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

PARAMOUNT PICTURES  
CORPORATION *et al.*,  
  
Plaintiffs,

v.

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

CASE NO. CV 01-9358 FMC (Ex)

Hon. Florence-Marie Cooper

THE COPYRIGHT OWNER  
PLAINTIFFS' REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION FOR REVIEW AND  
RECONSIDERATION OF  
MAGISTRATE JUDGE'S  
DISCOVERY ORDER;

AND CONSOLIDATED ACTIONS.

Date: December 16, 2002  
Time: 10:00 a.m.  
Ctrm: Room 750

1 The Copyright Owner Plaintiffs submit their reply memorandum in support  
2 of their motion for review and reconsideration of the Magistrate Judge's ruling  
3 denying the motion for protective order concerning EFF (the "Motion for Review")  
4 as follows:

5 **I. INTRODUCTION**

6 Contrary to EFF's mischaracterizations in their opposition to the Motion for  
7 Review (*see, e.g.*, Opposition, at 2:6-8.), the Copyright Owner Plaintiffs did not  
8 bring their motion for protective order to prevent *all* of the Newmark Plaintiffs'  
9 attorneys from seeing *any* highly restricted documents. In fact, the Motion for  
10 Protective Order did not seek to restrict access of the Newmark Plaintiff's counsel  
11 of record, The Rothken Law Firm, to *any* of the documents. As to the in-house  
12 lawyers at EFF – an organization that competes with the Copyright Owner  
13 Plaintiffs in matters directly affecting the Copyright Owner Plaintiffs' business and  
14 competitive interests – the Copyright Owner Plaintiffs sought to treat them in the  
15 same manner that other in-house lawyers are treated in this case. Indeed, had the  
16 Magistrate Judge granted the motion, EFF would still have had broader access to  
17 Plaintiffs' documents than the other in-house counsel in this case, since the  
18 Copyright Owner Plaintiffs did not seek to restrict EFF's in-house lawyers from  
19 seeing *all* highly restricted documents, only those within specific categories for  
20 which the danger and likelihood of inadvertent disclosure by EFF was greatest.

21 The Copyright Owner Plaintiffs have limited their appeal to the core group  
22 of documents that are most sensitive in their adversarial dealings with EFF – those  
23 which reflect recent and *current* (i) strategic planning, (ii) lobbying tactics and  
24 strategies, and (iii) sensitive and detailed financial information.<sup>1</sup> These extremely  
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26 <sup>1</sup> In understanding the concerns of the Copyright Owner Plaintiffs in allowing EFF to review these extremely  
27 sensitive materials such as the so-called "lobbying documents," the Court is urged to review the EFF website at  
28 EFF.org. The website reveals the extent of EFF's lobbying activities opposed to the interests of the Copyright  
Owner Plaintiffs, including specific lobbying efforts in opposition to legislative initiatives supported by the

(continued on next page)

1 sensitive documents comprise a volume far smaller – probably less than 20,000  
2 pages –than those at issue before the Magistrate Judge.<sup>2</sup>

3 Despite EFF’s arguments to the contrary, the Ninth Circuit Court of  
4 Appeal’s decision in *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465 (9<sup>th</sup>  
5 Cir. 1992), provides the applicable standard in this case, and the Magistrate Judge  
6 did not conclude otherwise. The Ninth Circuit established in *Brown Bag Software*  
7 that the Court must weigh the “risk of disclosure” of the confidential information  
8 against “the hardship a protective order might impose on [the party’s] prosecution  
9 of its claim.” *Brown Bag Software, supra*, 960 F.2d at 1471. The only reasonable  
10 conclusion that can be drawn from the undisputed facts in this case is that EFF’s  
11 activities and those of its attorneys create a risk of inadvertent disclosure and  
12 resulting harm that outweighs any purported prejudice to EFF’s attorneys.

13 Moreover, EFF is not exempt from the *Brown Bag Software* balancing test  
14 because it is a non-profit corporation which purports to act as a “public interest”  
15 law firm. (See Opposition, at 9-12.) There is no reasoned basis for distinguishing  
16 between EFF’s activities and those of the Copyright Owner Plaintiffs for purposes  
17 of applying the *Brown Bag Software* analysis; and the Magistrate Judge did not  
18 find any.

