Restricted," or "Highly Restricted" information shall be marked on the cover
24 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted," and shall indicate as
25 appropriate within the transcript and on the videotape that the information has been so designated. A
26 party may designate any portions of the transcript (including exhibits) or videotape as containing
27 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information by so
28 advising the deposition reporter in the course of the deposition, who shall indicate in the deposition

1 transcript and on the videotape what portion(s) of the testimony (or exhibits thereto) were so
2 designated, or by so advising all other parties which pages are confidential within fifteen (15)
3 business days after receipt of the transcript. Until fifteen (15) business days have passed after the
4 receipt of any transcript, the entire transcript and videotape shall be deemed to contain "Confidential"
5 Information. Nothing in this Stipulation and Protective Order shall prevent an employee of a party,
6 In-House Counsel, or Outside Counsel from attending any deposition, except that only persons
7 entitled to receive "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted"
8 Information shall be present when such Information is disclosed at a deposition. Outside Counsel for
9 the party disclosing such "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted"
10 Information at a deposition shall, before such Information is disclosed, advise Outside Counsel for all
11 other parties so that appropriate safeguards can be taken to ensure that only persons entitled to receive
12 such Information pursuant to the terms of this Stipulation and Protective Order are present when such
13 Information is disclosed.

14 11. In the event that Outside Counsel for any party decides to file with or submit to the
15 Court any "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" Information,
16 the following procedures shall be used:

- 17 (a) All Information subject to confidential treatment in accordance with the terms of this
18 Stipulation and Protective Order that is filed with the Court, including any pretrial
19 pleadings, motions, deposition transcripts, exhibits or other papers that reproduce or
20 otherwise disclose, directly or indirectly, any "Confidential," "Highly Confidential,"
21 "Restricted," or "Highly Restricted" Information, shall be filed in a sealed envelope or
22 other container, together with a copy of this Stipulation and Protective Order, with a
23 cover sheet bearing the caption of the Consolidated Actions and a statement
24 substantially in the following form:

25 *CONFIDENTIAL – This envelope or container contains documents,*
26 *materials or intangible things that are subject to a PROTECTIVE ORDER*
27 *issued by the Court and is not to be opened, or the contents revealed,*
28 *except in compliance with that Order.*

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All such documents shall be kept under seal until further order of this Court. Parties shall have up to ten (10) business days from the date of filing to produce a redacted, public-record version of any papers filed under seal, which "blacks out," or otherwise conceals, the substance and sources of all confidential information.

(b) The parties agree to refrain, whenever possible, from including "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information in the titles of the documents filed with the Court so that, in all instances, the titles of the documents and the court's docket sheet reflecting those titles may remain public.

(c) All filings to be filed under seal, in whole or in part, must be so designated by the party making the filing. Filings containing "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information may be filed under seal in their entirety. If a filing containing such information is not placed under seal in its entirety, those portions containing "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information must be separated from the pleading and placed in an envelope bearing the caption of the above-captioned actions, the name of the filing, and the legend "Filed Under Seal." The clerk's office shall maintain the filing under seal, pending a ruling from the Court that such filing shall not remain under seal.

(d) Should any document be inadvertently filed without the designation stated in paragraph 11(a) above, the party filing the document shall, upon written notification, promptly cause the document to be sealed pursuant to this Protective Order.

12. The use of any "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information for the purpose of any trial or any hearing that is open to the public is not addressed at this time, but may be the subject of future agreement or order as the need may arise, except that the parties now agree that any party intending to use "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information at a hearing must, to the extent such party knows in advance of its need to use information not already identified in the papers submitted for such hearing, provide reasonable prior written notice to opposing parties and the party that is the source of the "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted"

1 Information, and the parties will confer in advance of the hearing and negotiate in good faith
2 concerning the procedures to be used during the hearing relating to the use of "Confidential," "Highly
3 Confidential," "Restricted," or "Highly Restricted" Information.

