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17 [Full counsel appearances on signature page]

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

20 CRAIG NEWMARK, SHAWN
HUGHES, KEITH OGDEN, GLENN
21 FLEISHMAN and PHIL WRIGHT,

22 Plaintiffs,

23 v.

24 TURNER BROADCASTING
SYSTEM, INC.; DISNEY
25 ENTERPRISES, INC.; PARAMOUNT
PICTURES CORPORATION;
26 NATIONAL BROADCASTING
COMPANY, INC.; NBC STUDIOS,
27 INC.; SHOWTIME NETWORKS
INC.; THE UNITED PARAMOUNT
28 NETWORK; ABC, INC.; VIACOM

CASE NO. 02-04445 FMC (Ex)

**REQUEST FOR JUDICIAL
NOTICE IN SUPPORT OF
MOTION TO DISMISS
COMPLAINT OR,
ALTERNATIVELY, TO STAY
PROCEEDINGS**

[Fed. R. Evid. 201]

DATE: August 12, 2002
TIME: 10:00 a.m.
PLACE: 750
JUDGE: Hon. Florence-Marie
Cooper

1 INTERNATIONAL INC.; CBS
2 WORLDWIDE INC.; CBS
3 BROADCASTING INC.; TIME
4 WARNER ENTERTAINMENT
5 COMPANY, L.P.; HOME BOX
6 OFFICE; WARNER BROS.;
7 WARNER BROS. TELEVISION;
8 TIME WARNER INC.; NEW LINE
9 CINEMA CORPORATION; CASTLE
10 ROCK ENTERTAINMENT; THE WB
11 TELEVISION NETWORK
12 PARTNERS, L.P.; METRO-
13 GOLDWYN-MAYER STUDIOS,
14 INC.; ORION PICTURES
15 CORPORATION; TWENTIETH
16 CENTURY FOX FILM
17 CORPORATION; UNIVERSAL CITY
18 STUDIOS PRODUCTIONS, INC.;
19 FOX BROADCASTING COMPANY;
20 COLUMBIA PICTURES
21 INDUSTRIES, INC.; COLUMBIA
22 PICTURES TELEVISION, INC.;
23 COLUMBIA TRISTAR
24 TELEVISION, INC.; TRISTAR
25 TELEVISION, INC.; REPLAYTV,
26 INC.; and SONICBLUE, INC.,

Defendants.

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1 Defendants Turner Broadcasting System, Inc., Disney Enterprises, Inc.,
2 Paramount Pictures Corporation, National Broadcasting Company, Inc., NBC
3 Studios, Inc., Showtime Networks Inc., The United Paramount Network, ABC,
4 Inc., Viacom International Inc., CBS Worldwide Inc., CBS Broadcasting Inc., Time
5 Warner Entertainment Company, L.P., Home Box Office, Warner Bros., Warner
6 Bros. Television, Time Warner Inc., New Line Cinema Corporation, Castle Rock
7 Entertainment, The WB Television Network Partners, L.P., Metro-Goldwyn-Mayer
8 Studios, Inc., Orion Pictures Corporation, Twentieth Century Fox Film
9 Corporation, Universal City Studios Productions, Inc., Fox Broadcasting Company,
10 Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia
11 Tristar Television, Inc., and Tristar Television, Inc. (the "Copyright Owner
12 Defendants") respectfully request that, pursuant to Rule 201 of the Federal Rules of
13 Evidence, the Court take judicial notice of the following pleadings and documents
14 filed in the action entitled *Paramount Pictures, et al. v. ReplayTV, Inc., et al.*,
15 United States District Court, Central District of California, Case No. 01-09358
16 FMC (Ex), true and correct copies of which are attached hereto:

17 Exhibit A: Complaint of Paramount Pictures Corporation, Disney
18 Enterprises, Inc., National Broadcasting Company, Inc.,
19 NBC Studios, Inc., Showtime Networks Inc., The United
20 Paramount Network, ABC, Inc., Viacom International
21 Inc., CBS Worldwide Inc., and CBS Broadcasting Inc.,
22 filed October 31, 2001 (Exhibits A-J, pp. 33-188,
23 omitted);

24 Exhibit B: Complaint of Time Warner Entertainment Company, L.P.,
25 Home Box Office, Warner Bros., Warner Bros.
26 Television, Time Warner Inc., Turner Broadcasting
27 System, Inc., New Line Cinema Corporation, Castle Rock
28 Entertainment, and The WB Television Network Partners,

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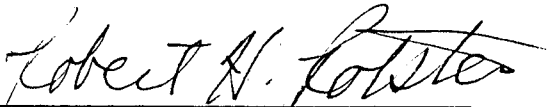
L.P., filed November 13, 2001;
Exhibit C: Complaint of Metro-Goldwyn-Mayer Studios, Inc., Orion Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions, Inc., and Fox Broadcasting Company, filed November 15, 2001;
Exhibit D: Amended Complaint of Paramount Pictures 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., filed November 27, 2001 (Exhibits A-J, pp. 34-189, omitted);
Exhibit E: Complaint of Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia Tristar Television, Inc., and Tristar Television, Inc., filed November 28, 2001;
Exhibit F: Plaintiffs' Supplemental Memorandum of Law in Support of Their Motion to Compel, filed April 11, 2002;
Exhibit G: Magistrate Judge's Order re: Plaintiffs' Motion to Compel, entered April 26, 2002; and

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Exhibit H: Order on Parties' Motions for Review of Magistrate
Judge's Order of April 26, 2002, entered May 31, 2002.

Dated: July 17, 2002

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[Full counsel appearances on next page]

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

20 **PARAMOUNT PICTURES**
21 **CORPORATION; DISNEY**
22 **ENTERPRISES, INC.; NATIONAL**
23 **BROADCASTING COMPANY,**
24 **INC.; NBC STUDIOS, INC.;**
25 **SHOWTIME NETWORKS INC.;**
26 **THE UNITED PARAMOUNT**
27 **NETWORK; ABC, INC.; VIACOM**
28 **INTERNATIONAL INC.; CBS**
WORLDWIDE INC.; and CBS
BROADCASTING INC.,

Plaintiffs,

v.

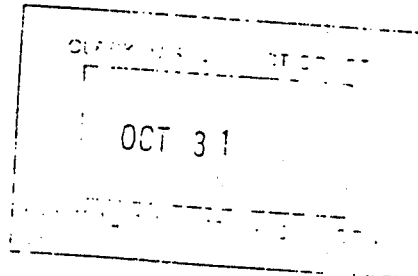
REPLAYTV, INC. and
SONICBLUE, INC.,

Defendants.

Civ. No. 01-09358 CAS (Ex)

COMPLAINT FOR:

1. Contributory copyright infringement
2. Vicarious copyright infringement
3. Violation of Section 553 of the Communications Act
4. Violation of Section 605 of the Communications Act
5. Unfair business practices



1 Plaintiffs Paramount Pictures Corporation, Disney Enterprises, Inc.,
2 National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks
3 Inc., The United Paramount Network, ABC, Inc., Viacom International Inc., CBS
4 Worldwide Inc., and CBS Broadcasting Inc. (hereinafter referred to as
5 "plaintiffs"), by their counsel, allege the following against defendants Replay, Inc.
6 and SONICblue Inc. (hereinafter referred to as "defendants").

7 **JURISDICTION AND VENUE**

8 1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 &
9 1338, under the Copyright Act, 17 U.S.C. § 101 *et seq*, under the Declaratory
10 Judgment Act, 28 U.S.C. §§ 2201(a) & 2202, and under the Communications Act,
11 47 U.S.C. §§ 553 & 605. Pursuant to 28 U.S.C. § 1367, this Court has
12 supplemental jurisdiction over Claim V because it is so related to the federal
13 claims as to form part of the same case or controversy. This Court has personal
14 jurisdiction over defendants Replay, Inc. and SONICblue Inc. due to their
15 operation of their principal place of business in this State and their extensive
16 commercial activities in this State, including this District. Venue is proper in this
17 judicial district pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the
18 events or omissions giving rise to this lawsuit, as well as substantial injury to the
19 plaintiffs, have occurred or will occur in this District as a result of defendants' past
20 and impending acts of copyright infringement, violations of the Communications
21 Act, and unfair competition, as alleged in detail below. Venue is also proper in
22 this judicial district pursuant to 28 U.S.C. § 1400(a) in that the defendants may be
23 found in this district in light of their extensive commercial activities in this district.

24 **PRELIMINARY STATEMENT**

25 2. Plaintiffs bring this action to obtain preliminary and permanent relief
26 against an unlawful plan by defendants to arm their customers with -- and
27 continuously assist them in using -- unprecedented new tools for violating
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1 plaintiffs' copyright interests in the programming they supply to various television
2 distribution services, including their own program services. Defendants' unlawful
3 scheme, which is centered on a new device called a "ReplayTV 4000," seeks to
4 profit from two novel methods of violating plaintiffs' rights. *First*, defendants
5 enable, assist, and induce their ReplayTV 4000 customers to make unauthorized
6 digital copies of plaintiffs' copyrighted television programming for the purpose of
7 -- at the touch of a button -- viewing the programming with all commercial
8 advertising automatically deleted. (Defendants offer essentially this same feature
9 on another device, a new analog videocassette recorder ("VCR") called the
10 "DDV2120.") This unlawful activity harms the potential market for and value of
11 plaintiffs' copyrighted works because commercial advertising is a crucial (and
12 often the sole) means by which plaintiffs receive payment for such programming.
13 *Second*, defendants provide their customers with a feature that makes it (in
14 defendants' words) "a breeze" to make perfect digital copies of plaintiffs'
15 copyrighted programs, including entire theatrical motion pictures, and distribute
16 them to other people -- even many other people -- through high-speed Internet
17 connections. This unlawful activity likewise deprives plaintiffs of the means of
18 payment for, and diminishes the value of, their copyrighted works. These new
19 infringing features, which defendants plan to bolster through daily contact with
20 their customers, are the principal selling points of the ReplayTV 4000 package and
21 the DDV2120 device.

22 3. The activity enabled, facilitated, and supervised by defendants differs
23 radically from the copying of over-the-air broadcast television programming found
24 to be permissible (under certain narrow circumstances and using much simpler
25 technology) in the Supreme Court's 1984 *Sony* decision. (Plaintiffs do not
26 challenge the use of either VCRs or ordinary digital video recorders for that
27 purpose.) Most importantly, the unprecedented new methods of copying and
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1 distribution enabled and induced by defendants will deprive plaintiffs of the means
2 of payment for their works and erode the value of plaintiffs' copyrighted
3 programming, in which plaintiffs have invested billions of dollars. In essence, the
4 defendants are seeking to profit from the sale of features that are calculated to
5 disrupt the ability of copyright owners to market their works for telecast by free,
6 over-the-air television, by basic and premium subscription services, and by pay-
7 per-view distribution services.

8 4. Plaintiffs are willing to incur the enormous costs of creating and
9 disseminating television programming because copyright provides the economic
10 incentive to do so. Indeed, copyright protection powerfully encourages free
11 expression, since plaintiffs cannot be expected to incur the large costs of producing
12 news and entertainment content (such as television programs and theatrical motion
13 pictures) for the public unless they have a way to recoup and profit from those
14 expenditures.

15 5. Copyright owners are rewarded for the creation, production and
16 delivery of copyrighted television programming almost exclusively through one or
17 both of two methods: (i) advertiser support and (ii) subscription fees. Defendants'
18 unlawful scheme attacks both.

19 6. The licensing of most copyrighted works for television viewing is
20 dependent on payments by advertisers for the right to include commercials during
21 designated breaks within and between programs. The sale of commercial time is
22 virtually the sole means of paying for the copyrighted programming offered by
23 free, over-the-air television networks and stations, such as the ABC, CBS, NBC,
24 and UPN television networks owned by plaintiffs and the hundreds of local
25 television stations (many owned by plaintiffs) that broadcast the programming of
26 those networks. Commercial advertising is also a vital source of payment for
27 copyrighted works purchased, licensed, or created by "basic" subscription program
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1 services, such as plaintiffs' CNBC, Nickelodeon, and SoapNet services, which are
2 transmitted by distributors such as cable systems and satellite carriers. Both over-
3 the-air and basic subscription program services depend on being able to deliver to
4 advertisers consumer audiences of pre-determined size and demographic
5 characteristics.

6 7. Defendants' unlawful scheme attacks the fundamental economic
7 underpinnings of free television and basic nonbroadcast services and, hence, the
8 means by which plaintiffs' copyrighted works are paid for. Advertisers will not
9 pay to have their advertisements placed within television programming delivered
10 to viewers when the advertisements will be invisible to those viewers. In effect, by
11 eliminating the embedded advertising, defendants' copying-and-commercial-
12 deletion feature will (as to those viewers who employ the feature) eliminate the
13 source of payment to the copyright owner for the very program being viewed. As
14 a result, defendants' unlawful scheme impairs the value of plaintiffs' works and
15 reduces the incentive for their creation and dissemination. For subscription
16 television program services that depend in part on advertising revenues, use of the
17 AutoSkip feature has the same effect. In both cases, the AutoSkip feature would
18 fundamentally and inevitably erode the means by which copyright owners are paid
19 for their works and hence the value of the programming they create.

20 8. Copyrighted works sold or licensed by cable television networks are
21 paid for, in part, by a second funding source -- payment of subscription (or similar)
22 fees. Such fees fund the purchase and creation of content by basic nonbroadcast
23 program services such as Nickelodeon, Toon Disney, and MSNBC, and are
24 virtually the sole means by which copyright owners are paid for programming
25 licensed to "premium" nonbroadcast program services such as Showtime and The
26 Movie Channel, which do not contain or derive any revenues from advertising.
27 The payment of fees to view individual programs is the central feature of pay-per-
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1 view distribution systems and, in effect, the means by which copyright owners are
2 paid for content licensed to those systems. Copyrighted works are licensed to all
3 subscription and pay-per-view services on the assumption that viewers of the
4 content will be charged a fee for the content they watch. The ability of copyright
5 owners to be paid for their works would plainly be undermined by any system that
6 facilitates the unauthorized dissemination of the contents of subscription or pay-
7 per-view services for free. Yet defendants' "Send Show" feature promotes and
8 enables precisely such unlawful conduct.