19 For all of the reasons set forth herein, the Copyright Owner Plaintiffs’  
20 Motion for Review should be granted, and the ruling of the Magistrate Judge  
21 reversed as to those limited documents that are the subject of the motion.

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22 Copyright Owner Plaintiffs, and in support of others to which the Copyright Owner Plaintiffs are opposed. The  
23 Copyright Owner Plaintiffs do not, of course, question the right of EFF and its attorneys to engage in these  
24 activities, or to choose its clients based on their ability to help the organization to deliver its message or further its  
25 agenda. (See Joint Stipulation, at 28:25-27; see also Declaration of Cindy Cohn in support of Joint Stipulation, ¶s 6-  
8.) They do, however, challenge EFF’s right to leverage those choices into unfair tactical and competitive  
advantages against the Copyright Owner Plaintiffs – advantages that are not reciprocal – in lobbying Congress,  
particularly where, as here, the “prejudice” to their clients is at best minimal.

26 <sup>2</sup> Of course, EFF’s suggestion (Opposition at 12) that there is something improper in the Copyright Owner  
27 Plaintiffs’ decision to appeal only a portion of the Magistrate Judge’s ruling is baseless. A party is never required to  
28 take an all or nothing approach to the scope of issues on appeal. Indeed, the Local Rules specifically require that a  
motion for reconsideration specify the “portion[] of the decision objected to . . .” Mag. Rule 3.3.1.

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## II. ARGUMENT

A. The Copyright Owner Plaintiffs Have Demonstrated Their Entitlement to the Relief Sought Under the Correct Legal Standard.

EFF misstates the applicable standard in suggesting that the Copyright Owner Plaintiffs must “identify . . . specific harm that would occur if the confidential information were to be inadvertently disclosed . . .” (Opposition, at 6:10-12.) In fact, the cases relied upon by EFF are inapplicable. The issue in those cases was whether there existed in the first instance good cause to protect information from public disclosure. *See, e.g., Phillips v. GMC, supra* (reversing order granting the Los Angeles Times access to confidential settlement information). The issue in this case concerns attorney access to already-protected documents. As stated in *Brown Bag Software*, the Court must weigh the “risk of disclosure” of the confidential information against “the hardship a protective order might impose on [the party’s] prosecution of its claim.” *Brown Bag Software, supra*, 960 F.2d at 1471. For the reasons previously stated, under that analysis there exist more than ample grounds to grant this Motion.

The only reasonable conclusion that can be drawn from the undisputed facts is that EFF’s activities and those of its attorneys create a risk of inadvertent disclosure and resulting harm that outweighs any purported prejudice to EFF’s attorneys. The Copyright Owner Plaintiffs have explained in the Motion for Review the extreme sensitivity of the documents in question. (Joint Stipulation, at 13-17.) The Copyright Owner Plaintiffs also demonstrated, both before the Magistrate Judge and in the Motion for Review, how EFF’s activities in particular create an unacceptable risk that the information will be disclosed – if not directly, then by informing the strategy of EFF in lobbying and other activities in which EFF opposes the Copyright Owner Plaintiffs. (*See, e.g., Motion for Review, at 8:11-9:21; see also Joint Stipulation, at 13:13-26.*) Finally, the Copyright Owner

1 Plaintiffs have both explained and demonstrated the injury that would inevitably  
2 result in the event of such disclosure. (*See, e.g.*, Motion for Review, at 8:18-9:6.)  
3 The evidence proffered in support of these assertions is undisputed. EFF simply  
4 argues, incorrectly, that it is insufficient.

5 EFF misses the point in arguing that the Copyright Owner Plaintiffs are  
6 “attack[ing] . . . the Magistrate Judge’s factual findings,” and not his legal  
7 conclusions. (Opposition, at 4:17-18.) The Magistrate Judge applied the correct  
8 legal standard. He erred because his decision was contrary to the only reasonable  
9 conclusion that can be drawn from the undisputed facts – that EFF’s activities and  
10 those of its attorneys create a risk of inadvertent disclosure and resulting harm that  
11 outweighs any purported prejudice to EFF’s attorneys.

12 **B. EFF’s Purported “Public Interest” Activities Do Not Exempt it**  
13 **From The *Brown Bag Software* Analysis.**

14 EFF accuses the Copyright Owner Plaintiffs of “attempt[ing] to radically  
15 expand” the *Brown Bag* test beyond its “traditional scope,” by applying it to  
16 “business competitors.” EFF argues that *Brown Bag* is inapplicable because EFF  
17 is not a business competitor of the Copyright Owner Plaintiffs.

