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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES CORPORATION, *et al.*, Plaintiffs, v. REPLAYTV, INC., *et al.*, Defendants. AND CONSOLIDATED ACTIONS.	Case No. 01-09358 FMC (Ex) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ENTERTAINMENT COMPANIES' MOTION TO DISMISS COMPLAINT; FILED WITH DECLARATION OF GWENITH A. HINZE** DATE: January 12, 2004 TIME: 10:00 a.m. PLACE: Courtroom 750

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I. INTRODUCTION

In its Order of August 15, 2002 (the "Order") denying the Entertainment Companies' previous motion to dismiss this action, the Court held that the Newmark Plaintiffs, together with every other consumer owner of a ReplayTV digital video recorder ("ReplayTV DVR"), have a real and reasonable apprehension of liability arising out of their present and ongoing use of their ReplayTV DVRs: "[T]he Entertainment Defendants have, with a great deal of specificity, accused the Newmark Plaintiffs (and other RePlayTV DVR owners) of infringing the Entertainment Defendants' copyrights, and have demonstrated the will to protect copyrights through litigation." Order at 7. The Entertainment Companies, seeking to revisit the issue of jurisdiction previously determined by the Court's Order, have once again moved to dismiss the Newmark Plaintiffs' complaint, contending that the apprehension of liability that the Court found to exist has now dissipated.

The motion to dismiss should be denied. Notwithstanding the Entertainment Companies' recent dismissal of SONICblue, Inc. and ReplayTV, Inc. (the former manufacturers of ReplayTV DVRs), their allegations of *direct* copyright infringement by ReplayTV DVR *users* on which the Court based its Order, have never been withdrawn or disavowed by them. Moreover, contrary to the Entertainment Companies' assertions, intervening events since the Court made its determination have not removed or lessened the prospect of litigation against consumer owners of ReplayTV DVRs, but have instead increased their apprehension of liability.

First, the Entertainment Companies have litigated SONICblue, Inc. into bankruptcy and SONICblue has sold its ReplayTV assets to a third party, which has stopped selling DVRs with the features to which the Entertainment Companies object. Having achieved their litigation goal of stopping the production of the ReplayTV DVR, the Entertainment Companies have dismissed without prejudice their suits against SONICblue, but have not retracted any of their allegations of direct infringement by ReplayTV DVR owners. As a result, SONICblue is no longer defending the interests of consumer owners of ReplayTV DVRs, leaving them exposed to the possibility of potentially ruinous litigation.

Further, as has been widely reported, the Entertainment Companies are making preparations

to sue individual consumers who record and share films and television programming using digital technologies. The hundreds of copyright infringement lawsuits already launched by recorded music companies (many of them under common ownership with the Entertainment Companies here) against individual consumers show that this is no idle threat. Rather than *reducing* the apprehension of consumer owners of ReplayTV DVRs, all of these events have only *increased* their concern that they will face a copyright infringement suit for their present and ongoing use of their ReplayTV DVRs.

Finally, given the pending motion to amend the complaint, the covenants not to sue that the Entertainment Companies belatedly extended to the five original Newmark Plaintiffs do not make this action moot. The covenants not to sue do not remove the reasonable apprehension of liability held by the new individual plaintiff nor the class of consumer owners of ReplayTV DVRs as a whole.

Viewed in its proper light, the Entertainment Companies' grant of covenants not to sue the five original Newmark Plaintiffs is an attempt to "buy out" the Newmark Plaintiffs, in order to avoid an adjudication of the important copyright and fair use questions raised by this consumer lawsuit. Indeed, the Entertainment Companies' failure to grant a covenant not to sue to other consumer owners of ReplayTV DVRs reveals the true goal of their motion to dismiss: to preserve their ability to bring copyright infringement suits against ReplayTV DVR owners and, by doing so, to continue to wield the threat of infringement liability as a "sword of Damocles" over consumers and technology innovators, chilling the development and use of ReplayTV DVRs and similar technologies. The Court should not allow this and should continue to exercise its jurisdiction over this case to finally resolve the controversy between the parties over the legality of use of the ReplayTV DVR.