9 9. Defendants' ReplayTV 4000 package is centered on a "digital video
10 recorder," a computer-like device for making perfect digital copies of television
11 programming. (The device is usable only with ongoing assistance from defendants
12 in the form of data delivered from defendants' servers each day.) In two key ways,
13 the capabilities of defendants' new ReplayTV 4000 go far beyond traditional home
14 recording technology and are instead specifically designed to violate the rights of
15 copyright owners and program services.

16 10. First, defendants' ReplayTV 4000 offers the ability (without any
17 authorization from copyright owners) to make digital copies of television programs
18 and then to use an "AutoSkip" feature that -- in defendants' own words -- enables
19 viewers "to watch recorded programs totally commercial-free" with a single press
20 of a button. In fact, the ReplayTV 4000 enables the user to set "AutoSkip" so that
21 it will automatically delete all commercials in *all* future playbacks of television
22 programming, without any need to activate the feature for viewing of a particular
23 program. (Defendant SONICblue also offers a different method, through use of a
24 new dual-deck videocassette recorder called the "DDV2120 Dual-Deck VCR," to
25 block all exposure to advertising.) Here is how defendants describe the ReplayTV
26 4000 AutoSkip feature in a "Frequently Asked Question" on their web site
27 (www.replay.com):

28

1 **Q. Can ReplayTV play shows without the commercials?**

2 **A. Yes! We call the new feature AutoSkip™. Here's how it works.**
3 You go to the Replay Guide and select a recorded show that you want
4 to watch. When you select the show, a pop-up menu will ask you if
5 you want to play it with or without commercials. If you choose to
6 skip commercials or "AutoSkip™", *then you get to sit back, relax and*
7 *enjoy your favorite show commercial-free! (Emphasis added)*
8

9 11. Although defendants position the AutoSkip feature as an option, they
10 expect it to be used routinely. Their web site, for example, says this: "You'll still
11 have the choice to watch recorded shows with the commercials, *if you really want*
12 *to . . .*" (Emphasis added.)

13 12. When a user copies a television program with a ReplayTV 4000 and
14 plays it back with the AutoSkip feature, defendants ensure that all commercials are
15 *automatically* omitted when viewing the program. Nor is it necessary for a viewer
16 to wait until the program is over for defendants' copying-and-commercial-deletion
17 scheme to work. For example, if a viewer begins watching an 8 p.m. comedy at
18 8:08, defendants' scheme enables the viewer to watch the program during virtually
19 the same time slot with no exposure whatsoever to commercials.

20 13. Copying a copyrighted program or film with a digital video recorder
21 is a violation of the exclusive rights of the copyright owner under Section 106 of
22 the Copyright Act. Such copying is entirely distinguishable from the type of
23 copying which, in narrow and different circumstances, might be defended as a fair
24 use. Copying programming for playback with defendants' AutoSkip feature
25 effectively circumvents the means of payment to copyright owners for the
26 programming being viewed and therefore their ability to fund it. Viewers will
27 continue to be able to watch the program, but the copyright owner will be deprived
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1 of the means of obtaining payment for the programming. Defendants' copying-
2 and-commercial-deletion scheme thus constitutes copyright infringement. As
3 discussed below, the conduct also constitutes a violation of California law.

4 14. The second unlawful new service offered by defendants to owners of
5 the new ReplayTV 4000 is a function – revealingly called “Send Show” – for
6 making and distributing to third parties perfect reproductions of entire copyrighted
7 television programs and motion pictures. With this feature, defendants facilitate
8 and induce the unauthorized reproduction and distribution of plaintiffs' valuable
9 works and encourage unauthorized access to subscription programming, in
10 violation of both federal and state law. Under the Copyright Act, of course,
11 plaintiffs enjoy the exclusive right to copy and to distribute copies of their
12 copyrighted works. 17 U.S.C. § 106(1), 106(3). Nothing in the Copyright Act
13 gives defendants or their customers any right to make, for *distribution to third*
14 *parties*, digital copies of “Will & Grace,” “The Tonight Show,” “20/20,” “Lizzie
15 McGuire,” “Daria,” or “Rugrats,” much less entire theatrical motion pictures
16 appearing on television, such as “Quiz Show,” “Sister Act 2,” “102 Dalmatians,”
17 “Powder,” “Election,” “Planes, Trains, and Automobiles” or “The Talented Mr.
18 Ripley.” These practices violate not only the Copyright Act but also the federal
19 Communications Act and California law.

20 15. Defendants assure their customers that using the ReplayTV 4000 to
21 infringe copyrights will be effortless: “[W]ith its broadband connectivity, sending
22 and receiving programs [with the ReplayTV 4000] is a breeze.” And the potential
23 customer base for this feature is large and growing: some 10 million U.S.
24 households are expected to have high-speed Internet connections by the end of
25 2001, with continued growth anticipated thereafter. There are also some nine
26 million broadband connections in college dormitory rooms nationwide, and at least
27 30 million more in workplace, government, and academic institutions.

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1 16. Defendants' unlawful "Send Show" feature is designed to violate
2 plaintiffs' rights in all types of programming, from over-the-air broadcast programs
3 to basic, premium, and pay-per-view nonbroadcast offerings. For example – with
4 defendants' explicit encouragement and instruction – a ReplayTV 4000 owner can
5 record a movie exhibited on Showtime (such as "The Talented Mr. Ripley") and
6 use defendants' "Send Show" feature to reproduce and transmit a perfect digital
7 copy of the movie to many other people, none of whom subscribes to Showtime or
8 has paid for a DVD or VHS copy of the movie.

9 17. Defendants not only provide the means to carry out this unlawful
10 conduct but highlight it as a principal selling point of the ReplayTV 4000.
11 Defendants' press release about the ReplayTV 4000, for example, urges customers
12 to use the "Send Show" feature to "*trade movies [and] favorite TV programs.*" In
13 a September 2001 interview with CNET, SONICblue's Vice President of
14 Marketing said: "*If there's a great movie that you've recorded and you want to*
15 *send it over to a friend, you'd be able to do that over your broadband connection.*"
16 And an October 9, 2001 email from Replay to potential purchasers tells them they
17 can use the ReplayTV 4000 to transmit copies of "*TV shows & movies [to] friends*
18 *& family over the Internet.*" (Emphasis added in each case.)

19 18. Defendants' web site features an online demonstration that illustrates
20 how to use the "Send Show" feature to reproduce and distribute recorded programs
21 to other people. The demonstration shows a ReplayTV 4000 user employing
22 "Send Show" to distribute to third parties digital copies of a copyrighted program
23 owned by one of the plaintiffs. Indeed, defendants have *specifically designed and*
24 *are actively marketing* their service as a tool to make it easy to infringe
25 copyrighted material.

26 19. Defendants' involvement with their customers' infringements does
27 not end with the sale of a ReplayTV 4000 box. Defendants' continued
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1 Food," "Enterprise," "Raising Dad," "Manhunt," "Becker," and "JAG."
2 Paramount also owns the U.S. copyright in many theatrical motion pictures telecast
3 by U.S. television program services or offered through pay-per-view distributors,
4 such as "The Talented Mr. Ripley," "Election," "Sabrina," and "Planes, Trains,
5 and Automobiles." Among the many programs and movies in which Paramount
6 owns the copyright are those listed in Exhibit A.

7 23. Disney Enterprises, Inc. ("Disney") is a Delaware corporation with its
8 principal place of business in Burbank, California. Disney owns the copyright in
9 many episodes of television programs, including "Lizzie McGuire," "Book of
10 Pooh," "Felicity," "The Geena Davis Show," and "House of Mouse," that are
11 telecast on a first-run basis or otherwise by U.S. television outlets. Disney also
12 owns the copyright in many theatrical motion pictures telecast by U.S. program
13 services or offered through pay-per-view distributors, such as "Quiz Show,"
14 "Sister Act 2," "The Waterboy," "High Fidelity," "102 Dalmatians," and
15 "Powder." Directly or through subsidiaries, Disney also operates numerous
16 nonbroadcast television program services, including the Disney Channel, Toon
17 Disney, and SoapNet. The programs in which Disney owns the copyright include,
18 by way of illustration, those listed in Exhibit B to this Complaint.

19 24. The National Broadcasting Company, Inc. ("NBC") is a Delaware
20 corporation with its principal place of business in New York, New York and with
21 studio facilities in Burbank, California. NBC is a diversified media company that
22 produces news, entertainment, sports, and financial programming for broadcast and
23 cable television, and is the copyright owner of, among other programs, "Saturday
24 Night Live," "The Today Show," "Dateline NBC," and "Meet The Press." NBC is
25 the sole owner of NBC Studios, Inc. ("NBC Studios"), a New York corporation
26 with its principal place of business in Burbank, California. NBC Studios produces
27 television programming and is the copyright owner of "Will & Grace," "Late Night
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1 With Conan O'Brien," "The Tonight Show," "Providence," "Emeril," "Lost," "The
2 Other Half," "The Weakest Link," "Three Sisters," and "Passions" among others.
3 In addition, NBC's thirteen owned and operated television stations produce (and
4 own the copyright in) a variety of programs, including daily news shows. NBC
5 also owns CNBC, Inc., a cable network with its headquarters in Fort Lee, New
6 Jersey, and produces and owns the copyright in most of its programming. Through
7 a joint venture, NBC owns MSNBC Cable, L.L.C., a cable network headquartered
8 in Secaucus, New Jersey, and is the joint or beneficial owner of much of its
9 programming. Representative examples of copyright registrations and/or
10 applications for recently and soon-to-be broadcast programs in which NBC and
11 NBC Studios, Inc. own the copyright are listed in Exhibits C and D.

12 25. Showtime Networks Inc. ("Showtime") is a Delaware corporation
13 with its principal place of business in New York, New York. Showtime offers
14 (through cable systems, satellite carriers, and other distributors) several premium
15 television program services (including Showtime, The Movie Channel, and Flix)
16 consisting of theatrically released feature films, original movies, series, and other
17 programming to subscribers, generally for a separate monthly fee. Showtime owns
18 copyrights in episodes of its programs such as "Queer as Folk" and in many
19 feature-length films such as "Harlan County War," "Out There" and "Rated X."
20 Among the many programs in which Showtime owns the copyright are those listed
21 in Exhibit E. Showtime also operates SET (Showtime Event Television) Pay Per
22 View, which markets and distributes boxing events and concerts on a pay-per-view
23 basis.

24 26. The United Paramount Network ("UPN") is a Delaware partnership
25 with its principal place of business in Los Angeles, California. UPN operates the
26 UPN Network, which offers advertiser-supported free, over-the-air programming
27 to the public in many television markets throughout the United States.
28

1 27. ABC, Inc. ("ABC") is a New York corporation with its principal place
2 of business in New York, New York. ABC is the legal or beneficial owner of
3 copyrights in numerous ABC Television Network programs, such as "Primetime
4 Thursday," "The View," "Port Charles," "All My Children," "One Life to Live,"
5 "General Hospital," "Good Morning America," "Nightline," "World News
6 Tonight," and "20/20." In addition, ABC's owned and operated television stations
7 produce (and own the copyright in) a variety of programs, including daily news
8 shows. Among the many programs in which ABC owns the copyright are those
9 listed in Exhibit F.

10 28. Viacom International Inc. ("Viacom International") is a Delaware
11 corporation with its principal place of business in New York, New York. Viacom
12 International operates numerous television programming services, including MTV
13 Music Television, MTV2, VH1 Music First, Nickelodeon, TNN The National
14 Network, CMT Country Music Television, and TV Land. Viacom International
15 owns copyrights in numerous television programs appearing on these services,
16 such as "Rugrats" (shown on Nickelodeon), "Daria" (shown on MTV) and
17 "Behind the Music" (shown on VH1). Viacom International also owns copyrights
18 in television programs shown on other U.S. television services, including "The
19 Chris Isaak Show," "Resurrection Blvd.," and "Sabrina, The Teenage Witch."
20 Among the many programs in which Viacom International owns the copyright are
21 those listed in Exhibit G.

22 29. CBS Broadcasting Inc. ("CBS Broadcasting") is a New York
23 corporation with its principal place of business in New York, New York. CBS
24 Worldwide Inc. ("CBS Worldwide"), a subsidiary of CBS Broadcasting, is a
25 Delaware corporation with a principal place of business in New York, New York.
26 CBS Worldwide owns copyrights in numerous programs broadcast on the CBS
27 Network, such as "The Ellen Show," "Touched by an Angel," and "CSI: Crime
28

1 Scene Investigation." In addition, CBS Broadcasting's 17 owned and operated
2 television stations produce (and own the copyright in) a variety of programs,
3 including daily news shows. Among the many programs in which CBS owns the
4 copyright are those listed in Exhibit H.

5 30. Defendant ReplayTV, Inc. ("Replay") is a Delaware corporation with
6 its principal place of business in Mountain View, California. Replay is a wholly
7 owned subsidiary of Defendant SONICblue Inc. ("SONICblue"). Replay has
8 developed and is marketing and selling the ReplayTV 4000 device and
9 continuously facilitates its use.

10 31. Defendant SONICblue is a Delaware corporation with its principal
11 place of business in Santa Clara, California. SONICblue is the parent company of
12 Replay. SONICblue promotes and markets the ReplayTV 4000, including through
13 promotions on its own web site, and continuously facilitates its use. SONICblue
14 also promotes and markets the DDV2120 dual-deck VCR designed to make
15 commercial-free copies of television programming.

16 STATEMENT OF FACTS

17 Plaintiffs' Exclusive Rights Under the Copyright Act

18 32. Plaintiffs are the copyright owners of many television programs
19 transmitted to television viewers in the United States. Illustrative works in which
20 one of the plaintiffs owns a copyright are listed in Exhibits A-H. Each such work
21 is an original audiovisual work fixed in a tangible medium of expression. Each
22 work listed in Exhibits A-H is copyrightable subject matter within the meaning of
23 the Copyright Act, 17 U.S.C. § 102, and each has been registered (or an application
24 has been filed) with the United States Copyright Office.

25 33. Section 106 of the Copyright Act grants copyright owners the
26 exclusive right, among other things, to copy their works, to distribute copies of
27 their works, and to authorize others to do the same. No plaintiff has granted any
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1 license, permission, or authorization to defendants, or to past, present, or future
2 customers of defendants, either to copy the works listed in Exhibits A-H or to
3 distribute digital copies of the works to third parties.

