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10

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**

14 PARAMOUNT PICTURES,
15 CORPORATION, et al.,

16 Plaintiff,

17 vs.

18 REPLAYTV, INC., et al.,

19 Defendant
20

Case No.: CASE NO. CV 01-09358 FMC
(Ex) (Consolidated with
Case No. CV 02-04445 FMC Ex))

**SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF NEWMARK
PLAINTIFFS' OPPOSITION TO
ENTERTAINMENT COMPANIES'
MOTION FOR PROTECTIVE ORDER**

21 AND CONSOLIDATED ACTIONS
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2 **I. INTRODUCTION**

3 The Newmark Plaintiffs hereby provide the Court with the following
4 supplemental information in support of their contentions in the Joint Stipulation:

5 1. Revised information about the proportion of documents produced by
6 the Entertainment Companies to which EFF would be precluded from access
7 under the Entertainment Companies' request. Based upon these new figures, it
8 appears that EFF would be precluded from an even greater percentage of the total
9 documents than the earlier estimate of 78%;

10 2. Declarations of four of the Newmark consumer plaintiffs expressing
11 their concern about the possible effective disqualification of EFF Attorneys; and

12 3. Argument that the Entertainment Companies' request does not even
13 meet the test for a protective order for commercial competitors.

14 **II. THE PROPOSED RESTRICTION ON EFF ATTORNEYS' ACCESS TO**
15 **DOCUMENTS IS NOT "NARROWLY TAILORED" AND IS GREATER THAN**
16 **PREVIOUSLY ADVISED.**

17 Based on information provided to Newmark Plaintiffs since filing of the
18 Joint Stipulation, it appears that the proportion of documents to which EFF
19 Attorneys would be precluded is greater than the 78% estimate previously
20 indicated in Newmark Plaintiffs' portion of the Joint Stipulation. Decln. of Nancy
21 Meeks, senior litigation paralegal at Fenwick & West, Exh. A.

22 That figure was based on a very rough, informal review of the documents
23 by the Newmark Plaintiffs' fourth counsel of record, Mr. Ira Rothken on
24 September 25, 2002, supplemented informally by personnel at Fenwick & West
25 LLP. Subsequently Fenwick & West has advised that additional documents have
26 been produced to it by the Columbia Plaintiffs and Fenwick personnel have had
27 the opportunity to conduct a more thorough review. Based on the revised
28 information, it appears that a total of 708,000 pages have now been produced.
Meeks Decln. ¶6.

1 Although no figures are currently available for the total proportion of
2 documents that would be excluded in the five categories of documents the subject
3 of the Entertainment Companies' request, based on the figures available for the
4 "Department of Justice" ("DoJ") category of documents, it appears that EFF
5 would be excluded from a greater proportion of documents than previously
6 advised. The DoJ documents category by itself constitutes approximately 65%
7 of the total documents produced, Meeks Decln ¶8. The Entertainment
8 Companies' counsel originally made a "blanket designation" that all documents
9 produced to the Department of Justice were designated "Highly Restricted".
10 Despite some recent downgrading of the confidentiality of some of those
11 documents, it appears that EFF Attorneys would be precluded from accessing
12 over 95% of that category of documents, if the Entertainment Companies'
13 request were granted. Meeks' Decln. ¶ 9 -11. Along with the Entertainment
14 Companies' financial information and business plans (past and present), these
15 documents are likely to be the most probative for the fair use claims in the
16 Newmark Plaintiffs' case.

17 **III. THE PROPOSED ORDER WOULD MATERIALLY PREJUDICE THE NEWMARK**
18 **PLAINTIFFS BY EFFECTIVELY REMOVING THEIR CHOSEN COUNSEL, THE**
19 **EFF ATTORNEYS**

20 Filed herewith are declarations from four of the five ReplayTV owner
21 plaintiffs, Craig Newmark, Phil Wright, Glenn Fleishman and Keith Ogden
22 (Exhibits B, C, D and E respectively), attesting to their concerns should EFF
23 effectively be removed as their chosen counsel of record. As the declarations
24 confirm, the Plaintiffs explicitly chose EFF to be counsel because of EFF's
25 public statements and advocacy on these and related issues.