II. STATEMENT OF FACTS

The Entertainment Companies brought four separate actions against SONICblue, Inc. and ReplayTV, Inc (collectively, "SONICblue"), the manufacturer of the ReplayTV DVR, in late 2001 (the "SONICblue litigation"). These suits alleged contributory and vicarious copyright infringement based on allegations that the use of ReplayTV DVRs by consumers directly infringes

the Entertainment Companies' copyrights. Following the allegations made against users of ReplayTV DVRs, and an order (subsequently overturned by the Court) issued by the Magistrate Judge on the motion of the Entertainment Companies that would have mandated the collection of various data from consumers' ReplayTV DVRs, five consumer owners of ReplayTV DVRs (the "Newmark Plaintiffs") brought this lawsuit against the Entertainment Companies and the SONICblue parties to clarify their legal rights to use the ReplayTV DVRs they had purchased. The Entertainment Companies then moved to dismiss the Newmark Plaintiffs' claim for lack of subject matter jurisdiction, as they have again in the instant motion. On August 15, 2002, the Court granted the Newmark Plaintiffs' motion to consolidate the suits, and denied the Entertainment Companies' first motion to dismiss the Newmark Plaintiffs' case. *See* Declaration of Scott Cooper in support of Motion to Dismiss, ("Cooper Declaration"), Exh. 1.

After over a year of costly litigation, SONICblue filed for bankruptcy on March 21, 2003 and sold its ReplayTV-related assets to Digital Networks North America ("DNNA") in April 2003. Following the sale of the ReplayTV assets, the Entertainment Companies and the Newmark Plaintiffs agreed to voluntarily dismiss SONICblue by a stipulation recently filed with the Court pursuant to the Court's order of November 12, 2003, modifying the stay of March 24, 2003. In June 2003, DNNA announced that it had agreed not to sell digital video recorders with the features to which the Entertainment Companies objected in their litigation against SONICblue (i.e., the "Send Show" and "Commercial Advance" features). According to DNNA's press release of June 10, 2003, these features were dropped, "to accommodate concerns" of content copyright owners, after negotiations with the Entertainment Companies which the Entertainment Companies have termed "settlement communications." Hinze Decl. ¶4, Exhibit C; Copyright Owners' Motion for Order Modifying the Court's March 24, 2003 Stay Order, at page 9, ln. 18-19.

By letter of July 24, 2003, the Entertainment Companies granted a covenant not to sue the five original Newmark Plaintiffs and announced their intention to bring this second motion to dismiss the consumers' lawsuit. Cooper Decl. Exh. 3. In recent months, over 90 consumer owners of ReplayTV DVRs have indicated their desire to join the Newmark Plaintiffs' consumer action to obtain declaratory relief. Hinze Decl.¶5. A motion for leave to amend to add a new individual

plaintiff, drop two existing plaintiffs, and convert the action into a class action is currently pending before the Court.

III. ARGUMENT

A. Legal Standard: Declaratory Judgment Jurisdiction Exists Where Plaintiffs Have a Real and Reasonable Apprehension of Liability Due to Ongoing Conduct Which is Alleged to Be Infringing

The relevant standard was set out in the Court's previous Order and is not disputed by the Entertainment Companies. See Order at 5-8. Subject matter jurisdiction under the Declaratory Judgment Act exists whenever there is a "substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Societe de Conditionnement en Aluminum v. Hunter Engineering Co., Inc.*, 655 F.2d 938, 942-943 (9th Cir. 1981), citing *Maryland Casualty Co. v. Pacific Coal & Oil Co*., 312 U.S. 270, 273 (1941). This standard is applied from the perspective of the plaintiff, not the defendant. *Chesebrough-Ponds v. Faberge*, 666 F. 2d 393, 396 (9th Cir. 1982); *Societe* at 944. Under Ninth Circuit caselaw, jurisdiction exists where a plaintiff has a real and reasonable apprehension that he will be subject to liability if he continues to engage in the activity that is alleged to be infringing. *Societe* at 943-44; *K-Lath v. Davis Wire Corp*., 15 F.Supp.2d 952 (C.D. Cal. 1998); *Hal Roach Studios, Inc. v. Richard Feiner & Co*., 896 F.2d 1542, 1566 (9th Cir. 1989).