18 EFF is wrong for two reasons. First, application of *Brown Bag* to the facts  
19 of this case is not a “radical” extension of the doctrine. EFF has tried to limit the  
20 reach of *Brown Bag Software* before, even suggesting that it does not apply to  
21 outside retained counsel.<sup>3</sup> From its inception, however, the rule was not intended  
22 to be limited to either in-house or “for profit” lawyers. In first articulating this  
23 purportedly “traditional” rule in 1984, the Federal Circuit Court in rejected any  
24 bright line distinction between in-house and “retained” counsel, reasoning that  
25 “[d]enial or grant of access . . . cannot rest on a general assumption that one group

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27 <sup>3</sup> In its papers filed with the Magistrate Judge, EFF repeatedly referred to the *Brown Bag Software* rule as the “in-  
28 house counsel” rule, suggesting that the rule had no other application.

1 of lawyers are more likely or less likely inadvertently to breach their duty under a  
2 protective order.” *U.S. Steel Corp. v. United States*, 730 F. 2d 1465, 1468 (Fed.  
3 Cir. 1984). In practice, too, the rule articulated in *Brown Bag* and *U.S. Steel Corp.*  
4 has been the basis for restricting activities of outside counsel. *See, e.g., In re Pabst*  
5 *Licensing*, 2000 U.S. Dist. LEXIS 6374 (E.D. La.) (protective order granted  
6 restricting both in-house *and* retained counsel “because risk of inadvertent  
7 disclosure or misuse is identical . . .”)

8       The court’s reasoning applies with equal force to non-profit legal service  
9 providers. In determining whether to restrict access to confidential information, a  
10 court should consider whether the lawyers are “likely inadvertently to breach their  
11 duty under a protective order,” not whether they are engaged in *for profit* activities.  
12 *U.S. Steel Corp. supra*, 730 F. 2d at 1468. As its origins in a footnote in *U.S. Steel*  
13 *Corp.* confirm, “competitive decisionmaking” is nothing more than shorthand to  
14 connote activities that place an attorney at risk of disclosing an adversary’s  
15 confidential, proprietary information. *U.S. Steel Corp. v. United States, supra*, 730  
16 F. 2d at 1468, n. 3. (“The parties have referred to involvement in ‘competitive  
17 decisionmaking’ as a basis for denial of access. The phrase would appear  
18 serviceable as shorthand for a counsel’s activities . . . that are such as to involve  
19 counsel’s advice and participation in any or all of the client’s decisions . . .”)

20       None of the cases cited by EFF in the Opposition suggest that there is a  
21 reasoned basis for distinguishing “for profit” competitors from “not for profit”  
22 competitors. In both cases, the risks and harms of inadvertent disclosure may be  
23 equally great. Moreover, contrary to EFF’s assertion, the ruling of the Magistrate  
24 Judge did not indicate that he “question[ed] whether *Brown Bag* applies here at  
25 all.” (Opposition, at 9:10.) Indeed, the record of the hearing on the Motion  
26 reflects that, in considering EFF’s lobbying activities, the Magistrate Judge was  
27 unpersuaded by EFF’s argument that its purported public interest mission  
28 exempted it from the *Brown Bag* analysis:

1           **THE COURT:** You try to draw th[e] distinction [between public and  
2 private interest activities] in the papers. And I question whether it's  
3 not an artificial one. What I would think that the companies do what  
4 they do before Congress because they believe that it affects their  
5 bottom line and it probably does. And I don't know that a financial  
6 effect arising out of the success or lack of success in lobbying is any  
7 different than a financial effect arising out of the success or failure in  
8 marketing vis-à-vis a competitor. It's still either money in or money  
9 out of the Copyright Owner Plaintiff's pockets. . . .

10 (Transcript at page 40:20-41:4)

11           Limiting *U.S. Steel Corp.* and *Brown Bag Software* to cases in which  
12 attorneys are retained or employed by business competitors would frustrate the  
13 purposes of FRCP Rule 26(c), which protects parties from a "range of troubles"  
14 not restricted to business interests. *Cipollone v. Liggett Group, Inc.*, 785 F.2d  
15 1108, 1114, n. 10 (3<sup>rd</sup> Cir. 1986). Contrary to EFF's unsupported assertions, there  
16 is no basis for exempting EFF from a protective order on this ground, and the  
17 Magistrate Judge did not conclude otherwise.