1 **IV. THE ENTERTAINMENT COMPANIES' CLAIMS DO NOT EVEN MEET THE**
2 **BASIC STANDARD FOR LIMITING ATTORNEY ACCESS IN A COMMERCIAL**
3 **COMPETITION CONTEXT, MUCH LESS EXTENDING THAT STANDARD TO**
4 **REACH A NON-COMMERCIAL COMPETITOR, EFF.**

5 The Newmark Plaintiffs' contentions in the Joint Stipulation explain why
6 EFF should not be considered a business competitor of the Entertainment
7 Companies, and EFF Attorneys are not engaged in "competitive decision-
8 making" and are not "in-house counsel." Yet even under the legal test for
9 excluding commercial competitors, the Entertainment Companies' arguments
10 fail.

11 Purely having the status of competitive in-house counsel is not a sufficient
12 basis for restricting access, since courts have explicitly rejected the notion of a
13 blanket exclusion of in-house counsel. *U.S. Steel v. U.S.*, 730 F. 2d. 1469. Courts
14 apply a three-factor balancing test to weigh up the competing interests of parties
15 seeking discovery who are entitled to all information reasonably calculated to
16 lead to the discovery of admissible evidence with the need to protect parties from
17 the misuse of trade secrets by competitors:

- 18 1. the nature and complexity of the litigation;
- 19 2. whether alternative discovery measures exist which would assist the
20 in-house counsel to develop the litigation; and
- 21 3. whether in-house counsel is engaged in competitive decision-
22 making on behalf of a business competitor.

23 *Volvo Penta of the Americas, Inc. v. Brunswick Corporation*, 187 F.R.D. 240
24 (E.D Va. 1999). The key determinative factor is whether in-house counsel is
25 engaged in competitive decision-making. *Brown Bag Software*, 960 F. 2d 1465,
26 1470; *Amgen, Inc., v. Elanex Pharmacy, Inc.*, 160 F. R.D. 134, 137-138
27 (W.D.Wash. 1994); *Fluke Corporation v. Fine Instruments Corp et al*, 1994 WL
28 739705 (W.D. Wa. 1994).

The request here fails on all three tests. First, the complexity of the claims
in the present case support EFF Attorneys' involvement. In *U.S. v. Sungard Data*

1 *Systems, Inc.*, 173 F. Supp.2d 20, the court declined to exclude access of in-house
2 counsel on the basis of the tight litigation schedule, the complexity of the claims,
3 and because in-house counsel’s significant knowledge about the industry gave
4 them a “much deeper and complete understanding of the documents being
5 produced,” *Id.* at 21. In the present case, the complexity of the claims in issue, the
6 700,000 pages produced so far, the tight discovery schedule where depositions
7 are already underway and the EFF Attorneys’ long experience with these issues
8 all suggest that it would “create an extreme and unnecessary hardship,” (*U.S.*
9 *Steel Corp.*, 730 F. 2d. at 1468) to exclude EFF Attorneys.

10 Second, no alternate discovery is readily available to assist Newmark
11 Plaintiffs’ counsel in determining what the likely effect on the market will be
12 from the Newmark Plaintiffs’ use of the ReplayTV. The Entertainment
13 Companies’ own analyses of current and potential markets for their works is not
14 only the best, but also potentially the only data available on the future markets, as
15 well as the most authoritative source for base data about the current and past
16 markets for their works.¹

17 Finally, in considering whether to restrict access to in-house counsel,
18 courts have generally relied on the terms of the existing protective orders in
19 place, the in-house counsel’s professional and ethical obligations as a member of
20 the Bar and the possibility of attorney sanctions, together with individual attorney
21 liability, as the appropriate means of containing the risk of inadvertent disclosure,
22 rather than blindfolding counsel. *See U.S. V. Sungard, supra*, at 21-22; *Volvo*, at
23 245: “The Court re-affirms its belief that, as the U.S. Steel Corp. decision
24 reasoned, the all-important codes and model rules of professional conduct,
25

26 ¹ The Entertainment Companies’ claims of the extreme sensitivity of the documents produced do not, by
27 themselves, increase the risk of inadvertent disclosure or change that analysis. *Volvo Penta* at 244
28 (“[T]he Court hesitates to resolve a discovery dispute based on the uncertain calculus of how sensitive a
litigant perceives its confidential data is; attempting to objectively gauge that sensitivity at this
preliminary stage of litigation would not lend itself to efficient or predictable judicial decision-making”).