As the Court previously held, this case deals with an actual controversy involving substantial issues regarding the boundary between fair use and copyright liability for particular consumer uses of a specific digital device for recording, storing, transferring and viewing television programming. The parties have clearly-defined adverse legal interests: The Entertainment Companies claim that the Plaintiffs' use of their devices constitutes copyright infringement; the Plaintiffs disagree and seek a declaration from this court to give them certainty that their day-to-day consumer uses of the ReplayTV DVR are lawful. There is also both sufficient immediacy and reality to the controversy because the Entertainment Companies have already demonstrated their willingness to bring legal action to enforce their copyrights.

B. ReplayTV DVR Owners Continue to Have a Reasonable Apprehension of Liability Notwithstanding the Dismissal of SONICblue

As this court previously recognized in its Order denying the Entertainment Companies' first motion to dismiss this action, ReplayTV DVR owners clearly have a real and reasonable apprehension that they will be subject to liability arising out of their use of their ReplayTV DVRs. Applying the Order's analysis to this case, it is clear that subsequent events do not alter that result. This continuing apprehension arises from several independent bases: First, the Entertainment Companies' allegations in the SONICblue litigation, which they have never retracted, of direct infringement by ReplayTV DVR owners; Second, the recent, widely-publicized reports that television and motion picture copyright owners, including the Entertainment Companies, have begun preparing lawsuits against individuals who copy and share the Entertainment Companies' television programming using digital technologies such as the ReplayTV DVR; Third, the Entertainment Companies' public statements and efforts to obtain information about consumers' use of their ReplayTV devices; Fourth, the Entertainment Companies' failure to grant a covenant not to sue to consumer owners of ReplayTV DVRs when specifically requested to do so, and; Finally, the ongoing use of ReplayTV DVRs in a manner that the Entertainment Companies claim constitutes copyright infringement.

The Entertainment Companies' motion to dismiss presents two grounds for dismissal. The first ground is their contention that, because of the dismissal of SONICblue, owners of ReplayTV DVRs no longer experience the reasonable apprehension of liability the Court previously found to exist. Motion at 8-9. This argument misreads the Court's prior Order, ignores the fact that SONICblue's dismissal actually increases the apprehension of liability to an ordinary consumer, and ignores other events occurring since the Court's Order that have also increased consumer owners' apprehension of liability.

In concluding that all ReplayTV DVR owners had a reasonable apprehension of liability in its previous Order, the Court noted the Entertainment Companies' allegations of direct infringement by ReplayTV DVR owners, the willingness of the Entertainment Companies to protect copyrights through litigation, and consumer owners' ongoing use of their ReplayTV DVRs:

> "The Complaints in the *RePlayTV* action allege that the actions of the *Newmark* Plaintiffs (and other RePlayTV DVR owners) constitute direct copyright infringement. Of course, the Entertainment Defendants must allege these facts to support their claims of contributory and vicarious copyright infringement. But the fact remains that the Entertainment Defendants have, with a great deal of specificity, accused the *Newmark* Plaintiffs (and other RePlayTV DVR owners) of infringing the Entertainment Defendants' copyrights, and have demonstrated the will to protect copyrights through litigation. These facts raise a reasonable apprehension on the part of the *Newmark* Plaintiffs. This is especially so because that it appears from the Complaint in the *Newmark* action that the *Newmark* Plaintiffs are continuing to use their RePlayTV DVRs in a manner that the Entertainment Defendants allege constitutes infringing activity."

Order at 7. All three of these factors continue to exist.

The Entertainment Companies have consistently and steadfastly taken the position that the use of the ReplayTV DVRs' Send Show and Commercial Advance features by consumer owners infringes their copyrights. As the Court noted in its Order, these allegations form the basis of the Entertainment Companies' secondary copyright liability lawsuits against SONICblue. (See *Paramount Pictures Corp. v. ReplayTV*, Inc., at ¶3, ln 6-13, ¶4, ln 14-21, and ¶18, ln 15-16 of First Amended Complaint, and ¶5 ln 14-17 of the Time Warner parties' Complaint; Order at 7). The allegations of direct infringement by ReplayTV DVR owners made in the Entertainment Companies' complaints were certified by their counsel to be legally and factually well supported. Fed. R. Civ. P. 11(b).