4 **Plaintiffs' Operation of Television Program Services**

5 34. In addition to producing (and owning the copyright in) thousands of
6 television programs and movies, several of the plaintiffs own and/or operate
7 television program services that deliver that programming (and/or programming
8 created by third parties, including other plaintiffs herein) to the American public.
9 Some of these services -- such as the ABC, CBS, NBC, and UPN television
10 networks -- transmit that programming to viewers by terrestrial over-the-air
11 broadcasts, which in many cases are retransmitted by cable, satellite and other
12 multichannel video services. Other television program services, such as MSNBC,
13 CNBC, the Disney Channel, Toon Disney, SoapNet, Nickelodeon, MTV, VH1,
14 TNN, CMT, TV Land, Flix, The Movie Channel, and Showtime, are transmitted
15 by distributors such as cable systems and satellite carriers to subscribers who pay a
16 subscription fee to receive these channels. In all cases, the value of -- and hence
17 the incentive for plaintiffs to create -- copyrighted works will be eroded by a
18 technology that undermines the principal means by which copyright owners are
19 paid for such works by television distributors.

20 **The Structure of the Television Industry**
21 **and the Threat Posed by Defendants**

22 35. In the United States today, there are four principal methods by which
23 television programming is transmitted to the public. The first -- and oldest --
24 method is through "free," over-the-air television networks such as ABC, CBS,
25 NBC, and UPN and the hundreds of local terrestrial broadcast stations that carry
26 their programming. Free, over-the-air television networks and local stations both
27 create and license copyrighted content -- largely entertainment, news and sports
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1 programming -- on which the public has come to rely for information and
2 entertainment. Virtually the sole means of payment for such copyrighted content is
3 revenue from advertisers who pay for commercials that appear during, or between,
4 television shows. It is the advertising that pays for a particular show that a viewer
5 may choose to watch. Although nonbroadcast services have attracted an increasing
6 number of viewers over the past 20 years, broadcast television networks and local
7 stations nevertheless continue to account for a large percentage of all television
8 viewing in the United States.

9 36. Maintaining a nationwide system of free, over-the-air local television
10 stations, which makes news, information, and entertainment available to virtually
11 all Americans without any need to pay subscription fees, has been a crucial public
12 policy goal in the United States for many decades. The creation and acquisition of
13 the copyrighted content that has come to define free, over-the-air television is
14 made possible through commercial advertisements that are embedded in each
15 program. In short, advertisements provide the means of payment for the
16 copyrighted works that the public enjoys at no direct charge.

17 37. The second method of television distribution is through controlled
18 access via so-called "basic" nonbroadcast channels such as Disney Channel, Toon
19 Disney, SoapNet, Nickelodeon, MTV, MTV2, VH1, TNN, CMT, TV Land,
20 CNBC, and MSNBC. The sale of commercial time to advertisers and the
21 collection of fees from distributors such as cable systems and satellite carriers are
22 the means by which such channels create or license copyrighted works.

23 38. The third model of transmission of television programming in the
24 United States is via premium television program services such as Showtime and
25 The Movie Channel. These services, which are available to subscribers to cable,
26 satellite, and other multichannel video distribution systems, are typically made
27 available to consumers for a substantial monthly fee. Premium services offer
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1 original programming, theatrical motion pictures, or both, all without commercial
2 interruption – but only to those who have paid the subscription fee. Subscription
3 fees are the means by which the copyright owners are paid for licensing their
4 works to these services.

5 39. The fourth model of transmission of television programming in the
6 United States is through pay-per-view delivery, in which viewers obtain one-time
7 access to particular programs (such as feature films, live boxing events and
8 concerts) in return for payment of a fee for that access.

9 40. The creation and licensing of the overwhelming majority of television
10 programs that are offered to American viewers today is made possible by and is
11 completely dependent on the commercial advertising that is embedded in that
12 programming. Advertisements provide the means of payment for each show that a
13 viewer chooses to watch. A device that completely blocks the delivery of
14 advertising to viewers therefore deprives copyright owners of the means by which
15 they are paid for their works and diminishes both the value of the works and the
16 incentive to create and distribute original content over the medium. By
17 undermining the engine by which content is produced, the device will inevitably
18 dry up the source and diminish the quality of the programming that most
19 Americans have come to expect and demand.

20 41. Similarly, the "Send Show" feature will jeopardize the means by
21 which copyright owners are paid for the creation of copyrighted content by
22 nonbroadcast channels (whether basic or premium). Such payments are generated,
23 at least in part, by monthly subscription fees that viewers pay for the privilege of
24 viewing the nonbroadcast network's programming. The "Send Show" feature,
25 however, enables a single person who has paid the monthly subscription fee to
26 make and to transmit to third parties perfect digital copies of the programs offered
27 by subscription channels. This feature enables the evasion of payments for
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1 subscription programming, depriving the copyright owner of the right to control
2 how the work is disseminated and shrinking the subscription base that pays for
3 such programming.

4 42. Finally, the unauthorized copying and distribution of perfect copies of
5 theatrical motion pictures and other programs offered on a pay-per-view basis is a
6 clear violation of plaintiffs' rights. These works are licensed and paid for on the
7 basis that each viewer who wishes to see a work will pay a fee for such viewing.
8 No permission is granted to reproduce and disseminate copies of the work to those
9 who have not likewise paid for its exhibition. Indeed, it is self-evident that the
10 unauthorized dissemination of works enabled by the "Send Show" feature defeats
11 the means by which the copyright owner has agreed to be compensated for the
12 exhibition of its work. Viewers who obtain unauthorized digital copies of such
13 programs from other viewers have no reason to agree to pay-per-view fees to
14 obtain access to them. Defendants' unlawful service is also a threat to the
15 legitimate sale of copies of television programming (including feature films) in the
16 form of videotapes or DVDs.

17 **Defendants' ReplayTV 4000 and DDV2120 Dual-Deck VCR**

18 43. The ReplayTV 4000 is a type of digital video recorder. Far from
19 being a stand-alone device, the ReplayTV 4000 is capable of copying television
20 programs only through continuous assistance from defendants. Each night, the
21 ReplayTV 4000 automatically contacts SONICblue to download from
22 SONICblue's server a current program guide. The downloaded schedule, also
23 known as the Replay Guide, lists on the television screen all television
24 programming available to the viewer. By clicking on particular programs listed on
25 the Replay Guide, including programs owned by plaintiffs, the viewer can program
26 the ReplayTV 4000 to record and store those programs onto a hard drive built into
27 the box. Significantly, and unlike standard video recorders, defendants' ReplayTV
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1 4000 also enables users to make digital copies of television programs for the
2 unlawful purpose of playing them with all commercials deleted, and to copy and
3 distribute copyrighted programs and movies without authorization to third parties.

4 44. The DDV2120 Dual-Deck VCR recently introduced by defendant
5 SONICblue is an analog videocassette recorder. With the DDV2120, according to
6 defendant SONICblue, "you can record all your favorite shows, and make
7 commercial-free copies of them for viewing or archiving." The device
8 accomplishes this by making an initial copy of television programming for the
9 unlawful purpose of then making a second-generation unauthorized copy that
10 omits all commercials.

11 Defendants' Commercial Deletion Technology

12 45. As defendants themselves boast in their marketing materials, the
13 ReplayTV 4000 "does what no other [digital video recorder] on the market can
14 do": it enables viewers to make unauthorized digital copies of copyrighted
15 television programs and then use defendants' "AutoSkip" function to eliminate any
16 exposure to the advertising that is the lifeblood of most television channels. On
17 their web site, defendants explain the AutoSkip function as follows: it "[a]llows
18 ReplayTV 4000 users to playback recorded programming while automatically
19 bypassing all commercials. It's commercial-free television."

20 46. A demonstration program on defendants' web site (www.replay.com)
21 shows potential customers how AutoSkip works. The demonstration shows a
22 Replay Guide (the on-screen program guide updated daily by defendants), which
23 lists several copyrighted television programs such as "CSI: Crime Scene
24 Investigation" (CBS), "Friends" (NBC), "Just Shoot Me" (NBC), and "General
25 Hospital" (ABC). The demonstration instructs users to "select the show you want
26 to watch from your Replay Guide" and highlights the listing for ABC's "General
27 Hospital." Another frame then displays a pop-up menu within the Replay Guide
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1 and explains that this "pop-up menu gives you the option to play the show without
2 any commercials." The demonstration directs the viewer to select the option "Skip
3 Commercials," and then announces that the viewer can now enjoy "commercial-
4 free entertainment!" According to the demonstration, the program can be played
5 commercial-free only by using the Replay Guide supplied (and updated daily) by
6 defendants. Copies of this segment of defendants' demonstration are attached as
7 Exhibit I.

8 47. Defendants' DDV2120 accomplishes the destruction of all
9 commercial advertising in a different, but equally unlawful, manner. The
10 DDV2120 offers (in defendants' words) "One-Touch Commercial Free Copying
11 For Ad-Free Tapes." To do this, defendants' DDV2120 makes a copy of an entire
12 television transmission, including commercials, for the unlawful purpose of then
13 making an unauthorized second-generation tape that omits all commercials.

14 48. The unauthorized making of copies of television programming for the
15 purpose of viewing with all commercials automatically deleted is not a fair use,
16 and goes far beyond the narrowly circumscribed conduct discussed by the Supreme
17 Court in the 1984 *Sony Betamax* decision. The same is true of the creation (with
18 the DDV2120) of two unauthorized copies of television programming -- a first-
19 generation copy with commercials and a second-generation copy without them.
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**Defendants' Facilitation of Unauthorized
Distribution of Plaintiffs' Programs and Films**

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3 49. The "Send Show" feature of the ReplayTV 4000 package enables
4 owners of a ReplayTV 4000 (in Replay's own words) to "share programs with
5 friends who also own ReplayTV 4000." Defendants' "Send Show" feature
6 enables, materially contributes to, and induces the unlawful distribution of
7 copyrighted works owned by plaintiffs.

8 50. For example, according to defendants' web site, a ReplayTV 4000
9 owner could, with a few clicks on a remote control, send any television program
10 whatsoever -- including, for example, a theatrical film such as "Con Air" or "The
11 Talented Mr. Ripley" exhibited on the Showtime service -- to a large number of
12 third parties, regardless of whether the third parties themselves had a subscription
13 to the program service from which the program was copied. This would make it
14 unnecessary for those third parties to subscribe to Showtime, jeopardizing its
15 business and (over time) its existence. A ReplayTV 4000 owner could do the same
16 with many theatrical motion pictures, boxing events, concerts and other
17 copyrighted works owned by plaintiffs and transmitted on a pay-per-view basis, or
18 with works owned by others and transmitted by a pay-per-view service operated by
19 plaintiffs.

20 51. Defendants' on-line demonstration shows potential ReplayTV 4000
21 customers how to use the "Send Show" feature. The demonstration illustrates how
22 easy it is to use the feature by showing how to send a copy of the show "General
23 Hospital" -- owned by one of the plaintiffs -- to a third party. Copies of this
24 segment of defendants' demo program are attached as Exhibit J.

25 52. The "Send Show" function is similar to the music infringement
26 scheme recently enjoined in the *Napster* case. Just as Napster established a
27 commercial business that was predicated on -- and knowingly benefited from -- the
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1 unlawful copying and distribution of music files by users, defendants plan to create
2 a network in which they facilitate, induce, and profit from the unlawful distribution
3 of television shows and feature films costing millions (and in some cases tens or
4 hundreds of millions of dollars) to produce.

5 53. The "Send Show" feature also jeopardizes, in many ways, the system
6 by which costly copyrighted programming is offered by free, over-the-air
7 television networks and local stations. For example, advertisers who pay stations
8 to run advertisements of purely local relevance will not be willing to pay for
9 viewers in their local area who see the station's national programming via an
10 unauthorized copy distributed by a viewer (through defendants' "Send Show"
11 service) in another market with different local advertisements. (Of course, if the
12 AutoSkip feature is not stopped, few ReplayTV users will see commercial
13 advertising or promotional spots in any event.)

14 54. The unauthorized dissemination of copyrighted over-the-air
15 programming will also impair the ability of copyright owners to realize its value --
16 and fund the costs of that programming -- through so-called "repurposing."
17 Daytime dramas broadcast by ABC television stations, for example, are later
18 shown on SoapNet, a nonbroadcast channel available to cable and satellite viewers;
19 network newscasts are often broadcast again on local cable news channels; and
20 several popular network prime-time dramas are shown on nonbroadcast program
21 services shortly after their initial network broadcast. By enabling, inducing, and
22 continuously facilitating the unauthorized copying and distribution of this
23 programming, defendants diminish plaintiffs' ability to market these repurposing
24 rights.

25 55. The "Send Show" feature will also harm several of the plaintiffs in
26 their capacity as owners of television stations in a number of U.S. television
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1 markets and as copyright owners who seek to achieve maximum value from their
2 programming through repurposing.

3 56. Sending a copy of a copyrighted television program or film to a third
4 party goes far beyond the scope of the fair use defense. Indeed, defendants have
5 specifically designed and customized the "Send Show" function to encourage and
6 provide for the easy infringement of copyrighted works delivered by program
7 services.

8 57. Nor is there any geographic limit to the infringements that defendants
9 encourage their users to commit through the "Send Show" feature. On information
10 and belief, ReplayTV 4000 users in the United States can and will retransmit
11 copyrighted television programs and movies from the United States to ReplayTV
12 4000 users in Canada, Mexico, or any other country that offers broadband
13 connections. A recent news article about the ReplayTV 4000 machine specifically
14 highlighted this capability: "Couch potatoes can rejoice: Soon, you'll be able to
15 lie around for nearly two weeks without running out of recorded programs to watch
16 on your TV. And you'll be able to share the shows with someone in the next room
17 -- *or the next continent.*" (Emphasis added). The unauthorized copying and
18 retransmission of copyrighted works to persons in other countries only magnifies
19 the harm that defendants' service will cause to plaintiffs.

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1 the DDV2120 device have already infringed (or will soon infringe) plaintiffs'
2 exclusive rights under 17 U.S.C. § 106 in many copyrighted works, including the
3 illustrative works identified in Exhibits A-H hereto.