18           **C. Limiting The Scope Of This Appeal Is Wholly Appropriate.**

19           The Copyright Owner Plaintiffs have appealed the Magistrate Judge's ruling  
20 only with respect to a discreet group of the most sensitive documents – the  
21 relatively few so-called "lobbying documents" and the business plans and financial  
22 information from 2000 to the present. Perhaps recognizing that this limitation  
23 further weakens their opposition, EFF suggests the limited nature of the appeal is  
24 somehow inappropriate.<sup>4</sup>

25 \_\_\_\_\_  
26 <sup>4</sup> Contrary to EFF's assertion, this is not a "new and different motion based on different facts." (Opposition, at  
27 12:13.) No new evidence nor "facts" are presented. To the extent that the limited appeal changes the purported  
28 burden or prejudice to either EFF or the Newmark Plaintiffs previously claimed by EFF, EFF has neither been  
unfairly surprised nor prejudiced in preparing its opposition. Indeed, as a result of the Court's *sua sponte*

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1 At the same time, EFF tries to suggest that the limitations do not  
2 meaningfully alter the volume of documents at issue. EFF claims that its in-house  
3 lawyers would still be denied access to 200,000 pages of documents if this Court  
4 were to grant this narrower motion for reconsideration. (Opposition, at 13:17.)  
5 EFF's estimate is flawed, and grossly overstates the number of pages at issue.  
6 Among other things, it overlooks the many thousands of pages of "highly  
7 restricted" documents to which the Copyright Owner Plaintiffs never sought to  
8 restrict access. Indeed, it appears that the number of pages at issue is less than  
9 20,000 pages, one-tenth of EFF's inflated estimate.<sup>5</sup>

10 **D. The Copyright Owner Plaintiffs Do Not Mischaracterize EFF's**  
11 **First Amendment Arguments; Those Rights are Not Implicated in**  
12 **this Motion.**

13 EFF accuses the Copyright Owner Plaintiffs of misstating EFF's First  
14 Amendment arguments by stating that EFF claims to "enjoy[] a privileged place  
15 in the heirarchy of First Amendment protections . . ." (Opposition, at 16:23-17:1.)  
16 But that is exactly what EFF urged when it explained in the Joint Stipulation that  
17 "Public-interest litigation is a form of public-interest advocacy protected by the  
18 First Amendment," and argued that, as a result, the Copyright Owner Plaintiffs  
19 were thus required to "first show that this action is necessary to achieve a  
20 compelling state interest." (Opposition, at 28:16-17, 29:20-21.)

21 Again, neither EFF nor its clients enjoy special First Amendment rights with  
22 respect to the requested relief. *Seattle Times v. Rhinehart*, 467 U.S. 20, 37 (1984).

23  
24  
25 continuation of the hearing date from November 25 to December 16, 2002, EFF's attorneys have had a full month to  
prepare their opposition to this Motion.

26 <sup>5</sup> The highly restricted business plans and internal financial documents of the Fox, Universal and Disney Plaintiffs  
27 from 2000 and later appear to number fewer than 7,000 pages combined. The highly restricted lobbying documents  
28 for all six of the Proskauer Plaintiff groups (Fox, Universal, MGM, Disney, Viacom and NBC) number fewer than  
1,000 pages.



1 The Magistrate Judge rejected that argument and First Amendment issues simply  
2 are not implicated in this motion.

3 **E. EFF's Purported Recitation of the "Procedural History" of this**  
4 **Motion for Review is Inaccurate and Misleading.**