4 13. Any party may give notice to another party that it is eliminating a previous designation
5 of a document or other information as "Confidential," "Highly Confidential," "Restricted," or
6 "Highly Restricted." In that event, if the information is used as an exhibit at trial or otherwise
7 displayed to the Court, all deposition statements and all markings indicating that the information had
8 previously been designated by the party as "Confidential," "Highly Confidential," "Restricted," or
9 "Highly Restricted" shall be removed (or edited, in the case of a videotaped deposition) prior to
10 offering the information into evidence or displaying same to the Court. The party requesting the
11 elimination of the previous designation shall be responsible for eliminating that designation and shall
12 fulfill this responsibility by providing a new, redesignated copy of the document or other information.
13 If any information designated by a party as "Confidential," "Highly Confidential," "Restricted," or
14 "Highly Restricted" is used as an exhibit at trial or otherwise displayed to the Court, the producing
15 party shall be entitled to add to the marking "Confidential," "Highly Confidential," "Restricted," or
16 "Highly Restricted," the following language: "Pursuant to the Protective Order Entered in The
17 Consolidated Actions." A similar statement may be added to any deposition transcript or videotaped
18 deposition.

19 14. Any person receiving "Confidential," "Highly Confidential," "Restricted" or "Highly
20 Restricted" information shall not disclose such information to any person who is not entitled to
21 receive such information.

22 15. Nothing herein shall impose any restriction on the use or disclosure by a party of its
23 own information. Nor shall this Stipulation and Protective Order be construed to prevent any party or
24 its Outside Counsel, In-House Counsel, or Outside Litigation Assistants from making use as they see
25 fit of information that was lawfully available to the public or lawfully in the possession of the party,
26 Outside Counsel, In-House Counsel, or Outside Litigation Assistant, or that properly came into the
27 possession of the party, Outside Counsel, In-House Counsel or Outside Litigation Assistant
28 independent of any disclosure of "Confidential," "Highly Confidential," "Restricted," or "Highly

1 Restricted" Information in the Consolidated Actions, or that was lawfully obtained from third parties
2 in the course of the Consolidated Actions and were not designated as "Confidential," "Highly
3 Confidential," "Restricted," or "Highly Restricted" by that third party or its present or former
4 employer. In the event, however, that a third party provides Information that was generated by a
5 party to this Stipulation and Protective Order and that party believes that the Information is
6 proprietary and confidential, the party may request that all copies of such Information be stamped
7 with whatever designation the party believes is appropriate. If the parties to this Stipulation and
8 Protective Order disagree concerning the proper designation of the Information, such dispute shall be
9 resolved pursuant to the procedures described in Paragraph 17 of this Stipulation and Protective
10 Order. Pending the Court's ruling, the party contesting the requested designation shall treat the
11 Information as if the requested designation were proper and effective.

12 16. Nothing contained in the Stipulation and Protective Order or any designation of
13 confidentiality hereunder or any failure to make such designation shall be used or characterized by
14 any party as an "admission" by a party opponent.

15 17. Entry of this Stipulation and Protective Order shall be without prejudice to any motion
16 for relief from or modification of the provisions hereof or to any other motion relating to the
17 production, exchange, or use of any document or other Information in the course of the Consolidated
18 Actions, provided, however, that no such motion shall be made after entry of a final judgment or
19 settlement. If a party disagrees at any stage of these proceedings with a producing party's designation
20 of Information as "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted," or
21 disputes the limitations on access to be accorded such Information under this Stipulation and
22 Protective Order, such party (the "Disputing Party"), shall provide to the producing party written
23 notice of its disagreement and specifically identify the Information or restriction on access in dispute.
24 If the dispute cannot be resolved informally, the producing party may file a motion with respect to the
25 designation pursuant to the following schedule: within seven calendar days after receipt of the notice,
26 the producing party's Outside Counsel shall provide to the Disputing Party's Outside Counsel its
27 portion of a Joint Stipulation on a motion with respect to the designation. The Disputing Party's
28 Outside Counsel shall provide to the producing party's Outside Counsel its portion of the Joint

1 Stipulation so that the Joint Stipulation may be filed within seven calendar days after the Disputing
2 Party receives the producing party's portion of the Joint Stipulation. The parties may file and serve
3 supplemental briefs within two court days after the Joint Stipulation is filed. The motion shall
4 thereupon be deemed submitted without further briefing or hearing unless deemed necessary by the
5 Magistrate Judge. The producing party shall bear the burden of demonstrating that the Information is
6 entitled to protection from disclosure under applicable law. Pending the Court's ruling, the Disputing
7 Party shall continue to treat the Information in the manner required by the Stipulation and Protective
8 Order.