4 64. Defendants know or have reason to know of the direct infringement of
5 plaintiffs' copyrights. Indeed, defendants actively promote the infringements as a
6 reason to purchase their products, provide tools that are indispensable to these
7 infringements, and continuously facilitate the infringements.

8 65. Defendants, through their own conduct, have induced, caused,
9 encouraged, assisted and/or materially contributed to this infringing activity.

10 66. The foregoing acts of infringement by defendants have been willful,
11 intentional and purposeful, in disregard of and with indifference to the rights of
12 plaintiffs.

13 67. Defendants' conduct constitutes contributory infringement of
14 plaintiffs' copyrights and exclusive rights under copyright in violation of Sections
15 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106, 501.

16 68. As a result of defendants' conduct, plaintiffs have suffered and will
17 continue to suffer irreparable injury.

18 **COUNT II: Vicarious Copyright Infringement**

19 69. Plaintiffs repeat and incorporate by reference, as if fully set forth
20 herein, the allegations of ¶¶ 1-57 and ¶¶ 59-68 above.

21 70. Defendants have the right and ability to supervise and/or control the
22 infringing conduct of users of the ReplayTV 4000 and DDV2120. *First*,
23 defendants have made a deliberate decision to offer their users features that are
24 specifically designed to enable widespread infringements, when they could have
25 prevented or greatly limited that conduct by declining to offer or to facilitate or
26 support use of those unlawful features. *Second*, although defendants could, on
27 information and belief, have designed their equipment to prevent the unauthorized
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1 distribution of copyrighted works delivered by television program services (such as
2 NBC, the Disney Channel, and Showtime) or on a pay-per-view basis, they instead
3 specifically designed their equipment (and planned their ongoing assistance to their
4 customers) to encourage distribution of such copyrighted works. *Third*,
5 defendants' regular involvement is an indispensable link in their customers'
6 infringing conduct.

7 71. Defendants have a direct financial interest in the infringements of
8 plaintiffs' copyrights by their customers. Defendants' economic success is directly
9 tied to the popularity of the infringing conduct that they seek to encourage.

10 Indeed, the defendants have candidly admitted that the ReplayTV 4000 and
11 DDV2120 are designed to enable users to copy programming for viewing with
12 automatic deletion of commercials, and that the ReplayTV 4000 is designed to
13 enable users to distribute perfect digital copies of entire copyrighted works to
14 others. These new infringing capabilities of the ReplayTV 4000 and DDV2120 are
15 among defendants' principal selling points.

16 72. Defendants' acts have been willful, intentional and purposeful, in
17 disregard of and with indifference to the plaintiffs' rights.

18 73. Defendants' conduct constitutes vicarious infringement of plaintiffs'
19 copyrights and exclusive rights under copyright in violation of Sections 106 and
20 501 of the Copyright Act, 17 U.S.C. §§ 106, 501.

21 74. As a result of defendants' conduct, plaintiffs will suffer irreparable
22 injury.

23 **COUNT III -- Violation of Section 553 of the Communications Act**

24 75. Plaintiffs repeat and incorporate by reference, as if fully set forth
25 herein, the allegations of ¶¶ 1-57, ¶¶ 59-68, and ¶¶ 70-74 above.

26 76. The Communications Act makes it unlawful for any person to
27 intercept or receive or assist in intercepting or receiving any communications
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1 service offered over a cable system, unless specifically authorized to do so by a
2 cable operator or as specifically authorized by law. 47 U.S.C. § 553. The
3 prohibited conduct includes the manufacture or distribution of equipment intended
4 by the manufacturer or distributor for unauthorized reception of any
5 communications service offered over a cable system.

6 77. Defendants' conduct violates Section 553. Among other things,
7 defendants are selling equipment -- the ReplayTV 4000 device -- with a feature
8 ("Send Show") that they intend to be used to enable persons without authorization
9 to receive communication services offered over a cable system, including but not
10 limited to cable-delivered programming of over-the-air television stations, basic
11 nonbroadcast services, premium services, and pay-per-view services.

12 **COUNT IV -- Violation of Section 605 of the Communications Act**

13 78. Plaintiffs repeat and incorporate by reference, as if fully set forth
14 herein, the allegations of ¶¶ 1-57, ¶¶ 59-68, ¶¶ 70-74, and ¶¶ 76-77 above.

15 79. Defendants' conduct violates 47 U.S.C. § 605, which, with certain
16 exceptions not relevant here, forbids any person receiving, assisting in receiving,
17 transmitting, or assisting in transmitting, any interstate communication by radio
18 from publishing the contents thereof except through authorized channels. By
19 selling (and facilitating the use of) a device intentionally designed and intended to
20 be used to publish the contents of communications by radio through the "Send
21 Show" feature, defendants are violating Section 605.

22 **COUNT V -- Unfair Competition under Cal. Bus. & Prof. Code § 17200**

23 80. Plaintiffs repeat and incorporate by reference, as if fully set forth
24 herein, the allegations of ¶¶ 1-57, ¶¶ 76-77, and ¶ 79 above.

25 81. California Business & Professions Code § 17200 provides for
26 injunctive and other relief against "any unlawful, unfair or fraudulent business act
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1 or practice.” Defendants are engaged in, or propose to engage in, several such
2 practices.

3 82. Plaintiffs operate numerous television program services that are
4 available only by subscription, including the Disney Channel, Toon Disney,
5 SoapNet, Nickelodeon, MTV Music Television, MTV2, VH1 Music First,
6 Nickelodeon, TNN The National Network, CMT Country Music Television, TV
7 Land, CNBC, MSNBC, The Movie Channel, Flix, and Showtime.

8 83. In their capacity as owners and operators of television program
9 services, plaintiffs operate a lawful business of packaging attractive content with
10 advertising paid for by third parties. A basic premise of this business is that the
11 advertising is tied to the attractive content. Defendants have engaged in one or
12 more unfair business acts and/or unfair business practices by providing a device
13 that enables users to instantly and completely eradicate an essential revenue-
14 producing aspect of plaintiffs’ business. By doing so, defendants have engaged (or
15 propose to engage) in a highly unfair business practice.

16 84. The public policy of the State of California favors the maximum
17 production of news and entertainment programming by means of television.
18 Defendants’ conduct works to defeat that policy by sabotaging the ability of
19 plaintiffs to obtain compensation for their news and entertainment programming.

20 85. As set forth above, defendant’s conduct is unlawful under Sections
21 553 and 605 of the Federal Communications Act. In addition, unlawful reception
22 of subscription television services, and facilitation of such unlawful reception, is a
23 violation of California law. Cal. Penal Code §§593d, 593e. By facilitating and
24 encouraging conduct that amounts to receipt by nonsubscribers of content offered
25 on a subscription-only basis, defendants are engaging in conduct that has the
26 functional effect of a violation of Cal. Penal Code §§ 593d and 593e. This is a
27 grossly unfair business practice.

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1 any provision, use or support of the AutoSkip or "Send Show" functions or any
2 similar functions, or from licensing any other person to do the same;

3 (e) require defendants and their officers, agents, servants, employees and
4 those persons in active concert to cease any activity that encourages viewers to
5 block access to commercial content transmitted during television programming
6 owned by plaintiffs or offered on a television network owned and/or operated by
7 plaintiffs, or that encourages or permits users to transmit copies of such
8 programming to other persons;

9 (f) award plaintiffs costs and reasonable attorney's fees in accordance with
10 17 U.S.C. § 505, 47 U.S.C. §§ 553 & 605, and other applicable law; and

11 (g) award plaintiffs such further and additional relief as the Court may deem
12 just and proper.

13
14 Dated: October 31, 2001



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TABLE OF EXHIBITS

1
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- A. Table of illustrative copyright registrations for programs owned by Paramount Pictures Corporation
- B. Table of illustrative copyright registrations for programs owned by Disney Enterprises, Inc.
- C. Table of illustrative copyright registrations for programs owned by National Broadcasting Co.
- D. Table of illustrative copyright registrations for programs owned by NBC Studios, Inc.
- E. Table of illustrative copyright registrations for programs owned by Showtime Networks Inc.
- F. Table of illustrative copyright registrations for programs owned by ABC, Inc.
- G. Table of illustrative copyright registrations for programs owned by Viacom International Inc.
- H. Table of illustrative copyright registrations for programs owned by CBS Broadcasting Inc.
- I. Segments about AutoSkip feature from demonstration video

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J. Segments about "Send Show" feature from demonstration video

EX-101
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10

11

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

12

13

14 TIME WARNER ENTERTAINMENT
COMPANY, L.P., a Delaware limited
15 partnership; HOME BOX OFFICE, a
division thereof; WARNER BROS., a
16 division thereof; WARNER BROS.
TELEVISION, a division thereof;
17 TIME WARNER INC., a Delaware
corporation; TURNER
18 BROADCASTING SYSTEM, INC., a
Georgia corporation; NEW LINE
19 CINEMA CORPORATION, a
Delaware corporation; CASTLE
20 ROCK ENTERTAINMENT, a
California general partnership; and
21 THE WB TELEVISION NETWORK
PARTNERS L.P., a California limited
22 partnership d/b/a The WB Television
Network,

23

Plaintiffs,

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v.

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26 REPLAYTV, INC., a Delaware
corporation; and SONICblue Inc., a
Delaware corporation,

27

Defendants.

28

Case No. 01 - 09693

DT

COMPLAINT FOR:

FMOx

1. CONTRIBUTORY
COPYRIGHT INFRINGEMENT
2. VICARIOUS COPYRIGHT
INFRINGEMENT
3. UNFAIR BUSINESS
PRACTICES IN VIOLATION
OF CALIFORNIA BUSINESS
AND PROFESSIONS CODE
SECTION 17200
4. DECLARATORY RELIEF

1 Plaintiffs Time Warner Entertainment Company, L.P., Home Box Office,
2 Warner Bros., Warner Bros. Television, Time Warner Inc., Turner Broadcasting
3 System, Inc., New Line Cinema Corporation, Castle Rock Entertainment, and The
4 WB Television Network Partners L.P. (collectively, "Plaintiffs"), for their
5 Complaint against Defendants ReplayTV, Inc. and SONICblue Inc. (collectively,
6 "Defendants"), allege and aver as follows:

7 **JURISDICTION AND VENUE**

8 1. Plaintiffs assert claims against Defendants arising under the Copyright
9 Act of 1976, as amended, 17 U.S.C. § 101 *et seq.*, California common law, and
10 California Business and Professions Code section 17200. This Court has original
11 subject matter jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C.
12 §§ 1331 and 1338(a), and supplemental subject matter jurisdiction over Plaintiffs'
13 state law claims pursuant to 28 U.S.C. § 1367(a).

14 2. This Court has specific personal jurisdiction over all of the Defendants
15 as each has purposefully committed, within the state, the acts from which these
16 claims arise and/or has committed unlawful acts outside California, knowing and
17 intending that such acts would cause injury within the state. The Court also has
18 general personal jurisdiction over Defendants as each conducts continuous,
19 systematic, and routine business within this state and county.

20 3. Venue is proper in the United States District Court for the Central
21 District of California pursuant to 28 U.S.C. §§ 1391(b), 1391(c) and 1400(a).

22 **NATURE OF THE CASE**

23 4. Plaintiffs create and distribute some of the most sought-after and
24 valuable intellectual property in the world. That intellectual property includes
25 copyrighted motion pictures and television programs produced by Warner Bros.,
26 New Line Cinema, and Castle Rock Entertainment. It includes the CNN, CNN
27 Headline News, TBS, and TNT cable television services. It includes The WB
28 Television Network. And it includes the HBO premium pay television channel.

1 That content is made available to millions of Americans via broadcast, satellite, and
2 cable television transmissions, on premium cable channels, via pay-per-view
3 performances, and through viewing videocassette and DVD copies of such content.

4 5. Plaintiffs bring this action to obtain preliminary and permanent
5 injunctive relief against Defendants for their contributory and vicarious
6 infringement of Plaintiffs' copyrighted works and their unfair business practices.
7 Defendants have designed and manufactured – and are currently advertising,
8 promoting, offering for sale, and accepting purchase orders for – a device that
9 illegally copies Plaintiffs' copyrighted works, strips them of commercial
10 advertisements during playback, and distributes them over the Internet to others.
11 On information and belief, Defendants not only manufacture and sell the device,
12 they intend to maintain a permanent, continuous relationship with their customers'
13 devices. After the device is installed, it will communicate with Defendants every
14 day so that Defendants can tell its customers what programs are available for
15 copying and so that Defendants can encourage, assist, induce, cause, materially
16 contribute to, supervise, and/or control the infringing conduct of the users of
17 Defendants' device.

18 6. The subject of this case is Defendants' personal video recorder
19 ("PVR"), and Defendants' post-sale interaction with it, known as the "ReplayTV
20 4000." (A true and correct copy of information regarding the unit as it appears on
21 Defendants' website is attached hereto as Exhibit A.) In contrast to conventional
22 videocassette recorders ("VCRs") or other PVR systems, the ReplayTV 4000 goes
23 far beyond traditional home recording technology in ways that lie outside the scope
24 of the defense potentially accorded such technologies by *Sony Corp. of America v.*
25 *Universal City Studios*, 464 U.S. 417 (1984) (the Betamax case), and that clearly
26 violate the rights of copyright owners. Defendants' ReplayTV 4000: (a) takes
27 television signals that carry Plaintiffs' content, including cable, satellite, and pay-
28 per-view signals, and converts them into unauthorized digital copies of Plaintiffs'

1 copyrighted works; (b) can automatically delete all commercials from such copies
2 of Plaintiffs' television programming during playback; (c) creates libraries, indexed
3 and stored on the device, containing up to 320 hours of those works, and
4 (d) distributes copies of those works over the Internet to others. In so doing, it
5 deprives Plaintiffs of the revenue streams to which they are entitled and the
6 economic value of their intellectual property. Further, the removal of commercial
7 messages by itself robs the advertisers of the value of their purchase of advertising
8 time, depresses the value of such advertising time, and undermines the economic
9 models by which television programming is provided to consumers free of direct
10 charge (in the case of broadcast television) or at a cost lower than it would be
11 absent the revenues paid by advertisers (in the case of basic cable television).