5 In its "Procedural History" section of its Opposition, EFF attempts to recast  
6 the events leading up to this Motion in a light that is both inaccurate and  
7 misleading. A few examples illustrate the point. EFF claims that the Motion  
8 "omit[s] that the Entertainment Companies originally sought to preclude access by  
9 *all* Newmark Plaintiffs Counsel, including Mr. Rothken, to approximately 70% of  
10 all documents produced thus far . . ." (Opposition, at 2:7-8.) In fact, as even Mr.  
11 Rothken's own declaration reflects, it was the Newmark Plaintiffs themselves,  
12 through Mr. Rothken, who initially agreed to "enter into a stipulation that binds the  
13 Newmark Plaintiffs and their counsel to a protective order and gave access to all  
14 documents and discovery responses except for the documents relating to the  
15 lobbying efforts with U.S. Congress and the U.S. Department of Justice . . ."<sup>6</sup> (*See*  
16 *Rothken Declaration in support of Joint Stipulation, ¶ 5.*) (Under the proposed  
17 stipulation, the Newmark Plaintiffs also reserved all rights to bring a subsequent  
18 motion to gain access to these documents.) Mr. Rothken later withdrew his  
19 agreement. The Copyright Owner Plaintiffs made no effort to enforce that  
20 agreement, and never attempted in their Motion for Protective Order to preclude  
21 the Rothken Law Firm from gaining access to *any* documents.

22 EFF also claims that "the Entertainment Companies have now prevented the  
23 EFF Attorneys from seeing the key documents in this case for more than four  
24 months while document production . . . have continued unabated." (Opposition, at

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25 <sup>6</sup> In fact, Mr. Rothken was mistaken in part on this point. He initially agreed that the Newmark Plaintiffs and their  
26 attorneys would agree not to gain access to the documents reflecting lobbying efforts before the U.S. Congress and  
27 documents *produced* to the Department of Justice (to the knowledge of the Copyright Owner Plaintiffs, there were  
28 *no* documents produced that reflect efforts to "lobby" the Department of Justice). (*See* Cooper Decl., ¶ 3.) It is the  
latter group that comprises the bulk of the "70%" of the production identified in the Opposition.

1 2:1-4.) In fact, EFF voluntarily entered into a stipulation with the Copyright  
2 Owner Plaintiffs not to gain access to the documents at issue pending the outcome  
3 of this Motion for Review.

4 Contrary to the statements and implications of the Opposition's "Procedural  
5 History," the Copyright Owner Plaintiffs have acted reasonably and restrained in  
6 bringing their motion, and in the negotiations preceding it. In their Motion for  
7 Protective Order, the Copyright Owner Plaintiffs *narrowed*, not broadened, the  
8 protections that they sought with respect to the Newmark Plaintiffs. And in  
9 bringing this Motion for Review, the Copyright Owner Plaintiffs have identified  
10 the *narrowest* scope of relief they believe is adequate to protect their rights.

11 **III. CONCLUSION**

12 For all of the foregoing reasons, the Copyright Owner Plaintiffs respectfully  
13 submit that their Motion for Review and Reconsideration be granted and the ruling  
14 of the Magistrate Judge be reversed as to those relatively few documents that are  
15 the subject of this motion.

16  
17 DATED: December 9, 2002

By:   
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1 **PROOF OF SERVICE BY MAIL**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I declare that: I am employed in the County of Los Angeles, California. I  
4 am over the age of eighteen years and not a party to the within cause; my business  
5 address is 2049 Century Park East, Suite 3200, Los Angeles, California 90067-  
6 3206.

7 On December 9, 2002, I served the foregoing document described as:

8 THE COPYRIGHT OWNER PLAINTIFFS' REPLY  
9 MEMORANDUM IN SUPPORT OF MOTION FOR REVIEW AND  
10 RECONSIDERATION OF MAGISTRATE JUDGE'S DISCOVERY  
11 ORDER

12 on the interested parties in this action:

13 (By Mail) By placing true copies thereof enclosed in sealed envelopes  
14 addressed as follows: PLEASE SEE ATTACHED SERVICE LIST

15 I am "readily familiar" with the firm's practice of collection and processing  
16 correspondence for mailing. Under that practice, the envelopes would be deposited  
17 with the U.S. Postal Service on that same day with postage thereon fully prepaid at  
18 Los Angeles, California, in the ordinary course of business. I am aware that on  
19 motion of the party served, service is presumed invalid if postal cancellation date  
20 or postage meter date is more than one day after date of deposit for mailing in  
21 affidavit.

22 -and-

23 (By Email) By transmitting a true and correct copy thereof via email  
24 transmission to: PLEASE SEE ATTACHED SERVICE LIST

25 (Federal) I declare that I am employed in the office of a member of the bar  
26 of this Court at whose direction the service was made.

27 Executed on December 9, 2002, at Los Angeles, California.

28   
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