The Entertainment Companies have never retracted or disavowed, either before this Court or in any other forum, their allegations that ReplayTV DVR owners are committing copyright infringement by using their machines. They have continued to repeat this allegation in various fora since the commencement of this litigation.[1] The dismissal of SONICblue, because it was voluntary

[1] For example, Jamie Kellner, then Chief Executive Officer of defendant Turner Broadcasting System, Inc., stated in an interview in Cableworld magazine that avoiding advertisements in programs amounts to "theft" and "stealing." Specifically, Kellner is reported to have declared: "the ad skips.... It's theft…. Any time you skip a commercial or watch the button you're actually stealing the programming." Cableworld Magazine, Monday, April 29, 2002. See: <http://www.inside.com/product/product.asp?entity=CableWorld&pf_ID=7A2ACA71 -FAAD-41FC-A100-0B8A11C30373>.

Mr. Kellner's assertions that ReplayTV users are engaging in "theft" and "stealing" have been widely circulated in the mainstream and internet press, and have never been repudiated by Mr. Kellner nor defendant Turner Broadcasting System, Inc.

More recently, in the course of third-party discovery in the SONICblue litigation prior to SONICblue's bankruptcy filing and the stay of this case, the Entertainment Companies asserted that they were legally entitled to seek preservation of information collected by a website owner

and without prejudice, is not a disavowal of the allegations stated in their complaints. Indeed the Entertainment Companies remain free to re-file their actions against SONICblue. Nor have the Entertainment Companies made any public statement to the effect that they dismissed SONICblue because they concluded that their prior allegations of copyright infringement by consumers using ReplayTV DVRs were ill-founded and erroneous. To the contrary, the Entertainment Companies' allegations of copyright infringement by ReplayTV DVR users made in their complaints remain a matter of public record on file with this Court.

Moreover, the Entertainment Companies did not end their litigation against SONICblue because of any adverse decision on the merits, or because they lost interest in stopping the manufacture of digital video recorders with the features found in the ReplayTV DVRs. Rather, the Entertainment Companies voluntarily dismissed SONICblue without prejudice because of SONICblue's bankruptcy and the promise of its successor DNNA not to include those features in its DVRs. By these events, the Entertainment Companies had *succeeded* in their litigation goal of stopping the manufacture of such DVRs. Thus, there has been no reduction in the ardor of the Entertainment Companies to aggressively litigate their claims that use of the ReplayTV DVR infringes their copyrights.

Nor, contrary to the assertion of the Entertainment Companies (Motion at 8-9), does the mere fact that litigation has now ceased against SONICblue offer any reassurance to ReplayTV DVR owners that they will not be sued. Instead, the cessation of litigation against SONICblue leaves ReplayTV DVR owners more exposed than ever to litigation by the Entertainment Companies. Before filing for bankruptcy and being dismissed, SONICblue was using its substantial financial and legal resources to litigate tenaciously on behalf of the interests of ReplayTV owners, because its defense to the Entertainment Companies' claims of contributory infringement was that ReplayTV owners were not committing direct copyright infringement. SONICblue no longer stands as a line of defense between the Entertainment Companies and ReplayTV owners, who instead are now left exposed to litigation from the Entertainment

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related to the use of the Send Show feature by individual ReplayTV DVR users. Hinze Decl. ¶3, Exh. B. Such information would have obvious evidentiary value in lawsuits against individual ReplayTV DVR owners.

Companies (nor does SONICblue's successor, DNNA, provide any protection because unlike SONICblue it does not manufacture DVRs with the features to which the Entertainment Companies object).

In addition, the fact that SONICblue was driven out of the digital video recorder business and into bankruptcy by the Entertainment Companies' copyright litigation against it adds to the apprehensions of ReplayTV DVR owners. The fact that a thriving technology company can be brought to its knees by the Entertainment Companies only increases the fear of individual ReplayTV owners that the same fate could befall them. For consumer owners of ReplayTV DVRs, litigation could cause financial ruin in attorneys' fees alone (as evidenced by the bankruptcy of SONICblue), even if the Entertainment Companies' case did not ultimately succeed on the merits. Moreover, any infringement action would raise potential liability for statutory damages, actual damages and the Entertainment Companies' attorneys fees, which consumer owners are not in a position to bear.