12 7. Defendants' conduct threatens to cause extraordinary and continuous
13 harm to Plaintiffs' businesses in the future. Unless enjoined, Defendants'
14 distribution of the ReplayTV 4000 devices and their active facilitation of the use of
15 those devices to illegally copy and distribute Plaintiffs' copyrighted works will
16 result in significant financial loss and irreparable injury to Plaintiffs.

17 8. Defendant Replay TV, Inc.'s conduct also constitutes a breach of a
18 July 1999 license agreement between Replay Networks, Inc. (now known as
19 ReplayTV, Inc.) and Plaintiffs Time Warner Inc. and Turner Broadcasting System,
20 Inc. that, *inter alia*, prohibits ReplayTV from offering and interacting with products
21 that include the ReplayTV 4000's infringing features, as alleged below.

22 THE PARTIES

23 9. Plaintiff Time Warner Entertainment Company, L.P. ("TWE") is a
24 Delaware limited partnership, with its principal place of business in New York,
25 New York. Among many other things, it is involved in all aspects of motion
26 picture and television production and distribution and the operation of television
27 networks and cable television channels and program services.

1 10. Plaintiff Home Box Office (“HBO”) is a division of TWE. HBO is a
2 “pay” or “subscription” cable and satellite service. Programming that HBO
3 provides to its subscribers for a monthly fee includes original programs produced
4 by HBO (e.g., episodic series, miniseries, and movies) and movies produced by
5 other entities that typically (but not necessarily) were exhibited in movie theaters
6 before being shown on HBO. It owns the copyrights to programs such as *The*
7 *Sopranos*, *Sex and the City*, and *Band of Brothers*. HBO also operates other cable
8 services, including HBO Family, HBO Comedy and HBO Latino.

9 11. Plaintiff Warner Bros. is a division of TWE. It is involved in the
10 production, distribution, exhibition, and licensing of motion pictures. It owns the
11 copyrights to such movies as *Batman*, *The Matrix*, and the upcoming *Harry Potter*
12 *& The Sorcerer’s Stone*.

13 12. Plaintiff Warner Bros. Television is a division of TWE. It is involved
14 in the production, distribution, and licensing of television programs. It owns the
15 copyrights to many episodes of television series telecast by United States television
16 networks and individual stations, including such series as *ER*, *The West Wing*,
17 *Friends*, and *The Drew Carey Show*.

18 13. Plaintiff Time Warner Inc. (“TWI”) is a Delaware corporation with its
19 principal place of business in New York, New York. TWI is an affiliate of TWE.

20 14. Plaintiff Turner Broadcasting System, Inc. (“Turner Broadcasting”) is
21 a Georgia corporation with its principal place of business in Atlanta, Georgia. It is
22 a major producer of news and entertainment programs and the leading provider of
23 programming for the basic cable industry. It owns cable networks and program
24 services, such as TBS, TNT, Cartoon Network, Turner Classic Movies, and the
25 various CNN networks (such as CNN, CNN Headline News, CNNfn, and CNN SI).
26 Turner Broadcasting owns the copyrights to programs such as *The Powerpuff Girls*
27 and *Dexter’s Laboratory*, movies produced by Turner Broadcasting (such as
28

1 *Pirates of Silicon Valley* and *Running Mates*), and movies produced by others (such
2 as *Gone With the Wind*, *The Wizard of Oz*, and *Dr. Zhivago*).

3 15. Plaintiff New Line Cinema Corporation is a Delaware corporation with
4 its principal place of business in Los Angeles, California. It is involved in the
5 production, distribution, exhibition, and licensing of motion pictures and television
6 programs. It owns the copyrights to such movies as *Rush Hour*, *Austin Powers:*
7 *International Man of Mystery*, and the upcoming *Lord of the Rings* trilogy.

8 16. Plaintiff Castle Rock Entertainment is a California general partnership
9 with its principal place of business in Beverly Hills, California. It is involved in the
10 production, distribution, exhibition, and licensing of motion pictures and television
11 programs. It owns the copyrights to such movies as *When Harry Met Sally*, *A Few*
12 *Good Men*, *The Shawshank Redemption*, and *The Green Mile*.

13 17. Plaintiff The WB Television Network Partners L.P. ("The WB
14 Television Network") is a California limited partnership d/b/a The WB Television
15 Network. WB Communications, the General Partner, is a division of TWE. The
16 WB Television Network is involved in the production, distribution, and broadcast
17 of television programs.

18 18. Collectively, Plaintiffs are the legal or beneficial owners of numerous
19 United States copyrights in and to a substantial amount of television programs and
20 movies currently available through United States broadcast, satellite, and cable
21 television channels. Plaintiffs have registered these copyrights with the Copyright
22 Office and possess valid registrations for each copyrighted motion picture and
23 television program on which this lawsuit is based. Attached hereto as Exhibit B is a
24 schedule of illustrative copyright registrations for certain of Plaintiffs' works, or
25 works to which Plaintiffs hold exclusive distribution rights thereto, susceptible to
26 infringement by Defendants' ReplayTV 4000 system.

27 19. Upon information and belief, Defendant ReplayTV, Inc. ("Replay") is
28 a Delaware corporation with its principal place of business in Santa Clara,

1 California. Replay was formerly known as Replay Networks, Inc. According to
2 documents publicly filed by Defendant SONICblue Inc. ("SONICblue"), Replay is
3 a wholly owned subsidiary of SONICblue. Replay has developed and is marketing
4 and offering for sale the ReplayTV 4000 and intends to continuously facilitate its
5 use through, among other things, electronic program guides and related recording
6 instructions that it transmits every night to every ReplayTV unit.

7 20. Upon information and belief, Defendant SONICblue is a Delaware
8 corporation with its principal place of business in Santa Clara, California.
9 SONICblue is the parent company of Replay. SONICblue promotes and markets
10 the ReplayTV 4000, including through promotions on its own website, and
11 continuously facilitates its use.

12 **ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF**

13 **The Economics of Creating and Distributing Programming Content**

14 21. Plaintiffs invest billions of dollars each year to create and deliver
15 motion pictures, television series, news, sports, and other programming content to
16 the public. To encourage Plaintiffs and others to create these works, the law
17 permits Plaintiffs, as the owners of the copyrights, to control how, where, when,
18 and on what terms they make their works available for the public to view.

19 22. Plaintiffs' works are made available through various forms of
20 distribution, including, but not limited to, by means of television exhibition.
21 Currently, television exhibition generally occurs through: (a) free, over-the-air
22 broadcasts, whether on national networks or individual television stations in local
23 markets; (b) exhibition on basic cable channels (e.g., TBS or TNT); (c) premium
24 pay television program services (e.g., HBO); and (d) various forms of pay-per-view
25 and video on demand. Plaintiffs' works also are made available through other
26 means of distribution, such as through videocassette and DVD sales and rentals for
27 home viewing. Plaintiffs receive compensation for the use of their works in each
28 form of distribution, whether by direct payments from consumers or retailers (e.g.,

1 video stores), through licenses with television stations, television networks, or cable
2 and satellite television channels and system operators, or through payments by
3 advertisers.

4 a. Free, Over-the-Air Broadcasts. Over-the-air broadcasting occurs
5 through television networks such as CBS, NBC, ABC, Fox, and The WB
6 Television Network (and stations affiliated with them), and hundreds of
7 local, independent terrestrial broadcast stations around the country. Free,
8 over-the-air television networks and local stations both create and license
9 copyrighted content – largely entertainment, news, and sports programming –
10 on which the public has come to rely for information and entertainment.
11 Broadcast television networks and local stations account for a large
12 percentage of all television viewing in the United States. The creation and
13 acquisition of the copyrighted content that has come to define free, over-the-
14 air broadcasting is made possible through commercial advertisements that are
15 inserted in or adjacent to each program. Virtually the sole means of payment
16 for such copyrighted content is revenue from advertisers who pay for these
17 commercials.

18 b. Basic Cable Channels. Another method for television distribution
19 is through controlled access via so-called “basic” non-broadcast channels
20 such as CNN, TBS, TNT and Cartoon Network. The sale of commercial
21 time to advertisers and the collection of fees from distributors such as cable
22 systems and satellite carriers (who in turn receive monthly fees paid by
23 subscribers to their services) are among the principal means by which such
24 channels finance the creation of their original works and other programming.

25 c. Premium Pay Television Program Services. Programming is also
26 distributed to the public via premium pay television program services such as
27 HBO. These services, which are available to subscribers to cable, satellite,
28 and other multi-channel video distribution systems, are typically made

1 available to consumers for a monthly fee. Premium services offer original
2 programming, theatrical motion pictures, or both, all without commercial
3 interruption – but only to those who have paid the subscription fee.
4 Subscription fees are the means by which the copyright owners are paid for
5 licensing their works to these services.

6 d. Pay-Per-View and Video On Demand. In recent years, more and
7 more television programming has been transmitted for viewing by the public
8 through some form of video on demand. The various forms of video on
9 demand include, among others, pay-per-view delivery (in which a viewer
10 obtains one-time access to a particular program, such as a feature film, a live
11 boxing event, or a concert, in return for payment of a fee for that access),
12 video on demand (in which a viewer can choose to watch a particular
13 program at any time of the viewer's choosing, also in return for payment of a
14 fee for that access), and near video on demand (in which a viewer can choose
15 to watch a particular program at one of several times offered by the program
16 distributor, also in return for payment of a fee for that access).

17 e. Home Video Exhibition. Many of the Plaintiffs herein also
18 distribute their works via sales of videocassettes and DVDs directly to
19 consumers or to retailers who then sell or rent those videocassettes and
20 DVDs to the public. Each year, millions of Americans watch the copyrighted
21 works of these Plaintiffs and of other persons by playing such videocassette
22 or DVD copies of those works. The sale of videocassettes and DVDs to
23 consumers and retailers by copyright owners (such as many of the Plaintiffs
24 herein) yields substantial revenues to such copyright owners.

25 23. By not obtaining Plaintiffs' permission or compensating Plaintiffs for
26 the uses of Plaintiffs' works by Defendants' ReplayTV 4000 customers, Defendants
27 will undermine each of these forms of distribution and the means by which
28 Plaintiffs are compensated for the public's viewing and enjoyment of their works.

1 The value of – and hence the incentive for Plaintiffs to create – expressive works
2 will be eroded.

3 The ReplayTV 4000

4 24. Defendants' ReplayTV 4000 is a device and system for making and
5 distributing digital copies of television programming. It contains, among other
6 things, a central data processing unit, a mechanism for communicating with
7 Defendants' central servers, and a hard drive with substantial storage capacity.

8 25. The ReplayTV 4000 goes far beyond traditional home recording
9 technology in ways that clearly violate Plaintiffs' copyrights. As shown by the
10 examples described below, the ReplayTV 4000 enables Defendants' customers to
11 infringe Plaintiffs' copyrights intentionally and flagrantly.

12 “Send Show”

13 26. The ReplayTV 4000 includes a function called “Send Show,” which
14 Defendants also refer to on their website as “Video Sharing Over the Internet” or
15 “Send Show Over the Internet.” This feature allows a user who has made a copy of
16 a copyrighted motion picture or television program on a ReplayTV 4000 unit to
17 distribute it to third parties who also own ReplayTV 4000 units. Defendants assure
18 their customers that using the ReplayTV 4000 to engage in the unauthorized
19 distribution of copies of Plaintiffs' works will be effortless: “[W]ith its broadband
20 connectivity, sending and receiving programs [with the ReplayTV 4000] is a
21 breeze.”

22 27. On information and belief, the transfer of such copies is to be
23 accomplished by means of a central server, file transfer protocol, and compression
24 and encryption algorithms designed and operated by Defendants. On Defendants'
25 server, Defendants will maintain a list of active ReplayTV 4000 owners which
26 other users will access to facilitate the unauthorized distribution of unauthorized
27 copies of Plaintiffs' copyrighted works. Defendants' “Send Show” feature is
28 designed so as to facilitate the infringement of Plaintiffs' rights in all types of

1 programming, from over-the-air broadcast programs to basic, premium, and pay-
2 per-view non-broadcast offerings. For example – with Defendants’ explicit
3 encouragement and instruction – a ReplayTV 4000 owner who pays for a monthly
4 HBO subscription can record a motion picture exhibited on HBO (such as *Almost*
5 *Famous*, which will debut later this month) and use Defendants’ “Send Show”
6 feature to reproduce and distribute a digital copy of the movie to third parties who
7 also own a ReplayTV 4000, even though none of those third parties subscribes to
8 HBO or has purchased or rented a DVD or VHS copy of the movie. Similarly,
9 ReplayTV 4000 users can record HBO’s exclusive programming (such as *The*
10 *Sopranos* or a particular musical concert) and distribute a copy of such
11 programming to ReplayTV owners who are not HBO subscribers and who have not
12 paid anything to receive HBO programming. Defendants have specifically
13 designed and are actively marketing the ReplayTV 4000 to make it easy to commit
14 such acts of copyright infringement.

15 “PC Connectivity”

16 28. Labeled on Defendants’ website as its “PC Connectivity” feature, the
17 ReplayTV 4000 has numerous output connections capable of transferring image
18 files to and from the device to a personal computer. Such transfers may also permit
19 transfer of stored audiovisual works, such as Plaintiffs’ copyrighted works, to the
20 users’ personal computers. From there, such infringing copies could be
21 redistributed to others (including persons who are not ReplayTV 4000 users) on an
22 unlimited basis. Absent some control or disabling of these outputs, the prospect of
23 widespread unauthorized distribution of Plaintiffs’ copyrighted works is substantial.

24 “AutoSkip”

25 29. The ReplayTV 4000’s “AutoSkip” feature (which Defendants also
26 describe on their website as “Commercial Advance”) permits viewers, in
27 Defendants’ own words, “to watch recorded programs totally commercial-free.”
28 Plaintiffs are informed and believe that, to deliver “commercial-free” television

1 viewing, the ReplayTV 4000 instantly reads ahead on the data file to skip the
2 commercial messages. To the viewer, this process is imperceptible. On
3 information and belief, Defendants expect the "AutoSkip" feature to be used
4 routinely. For example, their website says, "You'll still have the choice to watch
5 recorded shows with the commercials, *if you really want to.*" (Emphasis added.)