1 coupled with the specter of attorney sanctions or even disbarment, should also
2 allay many of [the].. concerns of intentional or unintentional disclosure of its
3 information.” The Entertainment Companies have failed to demonstrate that
4 these mechanisms would not be sufficient to prevent EFF Attorneys from
5 revealing confidential information in this case.

6
7 **CONCLUSION**

8 Based upon the foregoing, the Newmark Plaintiffs respectfully request that
9 the Entertainment Companies’ request for a further protective order be denied
10 and that the EFF Attorneys be ordered to enter into the existing Protective Order
11 dated May 29, 2002, and thereafter be granted immediate access to all documents
12 produced to date in this litigation.

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Dated this 7th day of October, 2002

Cindy Cohn on behalf of
all Attorneys for Newmark
Plaintiffs

ELECTRONIC
FRONTIER
FOUNDATION
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Bar No. 145997)
Fred von Lohmann, Esq.
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ROTHKEN LAW FIRM
Ira P. Rothken, Esq
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Exhibit A – To Supplemental Memorandum

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Attorneys for Defendants
REPLAYTV, INC. and SONICBLUE
INCORPORATED

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES
CORPORATION; et al.,

Plaintiffs,

v.

REPLAYTV, INC., and
SONICBLUE, INC.,

Defendants,

CONSOLIDATED ACTIONS.

Case No. CV 01-09358 FMC (Ex)

**DECLARATION OF NANCY M.
MEEKS**

Discovery Cutoff:
Pretrial Conference:
Trial Date:

1 1. I am a Senior Litigation Paralegal with the law firm of Fenwick &
2 West LLP, counsel for Defendants ReplayTV, Inc. and SONICblue Incorporated. I
3 make this declaration at the request of counsel for the *Newmark* Plaintiffs in
4 support of their Supplemental Brief In Opposition to Plaintiffs' Motion for
5 Protective Order. If called to do so, I could and would competently testify to the
6 matters stated herein.

7 2. I have assisted on the consolidated ReplayTV litigations since the
8 filing of the first action on October 31, 2001. I have personally reviewed, and
9 worked directly with attorneys here at Fenwick & West LLP who have also
10 reviewed the documents produced by Plaintiffs and related third party entities. I
11 have been principally responsible for managing an electronic database of all
12 documents produced to date in this action. Based on my handling of the
13 documents, review of correspondence by Plaintiffs' counsel, and work with the
14 Fenwick attorneys, I have personal knowledge of Plaintiffs' "confidentiality"
15 designations for the documents produced to date.

16 3. I understand that counsel for the Joint Plaintiffs are trying to prevent
17 disclosure to counsel at EFF of five categories of documents. These categories
18 include: (i) Plaintiffs' Business Plans; (ii) financial information; (iii) productions to
19 the U.S. Department of Justice ("the DOJ Productions"); (iv) lobbying documents;
20 and (v) "Security and Content Protection" documents.

21 4. On September 30, 2002, I provided Ira Rothken and the
22 Electronic Frontier Foundation ("EFF") information regarding the status of
23 documents previously produced and designated under the protective order by the
24 Entertainment Companies to ReplayTV and SONICblue. As of September 23,
25 2002, I had calculated the following based on several database reports:
26 approximately **600,000 pages** had been produced by Plaintiffs and third parties.
27 The 600,000 pages represented more than 106,000 *documents* of which more than
28 82,000 *documents* were designated "Highly Restricted."

1 (iii) DOJ Documents

2 9. I have now added the most recent DOJ document production by
3 Columbia Plaintiffs and can verify that:

4 a) More than **708,000 pages** have been produced by the Plaintiffs
5 in all categories;

6 b) Of those 708,000 pages, approximately 461,800 pages or **65%**
7 were produced in the first instance to the DOJ in connection with its investigation
8 into the Entertainment Companies' Movielink and Movies.com joint ventures, and
9 then produced in this litigation by court order; and

10 c) An additional 12,904 pages were produced to ReplayTV and
11 SONICblue directly by Movielink, again, pursuant to court order.