9 18. The parties may modify any of the provisions of this Stipulation and Protective Order
10 by written agreement between or among all of the parties.

11 19. If any of the parties or their counsel are served with a subpoena requiring production
12 of any Information that has been designated as "Confidential," "Highly Confidential," "Restricted,"
13 or "Highly Restricted," such party shall within three (3) business days send via facsimile a copy of
14 the subpoena to Outside Counsel for the party who produced the subpoenaed Information and shall
15 inform the entity issuing (or seeking to have a court issue) such subpoena that the Information is
16 confidential and subject to this Stipulation and Protective Order. The parties agree that if the party
17 who produced the subpoenaed Information objects to the disclosure or production of that Information,
18 that party shall, as soon as practicable, file a motion objecting to the subpoena or seek other
19 appropriate relief. If a motion objecting to the subpoena is timely filed, or other appropriate relief is
20 timely sought, a party shall not produce the subpoenaed Information until after the Court rules on
21 such motion, unless required to do so pursuant to court order (other than the subpoena itself) or other
22 applicable law.

23 20. A party may withhold from discovery information or documents in its possession,
24 custody or control that are subject to an obligation to a third party not to disclose such information or
25 documents (a "Non-disclosure Agreement") if, within 14 calendar days after learning of the
26 applicable Non-disclosure Agreement, either the producing party or the third party objects to the
27 disclosure. Within ten court days after service of the objection, the parties and the third party shall
28 attempt to resolve the dispute informally, and if they are unable to do so the producing party and/or

1 the third party shall provide to the party seeking discovery its or their portion of a Joint Stipulation on
2 a motion for protective order. The responding party shall serve its portion of the Joint Stipulation
3 within five court days thereafter, and the Joint Stipulation shall be filed within two court days
4 thereafter. The parties and the third party may file supplemental briefs within two court days after the
5 Joint Stipulation is filed, after which the motion shall be deemed submitted without further briefing
6 or hearing unless deemed necessary by the Magistrate Judge.

7 21. If a party inadvertently produces Information that it considers to be protected from
8 disclosure by the attorney-client privilege, the work product doctrine, or any other privilege or similar
9 legal protection, in whole or in part, or learns of the production of such Information by a third party,
10 the party may retrieve such Information as follows:

11 (a) Within ten (10) days of the date of discovery by a party of the inadvertent production
12 by it or a third party, the party asserting that an inadvertent production has occurred
13 must give written notice to all other parties that the party claims the Information, in
14 whole or in part, is privileged or protected material; in addition, the notice must state
15 the nature of the privilege or protection and the basis for asserting it, and the reason
16 the production is claimed to be inadvertent.

17 (b) Upon receipt of such notice, any party who has received the produced document or
18 material shall promptly return all copies to the party asserting inadvertent production.
19 In the event that only part of a document is claimed to be privileged or protected, the
20 party asserting inadvertent production shall furnish to the other parties who have
21 received the document a redacted copy of such document, removing only the part(s)
22 thereof claimed to be privileged or protected, together with such written notice. Any
23 party who has received the produced documents or material may contest the claim of
24 privilege or protection by filing a motion contesting the claim within ten (10) days of
25 receiving notice under subparagraph (a) above. During the pendency of such motion,
26 the receiving party need not return all copies of the produced documents or material to
27 the party asserting inadvertent production, however the receiving party may not use or
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1 disclose the information claimed confidential for any purpose other than prosecution
2 of the motion challenging the privilege or protection claim.

3 (c) The provisions of subparagraphs (a) and (b) above are without prejudice to any other
4 rights any party may have with respect to challenging or defending any claim of
5 privilege.

6 22. A party that has inadvertently produced information without designating it as
7 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" information may at any
8 time prior to the discovery cutoff in the Consolidated Actions redesignate such information as
9 "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted." The party receiving
10 such redesignated "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted"
11 information shall make a reasonable good faith effort to ensure that any analysis, memoranda, notes,
12 or other material that were generated based upon such information shall immediately be treated in
13 conformance with any such redesignation.