6 **Defendants' Post-Purchase Involvement in Infringing Acts**

7 30. Not only do the "Send Show," "PC Connectivity," and "AutoSkip"
8 features themselves enable users to infringe Plaintiffs' copyrights, but Defendants'
9 continuous, direct involvement with their customers well after the sale of each
10 ReplayTV 4000 unit is inextricably intertwined with that infringing activity:

11 a. Defendants will maintain a data link to each unit. On a daily basis,
12 each unit will initiate contact with, and connect to, a computer server
13 operated by Defendants.

14 b. Using that connection, Defendants will gather data from each unit
15 regarding that customer's recording and viewing behavior and preferences,
16 and then download data to enable the unit to, among other things, display on-
17 screen program guides and make copies of Plaintiffs' copyrighted works. In
18 addition, Defendants will be able to compile this highly valuable information
19 about its users' recording and viewing behavior and preferences and sell it to
20 advertisers and others.

21 c. Defendants will have the ability, from their own facilities, to update
22 and overwrite the software installed on their customers' devices, which
23 ability will permit Defendants to add features to those devices, or remove
24 features from them.

25 d. To enable ReplayTV 4000 users to distribute digital copies of
26 Plaintiffs' works to others using the "Send Show" feature, at a minimum,
27 Defendants will have to maintain a server to permit its customers to obtain a
28 unique address or other identifying information for each unit (which can then

1 be provided to other ReplayTV 4000 users), a file transfer protocol, and
2 compression and encryption algorithms.

3 **ReplayTV Inc.'s Breach of Contract**

4 31. Plaintiffs Turner Broadcasting and TWI are parties to a contract dated
5 July 30, 1999 with Replay Networks, Inc., now known as Defendant ReplayTV,
6 Inc. (the "Replay Network Agreement"). The terms of the Replay Network
7 Agreement are incorporated herein by reference as if set forth in full. (A copy of
8 the agreement will be filed with the Clerk under seal upon the entry of an
9 appropriate protective order). Pursuant to the Replay Network Agreement, Turner
10 Broadcasting granted to Replay Networks, Inc. a non-exclusive license to certain of
11 its programming and content for distribution through the ReplayTV platform and
12 the Replay Network Service for a term commencing as of July 30, 1999 and
13 expiring on July 29, 2002, unless earlier terminated.

14 32. The Replay Network Agreement provides, among other things, that
15 Replay may "not make any alterations, modifications, additions, or deletions ... to
16 any of the Turner Networks [as defined in the agreement], the Turner Content [as
17 defined in the agreement] ... or to any programming on the Turner Networks or any
18 Turner Content ... except with the prior approval of Turner in its absolute
19 discretion." These restrictions and approval rights are material terms of the
20 agreement and, as provided in the agreement, survive any termination or expiration
21 thereof. Contrary to the terms of the Replay Network Agreement, the ReplayTV
22 Model 4000 permits users to delete commercial advertisements from the content
23 licensed pursuant to the Replay Network Agreement. Turner Broadcasting has not
24 been asked to approve such a feature and has not given any approval for such a
25 feature.

26 33. The Replay Network Agreement also states that Replay intended to
27 develop a method for inserting advertising or promotional spots in the "pause" time
28 that is created through the Replay Network Service and that Replay Networks, Inc.

1 and Turner Broadcasting would share the advertising revenue generated from sale
2 of "pause" time inventory on any Turner Content or any portion of a Turner
3 Network, but that all "pause" time advertisements and promotions on any Turner
4 Content or any portion of any Turner Network would be subject to Turner
5 Broadcasting's approval. This approval right is a material term of the agreement.
6 Upon information and belief, Replay has developed and deployed a method for
7 inserting commercial messages during the "pause" time created through the Replay
8 Network Service when Turner Content has been recorded, although Replay has not
9 requested or obtained prior approval from Turner Broadcasting.

10 34. The Replay Network Agreement also requires Turner Broadcasting's
11 agreement to develop service offerings in addition to those specified in the Replay
12 Network Agreement. This requirement is a material term of the agreement. The
13 ReplayTV 4000 contains several such additional service offerings, including but
14 not limited to the "Send Show" feature, even though Turner Broadcasting has had
15 no involvement in the development of such additional service offerings and has not
16 agreed to their inclusion in the ReplayTV 4000.

17 35. On November 6, 2001, Plaintiffs Turner Broadcasting and TWI
18 notified Defendants that they intended to terminate the Replay Network Agreement
19 in accordance with its terms as a result of Replay's breaches of material terms of
20 the agreement.

21 FIRST CLAIM FOR RELIEF

22 **Contributory Copyright Infringement**

23 **(Under 17 U.S.C. § 101 *et seq.*, against all Defendants)**

24 36. Plaintiffs reallege the allegations contained in paragraphs 1 through 35
25 of this Complaint as though fully set forth herein.

26 37. Defendants are encouraging, assisting, inducing, causing, and/or
27 materially contributing to a vast number of actual or imminent copyright
28 infringements of Plaintiffs' works by users of the ReplayTV 4000 in violation of 17

1 U.S.C. §§ 106 and 501. Such acts of copyright infringement include the actual or
2 imminent unauthorized copying and/or distribution of Plaintiffs' works.

3 38. Defendants know or have reason to know of the actual or imminent
4 direct infringement of Plaintiffs' copyrights. Indeed, Defendants actively promote
5 the infringements as a reason to purchase their products, provide tools that are
6 indispensable to these infringements, and continuously facilitate the infringements.

7 39. The unauthorized copying and distribution of Plaintiffs' copyrighted
8 works that Defendants encourage, assist, induce, cause and/or materially contribute
9 to through the conduct described above is without Plaintiffs' consent and not
10 otherwise permissible under the Copyright Act.

11 40. The foregoing acts of infringement by Defendants have been willful,
12 intentional, purposeful, and with indifference to Plaintiffs' rights.

13 41. Defendants' conduct is causing and, unless enjoined and restrained by
14 this Court, will continue to cause Plaintiffs great, irreparable injury that cannot fully
15 be compensated or measured in money. Plaintiffs have no adequate remedy at law.

16 **SECOND CLAIM FOR RELIEF**

17 **Vicarious Copyright Infringement**

18 **(Under 17 U.S.C. § 101 *et seq.*, against all Defendants)**

19 42. Plaintiffs reallege the allegations contained in paragraphs 1 through 35
20 of this Complaint as though fully set forth herein.

21 43. Defendants have the right and ability to supervise and/or control the
22 infringing conduct of users of the ReplayTV 4000. Defendants have the particular
23 right and ability to supervise and/or control such activity as it pertains to the
24 unauthorized copying and distribution of Plaintiffs' copyrighted works by
25 ReplayTV 4000 users.

26 44. Defendants' regular involvement is an indispensable link in their
27 customers' infringing conduct. Although Defendants could have designed the
28 ReplayTV 4000 so as to prevent the making of unauthorized digital copies and the

1 unauthorized distribution of Plaintiffs' copyrighted works, instead they specifically
2 designed the ReplayTV 4000 (and planned their ongoing communication with and
3 assistance to their customers) to facilitate the digital copying and distribution of
4 such copyrighted works. Although Defendants could have sought licenses from
5 Plaintiffs to make such uses of these works (and thereby compensated Plaintiffs for
6 the use of these works and any injury to them resulting from use of the ReplayTV
7 4000), instead they chose not to.

8 45. Defendants have a direct financial interest in the infringements of
9 Plaintiffs' copyrights by their customers. Defendants' economic success is directly
10 tied to the popularity of the infringing conduct that they seek to encourage. For
11 example, the Defendants have candidly admitted that the ReplayTV 4000 is
12 designed to enable users to copy a massive volume of programs – up to 320 hours'
13 worth – and view them without the commercials, and that the ReplayTV 4000 is
14 designed to enable users to distribute digital copies of entire copyrighted works to
15 others – all without permission of the copyright owner. These new infringing
16 capabilities of the ReplayTV 4000 are among Defendants' principal selling points.

17 46. Defendants' conduct constitutes vicarious infringement of Plaintiffs'
18 copyrights and exclusive rights under copyright in violation of 17 U.S.C. §§ 106
19 and 501.

20 47. The foregoing acts of infringement by Defendants have been willful,
21 intentional, purposeful, and with indifference to Plaintiffs' rights.

22 48. Defendants' conduct is causing and, unless enjoined and restrained by
23 this Court, will continue to cause Plaintiffs great, irreparable injury that cannot fully
24 be compensated or measured in money. Plaintiffs have no adequate remedy at law.

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1 the Turner Networks or any Turner Content ... except with the prior approval of
2 Turner in its absolute discretion.”

3 54. An actual controversy has arisen and now exists between Plaintiffs
4 Turner Broadcasting and TWI and Defendant Replay, and each of them, regarding
5 their respective rights and duties under the Replay Network Agreement,
6 specifically, whether: (a) Plaintiffs Turner Broadcasting and TWI have the right to
7 terminate the Replay Network Agreement; and (b) Defendant Replay is obligated to
8 fulfill its post-termination obligations.

9 55. Plaintiffs Turner Broadcasting and TWI desire a judicial determination
10 and declaration of the parties' rights and duties under the Replay Network
11 Agreement. Such a determination is necessary and appropriate at this time in order
12 that Plaintiffs Turner Broadcasting and TWI may ascertain whether they have the
13 right to terminate the Replay Network Agreement. Plaintiffs Turner Broadcasting
14 and TWI desire a judicial determination and declaration in order that they may
15 ascertain whether Defendant Replay is relieved of any of its post-termination
16 obligations with respect to the Replay Network Agreement.

17 **PRAYER FOR RELIEF**

18 WHEREFORE, Plaintiffs pray that this Court enter judgment in their favor
19 and against Defendants and each of them as follows:

20 1. Adjudge and declare, pursuant to the Declaratory Judgment Act, 28
21 U.S.C. §§ 2201(a) and 2202, that Defendants have contributorily and vicariously
22 infringed Plaintiffs' exclusive rights under the Copyright Act;

23 2. Preliminarily and permanently enjoin, pursuant to 17 U.S.C. § 502,
24 Defendants, their officers, agents, servants, employees and those persons in active
25 concert or participation with them, from contributorily and/or vicariously infringing
26 by any means Plaintiffs' exclusive rights under the Copyright Act and from
27 licensing any other person to do the same, including by means of manufacturing,
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advertising, selling, offering for sale, distributing, or delivering into commerce any ReplayTV 4000 unit;

3. Preliminarily and permanently enjoin, pursuant to California Business and Professions Code section 17200, Defendants, their officers, agents, servants, employees and those persons in active concert or participation with them, from engaging in one or more unfair and/or unlawful business acts and/or practices, or from licensing any other person to do the same;

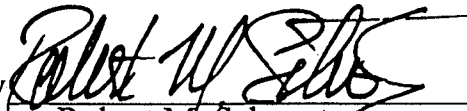
4. Adjudge and declare that (a) Plaintiffs Turner Broadcasting and TWI have the right to terminate the Replay Network Agreement; and (b) Defendant Replay is not relieved of any of its post-termination obligations with respect to the Replay Network Agreement; and

5. Award Plaintiffs such further relief as the Court may deem just and proper.

Dated: November 9, 2001.

ROBERT M. SCHWARTZ
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- and -
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By


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there's always something good on.



ReplayTV 4000

- **The only networked DVR with broadband connectivity**



The ReplayTV 4000 series networked Digital Video Recorder (DVR) takes advantage of broadband connectivity and home networks to deliver a home entertainment experience unlike any other. Now you can share media within and outside the home, access videos over the Internet and manage your home entertainment. ReplayTV 4000s have the highest recording capacity of any DVR on the market today, with up to 320 hours of storage space, and a new feature called Commercial Advance* that allows users to playback their recorded shows without commercials. And let's not forget ReplayTV favorites such as MyReplayTV.com, one-touch recording, QuickSkip™ and no monthly fees.

advantages

- The only networked DVR with broadband connectivity
- Video sharing inside and outside the home
- Highest recording capacity available, with up to 320 hours
- Commercial Advance* to watch recorded shows without commercials

Key features
Networking and multimedia features

- Video sharing between multiple ReplayTV 4000 units in your home
- Video sharing with friends and family owning ReplayTV 4000 units
- Ethernet port for connection to home networks
- PC connectivity for transferring digital photos to and from ReplayTV 4000 units
- iChannels that deliver unique programming over the Internet*
- Broadband-connected nightly downloads from ReplayTV service

* New feature coming soon.