Other events occurring since the Court issued its Order have independently increased the apprehension of liability of ReplayTV DVR owners. First, as has been widely publicized and commented upon, the recorded music industry in the past three months has filed hundreds of copyright infringement lawsuits against individual consumers claiming hundreds of thousands of dollars in statutory damages. Hinze Decl., ¶6, Exh. C. Many of these recorded music companies are sister companies under common ownership with various of the Entertainment Companies here. Hinze Decl., ¶[7, Exh. D. Second, in late September of this year the chiefs of the major movie studios held a summit meeting at which they agreed to begin necessary preparations for filing copyright infringement suits against individual consumers over the issue of "file-sharing," i.e., the transfer of digital copies of consumer-recorded movies and television shows. Hinze Decl. ¶8, Exh. E. Certain forms of file-sharing are possible with the ReplayTV DVR, and this is one of the features to which the Entertainment Companies object. (*Paramount Pictures Corp., v. ReplayTV, Inc*., First Amended Complaint, ¶5, ln 21-24).

The Entertainment Companies are thus preparing their campaign of threatened legal action while representing to this court that the very class of people against whom that threatened legal

action is directed can have no reasonable apprehension of liability. They cannot have it both ways. The hundreds of copyright infringement lawsuits filed by recorded music companies, and the widely publicized summit meeting at which the movie industry Entertainment Companies agreed to follow suit, have greatly increased the apprehension of liability held by ReplayTV owners and conclusively lay to rest any argument that copyright infringement lawsuits by the Entertainment Companies against individual consumers would never occur in practice.

Finally, and perhaps most importantly, consumers are continuing to use the Send Show and Commercial Advance features in ways in which the Entertainment Companies contend constitutes copyright infringement of their works. As this Court noted in its Order (at 7) and as the Ninth Circuit has previously recognized, continuing activity which is alleged to be copyright-infringing is sufficient to establish an apprehension of liability, even in the absence of a direct threat from a copyright owner. *Societe,* 655 F.2d 643-44.

As the foregoing demonstrates, the "actual controversy" over whether use of the ReplayTV DVR constitutes copyright infringement remains as sharply drawn and as hotly contested as ever, and the apprehensions of ReplayTV DVR owners that this controversy will lead to litigation has only increased since the Court last concluded that those apprehensions were real and reasonable. Consumers cannot afford to guess incorrectly about where the fair use/infringement boundary line falls in the case of their use of their ReplayTV DVRs, and the Court should continue to exercise its jurisdiction over this action to remove the *in terrorem* threat hanging over the heads of ReplayTV DVR owners and give certainty and predictability to the legal consequences of their actions.

C. In Light of The Proposed Amended Class Action Complaint, The Entertainment Companies' Covenant Not To Sue Five Individual ReplayTV DVR Owners Does Not Deprive The Court Of Jurisdiction Over The Entire Action

As a second alternative ground, the Entertainment Companies contend that their grant of a covenant not to sue to the five original Newmark Plaintiffs, but no other ReplayTV DVR owners, for copyright infringement arising out of their past and future uses of their ReplayTV DVRs, has deprived the Court of any continuing jurisdiction. Motion at 10-12. This argument is directed to the original complaint, not the proposed amended class action complaint that plaintiffs now wish to

pursue that is pending before the Court. Given the pending amended complaint, this argument, even if it were a valid basis for dismissing the *original complaint*, cannot support dismissal of the entire *action*.[2]

"Dismissal [for lack of subject matter jurisdiction] without leave to amend is improper unless it is clear, upon de novo review, that the complaint could not be saved by any amendment." *Polich v. Burlington Northern, Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991). Moreover, "liberality in granting leave to amend is not dependent on whether the amendment will add causes of action or parties." *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987).

Here, a valid amended complaint is not just an abstract possibility but has already been tendered to the Court. As the Court is aware, plaintiffs have moved to amend their complaint to add an additional individual named plaintiff, drop two existing named plaintiffs, and to convert this action into a class action. Plaintiffs' motion to amend the complaint will be heard by the Court together with the Entertainment Companies' motion to dismiss.