12 10. Plaintiffs initially designated their entire DOJ productions "Highly
13 Restricted." On August 9, 2002, Universal Plaintiffs' counsel, Tanya Forsheit,
14 notified ReplayTV and SONICblue that a small portion of the DOJ production
15 (approximately half a box), had been re-designated "Restricted," "Highly
16 Confidential" or "Confidential." On August 12, 2002, the Columbia Plaintiffs'
17 counsel, Robert Rotstein, notified ReplayTV and SONICblue that a small portion of
18 the DOJ production had been re-designated as "Confidential" or "Highly
19 Confidential." On August 13, 2000, Paramount counsel, Steven Cherry, notified
20 ReplayTV and SONICblue that they had "downgraded" 3 out of 51 boxes of
21 Movielink and Movies.com documents that the Paramount Plaintiffs had produced
22 from "Highly Restricted" to "Confidential" or "Highly Confidential." On August
23 21, 2000, Mr. Cherry notified ReplayTV and SONICblue that a small set of
24 documents (48 pages) had no confidentiality designation, but should have been
25 labeled "Highly Restricted." He asked that we replace the existing pages from the
26 production with newly labeled documents.

27 11. Even taking into account these limited changes in designation, I
28 estimate that **at least 95%** of the DOJ Production is still designated as "Highly

1 Restricted.” The designation of DOJ documents has a significant impact because it
2 constitutes the bulk of Plaintiffs’ overall document production. It also contains the
3 most detailed and complete documents produced to date.

4 **(iv) Lobbying Documents**

5 12. I understand from review by Fenwick attorneys and my handling of the
6 documents, that the vast amount of documents relating to lobbying were produced
7 by the Motion Picture Association of America, not Plaintiffs. The MPAA produced
8 its documents based on categories of “confidentiality,” which made it easier to
9 verify the extent of its designations. MPAA designated all “Highly Restricted”
10 documents with one of the following prefixes: “MPAA3,” “MPAA4,” or
11 “MPAA5.” Of the 11,959 pages produced, MPAA designated approximately 7,909
12 pages or 66% of its production as “Highly Restricted.” If EFF’s counsel were
13 unable to review the “Highly Restricted” documents, there would be few, if any,
14 substantive documents remaining. This is because the overwhelming majority of
15 “non-confidential” documents produced by the MPAA consists of nothing more
16 than news articles and website information.

17 **(v) “Security and Content Protection” Documents**

18 13. Plaintiffs are also attempting to restrict access to documents relating
19 to “content protection.” I have interpreted this to mean documents about Digital
20 Rights Management and related technology, as well as Internet piracy. I am aware
21 of some internal memorandum, presentations, and limited discussion about various
22 “content protection” measures. Based on review by the attorneys and myself, any
23 internal document with any meaningful discussion of the issues is designated as
24 “Highly Restricted.”

25 I declare under penalty of perjury that the foregoing statements are true and
26 correct, and that I executed this declaration on October 7, 2002, in Palo Alto,
27 California.

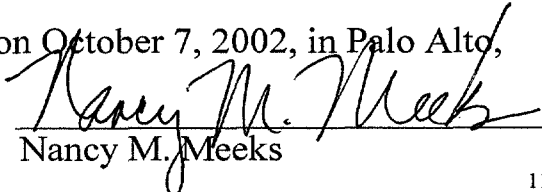
28 
Nancy M. Meeks

Exhibit B – To Supplemental Memorandum

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

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

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

21 Plaintiffs,

22 v.

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

24 Defendants.

CASE NO. CV 01 -09358 FMC (Ex)
(Consolidated with Case No. CV 02-04445 FMC (Ex))

DECLARATION OF CRAIG
NEWMARK IN SUPPORT OF
NEWMARK PLAINTIFFS'
OPPOSITION TO COPYRIGHT
OWNER PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER

25 **AND CONSOLIDATED ACTIONS.**
 26
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1 I, Craig Newmark, hereby declare:

2 1. I am the founder of the popular San Francisco Bay Area community
3 website, www.craigslist.org.

4 2. I own a ReplayTV 4000 unit and am one of the plaintiffs in the case
5 entitled Newmark et al v. Turner, case no. CV 02-0444 (now consolidated with
6 the case entitled Paramount Pictures Corporation v. ReplayTV, case no. CV 01-
7 9358), which seeks a declaration that use of my ReplayTV to record television
8 programs and skip commercials is legal.

9 3. I have heard from my lawyers, the Electronic Frontier Foundation
10 (EFF), that the attorneys representing the entertainment company plaintiffs are
11 attempting to prevent the EFF lawyers from viewing and using the majority of
12 documents that the entertainment companies have produced to ReplayTV, Inc.,
13 which the EFF lawyers believe are important to proving my case.