Hardware features

- Highest storage capacity available — up to 320 hours
- Compatible with cable, satellite and antenna programming feeds
- Progressive output provides higher quality image resolution and is compatible with HDTV monitors
- Front panel controls to operate your unit without the remote control
- Backlit remote control

Digital Video Recording features

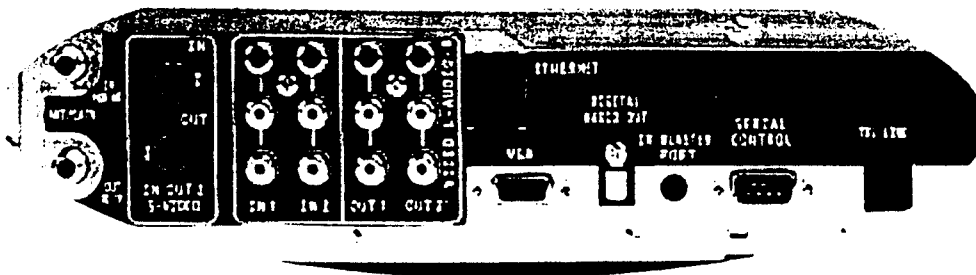
- One-touch recording from a grid-based channel guide
- Easily find shows with keyword search
- ReplayZones™ to browse for shows by category
- MyReplayTV.com for remote programming of your ReplayTV from the Web
- Improved Replay Guide with Show Organizer™ to easily manage shows and photos all in one location
- Immediate and simple resolution of recording conflicts

Live TV and playback controls

- Pause, Instant Replay, Slow Motion, Frame Advance, Multi-speed Rewind and Fast Forward
- QuickSkip™ ahead 30 seconds
- Commercial Advance* to watch recorded shows without commercials
- Slide show playback of personal digital photos
- Screen saver option using digital photos

ReplayTV service

- No monthly fees
- Automatic nightly channel guide download and clock set using broadband connection
- Free software upgrades


specifications
Back panel

- Infrared emitter
- Serial port
- RJ-11 telephone jack (not enabled)
- A/C power cord
- Ethernet port
- Inputs
 - RF / ANT for cable (F-type)
 - Line one (2 audio RCA; 1 composite video RCA)
 - Line two (2 audio RCA; 1 composite video RCA; 1 S-Video)
- Outputs
 - Line one (2 audio RCA; 1 composite video RCA)
 - Line two (2 audio RCA; 1 composite video RCA; 1 S-Video)
 - ANT / CATV out
 - Progressive output (VGA connector)
 - Digital audio output (optical connector)

Audio/Video

- Video vertical resolution: 450 lines minimum
- Video signal to noise ratio: 70dB minimum
- Audio frequency response: 20Hz-20KHz +/-1dB
- Differential gain: less than 1% maximum
- Differential phase: less than 1 degree maximum

ReplayTV 4000 series models

- ReplayTV 4040 - 40 hour capacity
- ReplayTV 4080 - 80 hour capacity
- ReplayTV 4160 - 160 hour capacity
- ReplayTV 4320 - 320 hour capacity


www.replaytv.com
EXHIBIT B

57

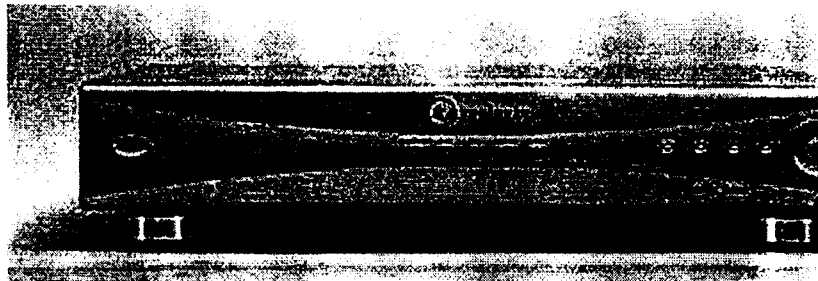
A-21



- **ReplayTV**
- Features
- FAQ
- Interactive Demo
- Technical Specs
- MyReplayTV
- Competitive Matrix
- Product Reviews
- Order Now
- Mail List

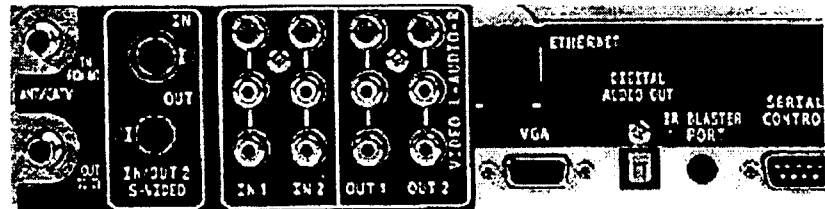
Technical Specifications

FRONT PANEL



- Status indicators:
 - On/Standby
 - New Content Available
 - Recording in Progress
 - Playing Delayed or Recorded Show Indicator
 - New Message Indicator
 - TV/DVR Indicator
- Infrared receiver for remote control
- Custom remote control included
- Power button to put device in Standby mode

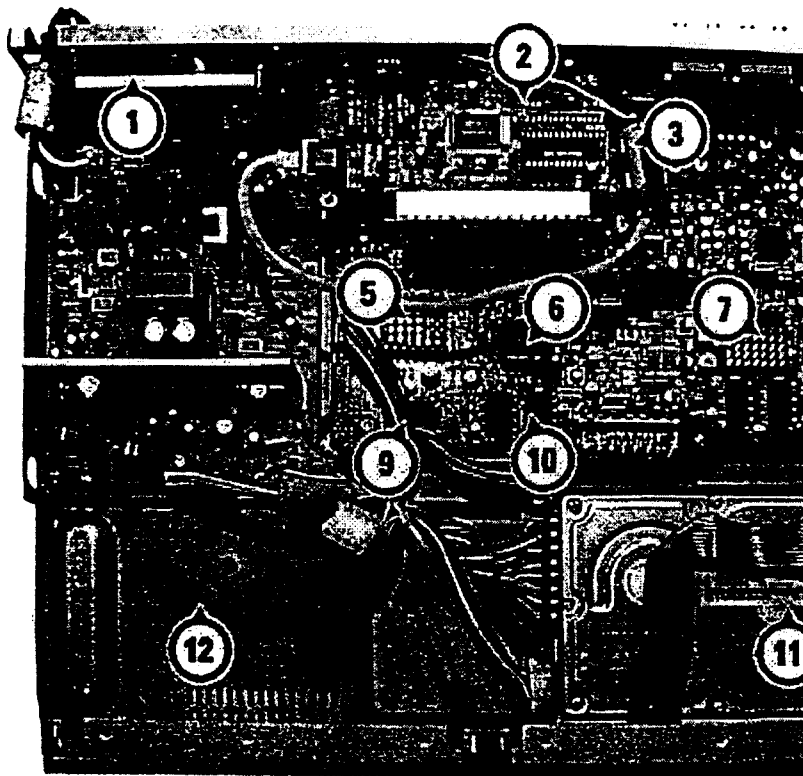
BACK PANEL



- Infrared blaster port
- Serial port
- Ethernet port (RJ-45 connector)
- RJ-11 telephone jack (not enabled)
- A/C power cord
- Inputs:
 - RF/ANT for cable (F-type)

- S-Video
- Line One (2 audio RCA; 1 composite video RCA)
- Line Two (2 audio RCA; 1 composite video RCA; 1 S-Video)
- Outputs:
 - RF/ANT for cable (F-type)
 - S-Video
 - Line One (2 audio RCA; 1 composite video RCA)
 - Line Two (2 audio RCA; 1 composite video RCA; 1 S-Video)
 - Progressive output (VGA connector)
 - Digital Audio output (Optical connector)
- Storage Capacity:
 - Up to 320 hours using MPEG 2 video encoding

BOARD



1. Fan
2. 10/100 base T Network Card
3. FPGA (under Network Card)
4. Tuner
5. CPU
6. System Controller
7. MPEG2 Decoder
8. MPEG2 Encoder
9. Flash BIOS
10. RAM
11. Hard Drive
12. Extra Hard Drive Bay

[View ReplayTV 4000 spec sheet \(PDF document\)](#)

EXHIBIT B
59

A-23

Illustrative Copyright Registrations

Copyright Registrant	Title	Registration No.
Home Box Office	<i>The Sopranos</i>	PA-1-021-745
Home Box Office	<i>The Sopranos</i>	PA-1-021-743
Home Box Office	<i>Sex and the City</i>	PA-1-008-079
Home Box Office	<i>Sex and the City</i>	PA-1-021-357
Warner Brothers, Inc.	<i>Batman</i>	PA-417-162
Warner Bros. Television	<i>ER</i>	PA-992-025
Warner Bros. Television	<i>ER</i>	PA-992-024
Warner Bros. Television	<i>The West Wing</i>	PA-999-327
Warner Bros. Television	<i>The West Wing</i>	PA-999-326
Warner Bros. Television	<i>Friends</i>	PA-1-021-729
Warner Bros. Television	<i>Friends</i>	PA-1-036-645
Warner Bros. Television	<i>The Drew Carey Show</i>	PA-1-036-551
Warner Bros. Television	<i>The Drew Carey Show</i>	PA-1-036-549
Cartoon Network, LP, LLLP	<i>Dexter's Laboratory</i>	PA-957-875
Cartoon Network, LP, LLLP	<i>Dexter's Laboratory</i>	PA-957-874
TNT Originals, Inc.	<i>Pirates of Silicon Valley</i>	PA-949-473
TNT Originals, Inc.	<i>Running Mates</i>	PA-1-003-121
Turner Entertainment Company	<i>Dr. Zhivago</i>	RE-630-136
New Line Productions, Inc.	<i>Rush Hour</i>	PA-911-012
New Line Productions, Inc.	<i>Austin Powers: International Man of Mystery</i>	PA-841-048
Castle Rock Entertainment	<i>When Harry Met Sally</i>	PA-423-275
Castle Rock Entertainment	<i>A Few Good Men</i>	PA-602-887
Castle Rock Entertainment	<i>The Shawshank Redemption</i>	PA-714-744
CR Films, LLC	<i>The Green Mile</i>	PA-986-142

COPY

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19 Attorneys for Plaintiffs

20 UNITED STATES DISTRICT COURT
21 CENTRAL DISTRICT OF CALIFORNIA

RJK

22 METRO-GOLDWYN-MAYER STUDIOS
23 INC., a Delaware corporation; ORION
24 PICTURES CORPORATION, a Delaware
25 corporation; TWENTIETH CENTURY FOX
26 FILM CORPORATION, a Delaware
27 corporation; UNIVERSAL CITY STUDIOS
28 PRODUCTIONS, INC., a Delaware
corporation; and FOX BROADCASTING
COMPANY, a Delaware corporation,

Case No. **01-09801** **VBKx**

COMPLAINT FOR:

1. Copyright Infringement
2. Contributory Copyright Infringement
3. Vicarious Copyright Infringement
4. Violation of Section 553 of the Communications Act
5. Violation of Section 605 of the Communications Act
6. Unfair Business Practices

Plaintiffs,

v.

REPLAYTV, INC., a Delaware corporation;
and SONICblue INC., a Delaware
corporation,

Defendants.

1 Plaintiffs Metro-Goldwyn-Mayer Studios Inc., Orion Pictures Corporation, Twentieth
2 Century Fox Film Corporation, Universal City Studios Productions, Inc., and Fox Broadcasting
3 Company (hereinafter collectively referred to as "Plaintiffs"), by their counsel, allege the
4 following against Defendants ReplayTV, Inc. ("Replay") and SONICblue Inc. ("SONICblue")
5 (hereinafter collectively referred to as "Defendants").
6

7 **Jurisdiction and Venue**

8 1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 & 1338, 17
9 U.S.C. §§ 101 *et seq.*, and 47 U.S.C. §§ 553 and 605. Pursuant to 28 U.S.C. § 1367, this Court
10 has supplemental jurisdiction over Count VI because it is so related to the federal claims as to
11 form part of the same case or controversy. This Court has personal jurisdiction over Defendants
12 ReplayTV, Inc. and SONICblue Inc. due to their operation of their principal place of business in
13 this State and their extensive commercial activities in this State, including this District. Venue is
14 proper in this judicial district pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the
15 events or omissions giving rise to this lawsuit, as well as substantial injury to the Plaintiffs, have
16 occurred or will occur in this District as a result of Defendants' past and impending acts of
17 copyright infringement, violation of the Communications Act, and unfair competition, as alleged
18 in detail below. Venue is also proper in this judicial district pursuant to 28 U.S.C. § 1400(a) in
19 that the Defendants may be found in this district in light of their extensive commercial activities
20 in this district.
21
22

23 **Nature of the Action**

24 2. Plaintiffs bring this action to obtain declaratory and injunctive relief against an
25 unlawful plan by Defendants to begin distribution of a new package of digital recording hardware
26 and services. The various individual components and features of this package and the package as
27 a whole are referred to herein as "ReplayTV 4000". ReplayTV 4000 consists of an "RTV 4040,"
28

1 "RTV 4080," "RTV 4160," or "RTV 4320" hard disc digital video recording device (these
2 models are individually and collectively referred to herein as the "ReplayTV 4000 device") that is
3 integrated with continuous online Internet connections to Defendants' servers and facilities for
4 the express purpose of illegally copying and redistributing Plaintiffs' copyrighted motion pictures
5 and television programs. ReplayTV 4000 is designed and advertised to make unauthorized digital
6 copies of Plaintiffs' copyrighted works, to create and organize libraries and collections of up to
7 320 hours of such unauthorized copies in the hard drive of the device, and to distribute such
8 copies and collections through a built-in broadband Internet connection to others on the World
9 Wide Web. Defendants maintain an online Internet connection between ReplayTV 4000 devices
10 and their customers, on the one hand, and Defendants' servers and facilities, on the other hand,
11 that, *inter alia*, actively seeks, locates, and copies Plaintiffs' copyrighted works to the hard drives
12 of ReplayTV 4000 devices. ReplayTV 4000 devices also incorporate, among other things, a
13 feature that eliminates from the digital playback of recorded television programming the very
14 commercial advertising that allows that programming to be provided to consumers free of direct
15 charge in the case of over-the-air broadcast programming and at minimum tier levels in the case
16 of subscription services ("basic cable"). Through this conduct, Defendants have engaged in and
17 threaten to engage in direct, contributory and vicarious copyright infringement of Plaintiffs'
18 copyrighted works, violations of the Communications Act, and unfair business practices in
19 violation of California Business and Professions Code section 17200.
20
21
22

23 3. ReplayTV 4000 is a new platform, devised and newly introduced by Defendants
24 for their profit. Unless enjoined, ReplayTV 4000 will irreparably injure Plaintiffs and the public.
25 It has been unilaterally devised by Defendants to and will usurp and negate Plaintiffs' rights and
26 ability to structure the presentation and distribution of their copyrighted works so as to maximize
27 the viewing opportunities of the public through various "windows," levels of subscription service,
28

1 and media; will damage Plaintiffs' ability to develop attractive new and varying ways (including
2 but not limited to "video on demand," "subscription on demand," and "near video on demand") to
3 serve market demands for their works; and in all the foregoing respects will thereby seriously
4 impair the interests of the public as well as those of the Plaintiffs.

5
6 **The Plaintiffs**

7 4. Plaintiff Metro-Goldwyn-Mayer Studios Inc. ("MGM") is a Delaware corporation
8 with a principal place of business at 2500 Broadway Street, Santa Monica, California 90404.

9 5. Plaintiff Orion Pictures Corporation ("Orion") is a Delaware corporation with a
10 principal place of business at 2500 Broadway Street, Santa Monica, California 90404.

11 6. Plaintiff Twentieth Century Fox Film Corporation ("Fox") is a Delaware
12 corporation with a principal place of business at 10201 West Pico Boulevard, Los Angeles,
13 California 90035.

14 7. Plaintiff Universal City Studios Productions, Inc. ("Universal") is a Delaware
15 corporation with a principal place of business at 100 Universal City Plaza, Universal City,
16 California 91608.

17 8. Plaintiff Fox Broadcasting Company ("FBC") is a Delaware corporation with a
18 principal place of business at 10201 West Pico Boulevard, Los Angeles, California 90035.