The proposed amended complaint states a valid legal claim and the court's jurisdiction over the proposed amended complaint is not affected by the Entertainment Companies' covenants not to sue. The covenants not to sue granted to the five original Newmark Plaintiffs do not remove the reasonable apprehension of liability held by the new plaintiff, Thomas White, nor the class of ReplayTV DVR consumer owners as a whole. To the contrary, the Entertainment Companies' failure to grant a covenant not to sue on similar terms to the other consumer owners of ReplayTV DVRs despite being requested to do so, has only increased their apprehension of liability. Thus, the action is not moot and should not be dismissed on this ground.

Both equity and judicial efficiency also weigh in favor of allowing the consumer action to continue. It would be highly inefficient and burdensomely unfair to dismiss this action and require

[2] In any event, the covenants not to sue from the Entertainment Companies may not be adequate to remove all potential liability of the Newmark Plaintiffs for use of their ReplayTV DVRs. As discussed by Newmark Plaintiffs' counsel in oral argument before the Court on August 12, 2002, the Newmark Plaintiffs and other ReplayTV users may have continuing liability under an indemnity clause in their ReplayTV DVR service agreement with SONICblue, and potentially now with DNNA, for SONICblue's past attorneys fees, arising out of their allegedly infringing use of their ReplayTV DVRs. See Transcript of Oral Argument on August 12, 2002, Hinze Decl. ¶2, Exh A ("Transcript") at p. 26 ln. 3-15.

plaintiffs to file an identical class action complaint as a separate action and effectively begin this case all over again. As the Court noted in its Order (at 11), this type of "unnecessary delay in adjudicating the rights of the Newmark Plaintiffs may chill their use of their RePlayTV DVRs . . . [and] may also lead to increased liability for statutory damages under federal copyright law." The same is obviously true of the class of ReplayTV DVR owners as a whole.

Thus, the equitable consideration underlying the Court's Order permitting consolidation and denying the Entertainment Companies' first motion to dismiss – the need for clarification of the legality of consumer owners' use of their ReplayTV DVRs – has not diminished by reason of recent events. Granting the Entertainment Companies' motion would effectively remove the consumers' voice and preclude any possibility of providing certainty and predictability to consumer owners of ReplayTV DVRs.

Moreover, caselaw and strong public policy reasons support allowing the consumer action to continue, notwithstanding the Entertainment Companies' efforts to avoid judicial resolution of the underlying issues in question. The Supreme Court has warned against permitting defendants in class action cases to manufacture mootness and avoid adjudication by "buying out" or "picking off" the claims of the named plaintiffs. In *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*, 445 U.S. 326 (1980), after a denial of class certification the defendant bank tendered to the named plaintiffs the maximum amount that each would be entitled to recover in the action and the trial court dismissed the action. The Supreme Court reversed, holding that the bank's unilateral action did not moot the named plaintiffs' individual claims and thus they continued to have standing to pursue an appeal of the class certification denial. *Id.* at 340. Chief Justice Burger, writing for the Court, stated that:

> "To deny the right to appeal simply because the defendant has sought to 'buy-off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be 'picked-off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement."

(*Id*. at 339); accord, *Susman v. Lincoln American Corp*., 587 F.2d 866 (7th Cir. 1978).

So, too in the present case, the Court should reject the Entertainment Companies' attempt to

artificially create mootness and avoid judicial adjudication of the real controversy between the parties – the legality of the ReplayTV DVR – by "buying off" the Newmark Plaintiffs through a unilateral covenant not to sue granted over a year after commencement of litigation.

IV. CONCLUSION

For the foregoing reasons, the Entertainment Companies' motion to dismiss should be denied.

DATED: December 9, 2003

ELECTRONIC FRONTIER FOUNDATION

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PROOF OF SERVICE

Paramount Pictures Corporation v. ReplayTV
CASE NO. CV 01-9358 FMC (EX)
(Consolidated With Case No. CV 02-04445 FMC (EX))
US District Court, Central District of California

I am over the age of 18 years, am not a party to this action and am employed by Plaintiff's Counsel, Electronic Frontier Foundation.

On December 9, 2003, I served the within:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ENTERTAINMENT COMPANIES' MOTION TO DISMISS COMPLAINT; DECLARATION OF GWENITH A. HINZE IN SUPPORT OF NEWMARK PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

on the parties in said action by US MAIL by depositing the originals or copies, as noted below, in an envelope, postage prepaid in a US MAIL BOX addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 9, 2003

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