14 4. I approached EFF to see if it would represent me after the Court
15 made an order requiring ReplayTV to modify ReplayTV units to monitor and
16 capture personal information about ReplayTV users' use of the ReplayTV,
17 including what programs I record.

18 5. I chose EFF as my counsel because of its expertise in copyright and
19 technology law, and its long-held commitment to protecting the rights of
20 consumers in relation to digital technology. I decided to ask EFF to represent
21 me because I knew from reading their public statements that they were
22 committed to the principles of fair use, and would vigorously represent me in my
23 action to obtain a declaration that my use of my ReplayTV unit is legal.

24 6. I believe that my case will be materially harmed if the EFF
25 attorneys are prevented from accessing and using the majority of the over
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_____ 1 _____

1 600,000 pages that the entertainment companies have produced so far, to prove
2 my case.

3 I declare under penalty of perjury under the laws of the United States
4 that the foregoing is true and correct and that this declaration is executed in
5 San Francisco, California, on October 3, 2002.

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Craig Newmark

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Exhibit C – To Supplemental Memorandum

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

14
 15 **UNITED STATES DISTRICT COURT**
 16 **CENTRAL DISTRICT OF CALIFORNIA**
 17

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

21 Plaintiffs,

22 v.

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

24 Defendants.

CASE NO. CV 01 -09358 FMC (Ex)
 (Consolidated with Case No. CV 02-04445 FMC (Ex))

DECLARATION OF PHIL WRIGHT
IN SUPPORT OF NEWMARK
PLAINTIFFS' OPPOSITION TO
COPYRIGHT OWNER PLAINTIFFS'
MOTION FOR PROTECTIVE ORDER

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 26 **AND CONSOLIDATED ACTIONS.**
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1 I, Phil Wright, hereby declare:

2 1. I am an engineer working on video editing technology, specializing
3 in Personal Media Synthesis, based in Carlsbad, California.

4 2. I own a ReplayTV 4000 unit and am one of the plaintiffs in the case
5 entitled Newmark et al v. Turner, case no. CV 02-0444 (now consolidated with
6 the case entitled Paramount Pictures Corporation v. ReplayTV, case no. CV 01-
7 9358), which seeks a declaration that use of my ReplayTV to record television
8 programs and skip commercials is legal.

9 3. I have heard from my lawyers, the Electronic Frontier Foundation
10 (EFF), that the attorneys representing the entertainment company plaintiffs are
11 attempting to prevent the EFF lawyers from viewing and using the majority of
12 documents that the entertainment companies have produced to ReplayTV, Inc.,
13 which the EFF lawyers believe are important to proving my case.

14 4. I approached EFF to see if it would represent me after the Court
15 made an order requiring ReplayTV to modify ReplayTV units to monitor and
16 capture personal information about ReplayTV users' use of the ReplayTV,
17 including what programs I record.

18 5. I chose EFF as my counsel because of its expertise in copyright and
19 technology law, and its long-held commitment to protecting the rights of
20 consumers in relation to digital technology. I decided to ask EFF to represent
21 me because I knew from reading their public statements that they were
22 committed to the principles of fair use, and would vigorously represent me in my
23 action to obtain a declaration that my use of my ReplayTV unit is legal.

24 6. I believe that my case will be materially harmed if the EFF
25 attorneys are prevented from accessing and using the majority of the over
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1 600,000 pages that the entertainment companies have produced so far, in order
2 to prove my case.

3 I declare under penalty of perjury under the laws of the United States
4 that the foregoing is true and correct and that this declaration is executed in
5 Carlsbad, California, on October 4, 2002

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Phil Wright

Exhibit D – To Supplemental Memorandum

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

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

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

21 Plaintiffs,

22 v.

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

24 Defendants.

CASE NO. CV 01 -09358 FMC (Ex)
(Consolidated with Case No. CV 02-04445 FMC (Ex))

**DECLARATION OF GLENN
FLEISHMAN IN SUPPORT OF
NEWMARK PLAINTIFFS'
OPPOSITION TO COPYRIGHT
OWNER PLAINTIFFS' MOTION FOR
PROTECTIVE ORDER**

25
26 AND CONSOLIDATED ACTIONS.
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1 I, Glenn Fleishman, hereby declare:

2 1. I am a freelance journalist, based in Seattle, Washington.