14 23. In the event that a party produces two or more identical or substantially identical
15 copies of a document or other information, and any copy is designated "Confidential," "Highly
16 Confidential," "Restricted," or "Highly Restricted," while other copies are not so designated, all such
17 identical or substantially identical documents or other information shall be treated with the highest
18 confidentiality designation once the inconsistent designation is known. The producing party shall be
19 responsible for informing all parties receiving the inconsistently designated document or other
20 information of the inconsistent designation.

21 24. All provisions of this Stipulation and Protective Order restricting the use of
22 information obtained during discovery shall continue to be binding after the conclusion of the
23 Consolidated Actions, including all appeals, until further order of the Court, unless the parties agree
24 otherwise in writing. Any and all originals and copies of documents or other information deemed to
25 be "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" shall, at the request of
26 the producing party, be returned to the producing party at the producing party's expense, or
27 destroyed, within one month after a final judgment and appeals herein or settlement of the
28 Consolidated Actions, except that Outside Counsel for each party (whether or not counsel of record)

1 may maintain one copy of all Information during the shorter of one year after a final judgment and
2 appeals herein or the period of time when an injunction, if any, is in effect, and may thereafter
3 maintain in its files one copy of each pleading filed with the Court, and each written discovery
4 request and written responses to discovery requests. Upon request from any party, a party who elects
5 to destroy confidential documents in its possession will attest to the fact that such documents have
6 been destroyed.

7 25. Neither this Stipulation and Protective Order nor any party's designation of
8 Information as "Confidential," "Highly Confidential," "Restricted," or "Highly Restricted" shall
9 affect the admissibility into evidence of the Information so designated. In addition, nothing contained
10 herein shall be deemed to waive any applicable privilege.

11 26. Third parties from whom discovery is sought by the parties to this Stipulation and
12 Protective Order may designate Information as "Confidential," "Highly Confidential," "Restricted,"
13 or "Highly Restricted" consistent with the terms of this Stipulation and Protective Order, provided
14 that such third parties agree in writing to be bound by the Stipulation and Protective Order by
15 executing an undertaking in the form annexed hereto as Exhibit A. Under such circumstances, all
16 duties applicable to a producing party shall apply to such third party. All obligations applicable to
17 parties receiving such Information shall apply to any party receiving Information from such third
18 party.

19 27. Nothing in this Stipulation and Protective Order is intended to constitute an agreement
20 regarding the scope of discovery.

21 The Court retains jurisdiction subsequent to settlement or entry of judgment to enforce the
22 terms of this Stipulation and Protective Order.

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DATED: 28 May 2002

**WHITE O'CONNOR CURRY
GATTI & AVANZADO LLP**

By: 
Andrew M. White

Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
Company, Inc., NBC Studios, Inc., Showtime Networks
Inc., The United Paramount Network, ABC, Inc.,
Viacom International Inc., CBS Worldwide Inc., and
CBS Broadcasting Inc.

DATED: _____

WILMER, CUTLER & PICKERING

By: _____
Thomas P. Olson

Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
Company, Inc., NBC Studios, Inc., Showtime Networks
Inc., The United Paramount Network, ABC, Inc.,
Viacom International Inc., CBS Worldwide Inc., and
CBS Broadcasting Inc.

DATED: _____

O'MELVENY & MYERS LLP

By: _____
Robert M. Schwartz

Attorneys for Plaintiffs Time Warner Entertainment
Company, L.P., Home Box Office, Warner Bros.,
Warner Bros. Television, Time Warner Inc., Turner
Broadcasting System, Inc., New Line Cinema

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DATED: _____

**WHITE O'CONNOR CURRY
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By: _____
Andrew M. White

**Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
Company, Inc., NBC Studios, Inc., Showtime Networks
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Viacom International Inc., CBS Worldwide Inc., and
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DATED: May 28, 2002

WILMER, CUTLER & PICKERING

By: Thomas P. Olson
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**Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
Company, Inc., NBC Studios, Inc., Showtime Networks
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CBS Broadcasting Inc.**

DATED: _____

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By: _____
Robert M. Schwartz

**Attorneys for Plaintiffs Time Warner Entertainment
Company, L.P., Home Box Office, Warner Bros.,
Warner Bros. Television, Time Warner Inc., Turner
Broadcasting System, Inc., New Line Cinema**

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DATED: _____

**WHITE O'CONNOR CURRY
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By: _____
Andrew M. Wilco

Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
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CBS Broadcasting Inc.