3 2. I own a ReplayTV 4000 unit and am one of the plaintiffs in the case
4 entitled Newmark et al v. Turner, case no. CV 02-0444 (now consolidated with
5 the case entitled Paramount Pictures Corporation v. ReplayTV, case no. CV 01-
6 9358), which seeks a declaration that use of my ReplayTV to record television
7 programs and skip commercials is legal.

8 3. I have heard from my lawyers, the Electronic Frontier Foundation
9 (EFF), that the attorneys representing the entertainment company plaintiffs are
10 attempting to prevent the EFF lawyers from viewing and using the majority of
11 documents that the entertainment companies have produced to ReplayTV, Inc.,
12 which the EFF lawyers believe are important to proving my case.

13 4. I approached EFF to see if it would represent me after the Court
14 made an order requiring ReplayTV to modify ReplayTV units to monitor and
15 capture personal information about ReplayTV users' use of the ReplayTV,
16 including what programs I record.

17 5. I chose EFF as my counsel because of its expertise in copyright and
18 technology law, and its long-held commitment to protecting the rights of
19 consumers in relation to digital technology. I decided to ask EFF to represent
20 me because I knew from reading their public statements that they were
21 committed to the principles of fair use, and would vigorously represent me in my
22 action to obtain a declaration that my use of my ReplayTV unit is legal.

23 6. I believe that my case will be materially harmed if the EFF
24 attorneys are prevented from accessing and using the majority of the over
25 600,000 pages that the entertainment companies have produced so far, in order
26 to prove my case.
27
28

1 I declare under penalty of perjury under the laws of the United States
2 that the foregoing is true and correct and that this declaration is executed in
3 Seattle, Washington, on October 5, 2002.

4
5
6 _ Glenn Fleishman

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8
9 *Glenn Fleishman*

Exhibit E – To Supplemental Memorandum

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14
 15 **UNITED STATES DISTRICT COURT**
 16 **CENTRAL DISTRICT OF CALIFORNIA**
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 19 PARAMOUNT PICTURES
 20 CORPORATION, *et. al.*,

21 Plaintiffs,

22 v.

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

24 Defendants.

CASE NO. CV 01 -09358 FMC (Ex)
 (Consolidated with Case No. CV 02-04445 FMC (Ex))

**DECLARATION OF KEITH OGDEN
 IN SUPPORT OF NEWMARK
 PLAINTIFFS' OPPOSITION TO
 COPYRIGHT OWNER PLAINTIFFS'
 MOTION FOR PROTECTIVE ORDER**

25
 26 AND CONSOLIDATED ACTIONS.
 27
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I, Keith Ogden, hereby declare

1 I am a licensed securities broker-dealer and the owner of a small
2 financial broker-dealer that does capital introductions. This broker-dealer is
3 based in San Francisco, California. I have never owned or shorted Sonicblue,
4 the manufacturer of the ReplayTV 4000 in any account I own or control.
5

6 2. I own a ReplayTV 4000 unit and am one of the plaintiffs in the case
7 entitled Newmark et al v. Turner, case no. CV 02-0444 (now consolidated with
8 the case entitled Paramount Pictures Corporation v. ReplayTV, case no. CV 01-
9 9358), which seeks a declaration that use of my ReplayTV to record television
10 programs and skip commercials is legal.
11

12 3. I have heard from my lawyers, the Electronic Frontier Foundation
13 (EFF), that the attorneys representing the entertainment company plaintiffs are
14 attempting to prevent the EFF lawyers from viewing and using the majority of
15 documents that the entertainment companies have produced to ReplayTV, Inc.,
16 which the EFF lawyers believe are important to proving my case.

17 4. I approached EFF to see if it would represent me after the Court
18 made an order requiring ReplayTV to modify ReplayTV units to monitor and
19 capture personal information about ReplayTV users' use of the ReplayTV,
20 including what programs I record.

21 5 I chose EFF as my counsel because of its expertise in copyright and
22 technology law, and its long-held commitment to protecting the rights of
23 consumers in relation to digital technology. I decided to ask EFF to represent
24 me because I knew from reading their public statements that they were
25 committed to the principles of fair use, and would vigorously represent me in my
26 action to obtain a declaration that my use of my ReplayTV unit is legal
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6. I believe that my case will be materially harmed if the EFF attorneys are prevented from accessing and using the majority of the over 600,000 pages that the entertainment companies have produced so far, in order to prove my case.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed in San Francisco, California, on October 4, 2002.



Keith Ogden