DATED: _____

WILMER, CUTLER & PICKERING

By: _____
Thomas F. Olson

Attorneys for Plaintiffs Paramount Pictures Corporation,
Disney Enterprises, Inc., National Broadcasting
Company, Inc., NBC Studios, Inc., Showtime Networks
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Viscom International Inc., CBS Worldwide Inc., and
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DATED: May 28, 2002

O'MELVENY & MYERS LLP

By: 
Robert M. Schwartz


Attorneys for Plaintiffs Time Warner Entertainment
Company, L.P., Home Box Office, Warner Bros.,
Warner Bros. Television, Time Warner Inc., Turner
Broadcasting System, Inc., New Line Cinema

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DATED: May 28, 2002

Corporation, Castle Rock Entertainment, and The WB
Television Network Partners, L.P.

PROSKAUER ROSE LLP

By: 
Scott P. Cooper

Attorneys for Plaintiffs Metro-Goldwyn-Mayer Studios
Inc., Orion Pictures Corporation, Twentieth Century Fox
Film Corporation, Universal City Studios Productions,
Inc., and Fox Broadcasting Company

DATED: _____

MCDERMOTT, WILL & EMERY

By: _____
Robert H. Rotstein

Attorneys for Plaintiffs Columbia Pictures Industries,
Inc., Columbia Pictures Television, Inc., Columbia
TriStar Television, Inc., and TriStar Television, Inc.

DATED: _____

FENWICK & WEST LLP

By: _____
Emmett C. Stanton

Attorneys for Defendants ReplayTV, Inc. and
SONICblue Incorporated

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Corporation, Castle Rock Entertainment, and The WB
Television Network Partners, L.P.

DATED: _____

PROSKAUER ROSE LLP

By: _____
Scott P. Cooper

Attorneys for Plaintiff Metro-Goldwyn-Mayer Studios
Inc., Orion Pictures Corporation, Twentieth Century Fox
Film Corporation, Universal City Studios Productions,
Inc., and Fox Broadcasting Company

DATED: May 24, 2002

MCDERMOTT, WILL & EMERY

By: Robert H. Rotstein
Robert H. Rotstein

Attorneys for Plaintiff Columbia Pictures Industries,
Inc., Columbia Pictures Television, Inc., Columbia
TriStar Television, Inc., and TriStar Television, Inc.

DATED: _____

FENWICK & WEST LLP

By: _____
Ernest C. Stanton

Attorneys for Defendants ReplayTV, Inc. and
SONICblue Incorporated

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Corporation, Castle Rock Entertainment, and The WB
Television Network Partners, L.P.

DATED: _____

PROSKAUER ROSB LLP

By: _____
Scott P. Cooper

Attorneys for Plaintiffs Metro-Goldwyn-Mayer Studios
Inc., Orion Pictures Corporation, Twentieth Century Fox
Film Corporation, Universal City Studios Productions,
Inc., and Fox Broadcasting Company

DATED: _____

MCDERMOTT, WILL & EMERY

By: _____
Robert H. Rotstein

Attorneys for Plaintiffs Columbia Pictures Industries,
Inc., Columbia Pictures Television, Inc., Columbia
TriStar Television, Inc., and TriStar Television, Inc.

DATED: May 23, 2002

FENWICK & WEST LLP

By: 
Brunell C. Stanton

Attorneys for Defendants ReplayTV, Inc. and
SONICblue Incorporated

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EXHIBIT A

UNDERTAKING

I, [NAME OF INDIVIDUAL], hereby certify my understanding that "Confidential," "Highly Confidential," "Restricted," and/or "Highly Restricted" Information is being provided to me pursuant to the terms and restrictions of the foregoing Stipulation and Protective Order applying to the production, exchange, disclosure and use of confidential information by parties and witnesses in the above-entitled actions. I further certify that I have been provided with a copy of and have read the foregoing Stipulation and Protective Order and hereby agree to be bound by its terms and to subject myself to the jurisdiction of the United States District Court for the Central District of California for purposes of enforcement of the terms and restrictions of the Stipulation and Protective Order. I understand that violations of those terms and restrictions are or may be punishable as contempt of court.

DATED: _____

[NAME OF INDIVIDUAL]