19 9. Plaintiffs are some of the largest, most successful producers and distributors of
20 motion pictures and television programming in the United States. Each of the Plaintiffs is
21 engaged in the business of producing copyrighted motion pictures and television programming, of
22 distributing, publicly performing and displaying those motion pictures and television programs,
23 and/or licensing those activities to others. Plaintiffs, either directly or through their affiliates or
24 licensees, distribute copyrighted audiovisual works theatrically, through television broadcasts, on
25 cable and direct-to-home satellite services, including basic, premium and "pay-per-view"
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27
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1 television services, and on portable media (such as digital versatile discs ("DVDs"), videocassette
2 tapes and laser discs). The names and reputations of the Plaintiffs as producers and distributors of
3 motion pictures and television programs of high artistic and technical quality, and those motion
4 pictures and television programs, are widely and favorably known throughout this Judicial
5 District, the United States, and the world.

7 10. Plaintiffs are the owners of copyright or exclusive reproduction and/or distribution
8 rights under United States copyright with respect to certain copyrighted motion pictures and
9 television programs, including but not limited to those listed on Exhibit A, each of which is the
10 subject of a valid Certificate of Copyright Registration from the Register of Copyrights (or for
11 which an application for such a certificate is pending).

12 11. Plaintiffs have invested and continue to invest substantial sums of money, time,
13 effort, and creative talent to find and develop screenplays and teleplays, to acquire and develop
14 motion pictures and television programs, to nurture the creative teams behind them, to create,
15 produce, advertise, promote, distribute, publicly perform, display, and license motion pictures and
16 television programs, to advertise, distribute, and sell authorized copies of those works in various
17 formats (such as DVDs, videocassette tapes and laser discs), and to explore and develop varying
18 new forms of distribution. Plaintiffs are compensated for their creative and distributive efforts
19 and monetary investments from a variety of sources, including home video sales and rentals,
20 advertising fees, and license fees for televised exhibitions. Many companies and individuals
21 depend on the revenues earned from these sources for their livelihood. Absent the ability to
22 generate revenues to cover such costs and make profits, Plaintiffs could not continue to create,
23 produce, and distribute the works and consider and develop new viewing opportunities for the
24 public. If the pool of resources available for finding and promoting screenplays and teleplays,
25 paying creative teams, and supporting distribution shrinks, the quality and availability of motion
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1 pictures and television programs will suffer. The ultimate result is to diminish the public's broad
2 range of access to a wide variety of high-quality motion pictures and television programs.

3 12. A significant portion of Plaintiffs' revenues comes from license fees and
4 advertising revenue generated by telecasts of motion pictures and television programs on
5 television, including on "network" television (e.g., NBC, ABC, CBS, UPN, the WB Network, or
6 the Fox Network operated by Plaintiff FBC), "cable" television (e.g., FX, TNT, Comedy Central,
7 the USA Network or the Lifetime Network), "independent" stations that acquire syndicated
8 programming content, premium movie "subscription" cable and satellite services (e.g., Home Box
9 Office or Showtime), and "pay-per-view" services. Many networks, stations and services,
10 including the Fox Network, depend upon advertising revenues to cover the costs of creating and
11 licensing content (including from the Plaintiffs). Subscription services (such as Home Box
12 Office) and pay-per-view services fund the purchase and creation of content by charging fees to
13 individual subscribers or viewers.
14

15
16 13. No Plaintiff has granted any license, permission, or authorization to Defendants, or
17 to past, present, or future customers of Defendants, either to reproduce any of their works
18 (including those listed in Exhibit A), or to distribute, over the Internet or otherwise, through
19 ReplayTV 4000, copies of any of their works (including those listed in Exhibit A).
20

21 14. In or about March 2000, Plaintiff FBC entered into an agreement with a
22 predecessor of Defendant ReplayTV with respect to the use of certain FBC content in the limited
23 manner and circumstances set forth in that agreement. As more fully described below, ReplayTV
24 4000, *inter alia*, creates and organizes libraries and collections of up to 320 hours of unauthorized
25 digital copies of FBC programming, causes and facilitates the distribution of those copies and
26 collections to others through a built-in broadband Internet connection, and automatically
27 eliminates commercial advertising. The agreement does not license or authorize any of these uses
28

1 of FBC's programming. In fact, the agreement expressly requires FBC's consent to develop
2 service offerings in addition to those specified in the agreement, and Defendants have neither
3 sought nor obtained such consent. In any event, the agreement does not bar any of the claims
4 asserted herein by FBC.

5
6 **The Defendants**

7 15. Defendant Replay is a Delaware corporation with its principal place of business in
8 Mountain View, California. Replay is a wholly owned subsidiary of Defendant SONICblue.

9 16. Defendant SONICblue is a Delaware corporation with its principal place of
10 business in Santa Clara, California. SONICblue is the parent company of Replay.

11 17. Replay and SONICblue developed, market and sell ReplayTV 4000, including
12 maintaining continuous connections to and integration with ReplayTV 4000 devices, all for the
13 express purpose of illegally copying and redistributing Plaintiffs' copyrighted motion pictures and
14 television programs.
15

16 **Facts Common To All Claims For Relief**

17 **ReplayTV 4000**

18 18. Defendants' ReplayTV 4000 features a ReplayTV 4000 hard disc digital video
19 recorder ("DVR") that makes and distributes to others unauthorized digital copies of copyrighted
20 motion pictures and television programs. Defendants' direction of, involvement with and
21 participation in such activities does not end with the sale of a ReplayTV 4000 "box" to their
22 customers. Defendants proclaim ReplayTV 4000 as the "first networked DVR": ReplayTV 4000
23 includes an online Internet connection that enables Defendants to remain connected with their
24 customers and to cause, participate in and facilitate infringement. Via that broadband connection,
25 Defendants collect information about what their customers copy. Defendants also provide
26 information to their customers, collect information about what their customers want or may want
27
28

1 to copy and/or distribute, and match that information with a frequently updated electronic
2 program guide ("EPG") which Defendants call a "Replay Guide" to accomplish and cause such
3 copying. Through that connection, Defendants also direct the operation of the device from distant
4 locations, and enable their customers to distribute such copies, including over the Internet. Upon
5 information and belief, Defendants' EPG and ReplayTV 4000 include *all* programs exhibited on
6 television, including broadcast, basic and premium satellite and cable, and pay-per-view. Certain
7 features of the Replay TV 4000 are described below.

9 **The Distribution Feature**

10 19. ReplayTV 4000's "Send Show" feature causes, enables and facilitates the unlawful
11 distribution of digitally recorded programs over the Internet to others. On information and belief,
12 ReplayTV 4000 accomplishes, causes, enables and facilitates such unlawful distribution and
13 copying by incorporating a file transfer program that, *inter alia*, presents the customer with a
14 menu, receives the customer's instruction, searches for a program that has been copied and stored
15 by that device, searches for recipient addresses, and formats the program for distribution.

17 20. Defendants assure their customers that using ReplayTV 4000 to infringe
18 copyrights will be effortless: "[W]ith its broadband connectivity, sending and receiving programs
19 [with the ReplayTV 4000] is a breeze." The potential damage to Plaintiffs from this feature is
20 large and growing: millions of Americans presently have high-speed Internet connections and
21 millions more will have such connections in the near future.

23 21. ReplayTV 4000 not only carries out this unlawful conduct, but Defendants
24 highlight it as a principal selling point. Defendants' press release about ReplayTV 4000, for
25 example, urges customers to use the "Send Show" feature to "*trade movies [and] favorite TV*
26 *programs.*" In a September 2001 interview with CNET, SONICblue's Vice President of
27 Marketing said: "*If there's a great movie that you've recorded and you want to send it over to a*
28

1 *friend, you'd be able to do that over your broadband connection.*" (Emphasis added in each
2 case.)

3 22. Defendants' web site features an online demonstration that illustrates how to use
4 the "Send Show" feature to reproduce and distribute recorded programs to other people. The
5 demonstration shows a ReplayTV 4000 customer employing "Send Show" to distribute to third
6 parties digital copies of a copyrighted program. Indeed, Defendants have specifically designed
7 and are actively marketing ReplayTV 4000 as a tool to make it easy to infringe copyrighted
8 material.

9
10 23. With the "Send Show" feature, Defendants cause, accomplish, facilitate and
11 induce the unauthorized reproduction and distribution of Plaintiffs' valuable works and encourage
12 unauthorized access to subscription programming, in violation of both federal and state law. For
13 example, a ReplayTV 4000 customer who has a paid subscription to Home Box Office or another
14 subscription service can send a perfect digital copy of each and every episode of "The Sopranos"
15 (and any other program aired on HBO or any other subscription or pay-per-view service) to any
16 other individual who has a ReplayTV 4000 device, and, on information and belief, to others. This
17 type of activity, which can be accomplished *whether or not the individual receiving the program*
18 *has paid for a subscription to that service*, obviously impacts sales of subscription and "pay-per-
19 view" services. It also impacts the sale of prerecorded DVD, videocassette tape and other copies
20 of programs that have aired on these services, and diminishes the value of programs aired on
21 these services for subsequent cycles of distribution through basic cable, syndication or other
22 licensing.

23
24
25 **The Seeking, Recording, Sorting and Storage Features**

26 24. Defendants cause, accomplish, facilitate and induce the unauthorized reproduction
27 of Plaintiffs' copyrighted works in violation of law. ReplayTV 4000's "Personal Channel," "Find
28

1 Shows," and "Record All Episodes" features allow Replay customers to enter keywords to
2 request that all movies and television shows of a particular genre or in which a particular actor or
3 character (such as James Bond) appears, or all episodes of a particular television program, be
4 recorded. ReplayTV 4000 will actively search the "Replay Guide" EPG seeking programs that
5 "match" customers' keyword searches and "Personal Channel" criteria, and will cause and
6 accomplish the copying of programs that Replay decides "match." In this manner, a Replay TV
7 4000 customer who has created a "James Bond Channel" need not know, *or even suspect* whether
8 or not, or when, a James Bond program is to be telecast, or whether it even *exists*. Defendants
9 will cause and accomplish the copying of any program Replay considers a "James Bond"
10 program. Replay's own materials describe the active role played by Defendants in connection
11 with these features: "Quickly find the show you're looking for based on keyword searches
12 *Let ReplayTV create a channel that continually finds and records* shows that match these
13 interests." Replay "*sets up personal channels that actively seek out* programs that match your
14 interests." (Emphasis added in each case.)

15
16
17 25. The ReplayTV 4000 device provides expanded storage, up to (currently) a massive
18 320 hour hard drive, which allows the unlawful copying and storage of a vast library of material.
19 In order to allow customers to easily locate (and distribute, *see infra*) the programs they archive
20 on this hard drive, Defendants offer "Show Organizer," a feature which sorts and organizes
21 customers' recordings. As Defendants state: "*You'll have more storage space than ever before,*
22 *so we've improved the Replay Guide to help you sort and access all those recorded shows easily*
23 *with Show Organizer. Now you can store Barney and other related shows into the Kids*
24 *category.*" (Emphasis added.) ReplayTV 4000's expanded storage and sorting features organize
25 disparate recordings into coherent collections, and cause, facilitate, induce and encourage the
26 storage or "librarying" of digital copies of copyrighted material, which harms the sale of DVDs,
27
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1 videocassette tapes and other copies, usurps Plaintiffs' right to determine the degree of "air time"
2 a particular program receives in various cycles of that program's distribution (thereby harming
3 the value of that programming for subsequent cycles of distribution through syndication or other
4 licensing), and materially contributes to unlicensed channels which unfairly compete with
5 plaintiffs' licensing of their motion picture and television product.
6

7 26. Defendants' violations are further aggravated by features of ReplayTV 4000 that
8 direct the recording of programs, including through the "Personal Channel," "Find Show," and
9 "Record All Episodes" features, from distant locations through a Replay TV web site, present
10 such digital recordings and collections to the viewer in new, technologically enhanced displays
11 and audio rendition, and cause their distribution to others, including over the Internet.

12 27. If a ReplayTV customer can simply (indeed, even from distant locations) type
13 "The X-Files" or "James Bond" and have every episode of "The X-Files" and every James Bond
14 film recorded in perfect digital form, and organized, compiled and stored on the hard drive of his
15 or her ReplayTV 4000 device, it will cause substantial harm to the market for prerecorded DVD,
16 videocassette and other copies of those episodes and films, and for syndication and subsequent
17 telecasts.
18

19 **The "AutoSkip" Feature**

20 28. The ReplayTV 4000 will also detect and skip commercials on playback of
21 recorded telecasts. Upon activation of the feature by a consumer, the ReplayTV 4000 device, on
22 its own, finds the commercials, passes over them, and determines where the commercials end and
23 programming resumes. Here is how Defendants describe the ReplayTV 4000 AutoSkip feature in
24 a "Frequently Asked Question" on their web site:
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Q. Can ReplayTV play shows without the commercials?

A. Yes! We call the new feature AutoSkip™. Here's how it works. You go to the Replay Guide and select a recorded show that you want to watch. When you select the show, a pop-up menu will ask you if you want to play it with or without commercials. If you choose to skip commercials or "AutoSkip™", then you get to sit back, relax and enjoy your favorite show commercial-free! (Emphasis added)

29. When a television program is copied by ReplayTV 4000 and played back with the AutoSkip feature, Defendants ensure that all commercials are *automatically* omitted when viewing the program, even when viewed in virtually the same time slot as the originally telecast program. The elimination of commercial advertising using the AutoSkip program will cause particular harm to the market for the licensing of Plaintiffs' content for television, in that many stations, networks and services depend upon revenues from a wide variety of commercial advertising arrangements, including payments from advertisers to include commercials during designated breaks within and between programs, and so-called "barter" arrangements, to cover the costs of licensing and producing that programming.

Claims for Relief

**Count I
Copyright Infringement**

30. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1 through 29 as if fully set forth herein.

31. By causing, accomplishing, participating in, and enabling the actual or imminent unauthorized copying and electronic distribution of unauthorized copies of Plaintiffs' works (including the works listed on Exhibit A) in the manner described above, Defendants are engaging in and imminently will engage in a vast number of direct copyright infringements,

1 including infringements of Plaintiffs' copyrighted works, in violation of sections 106 and 501 of
2 the Copyright Act, 17 U.S.C. §§ 106 and 501.

3 32. The foregoing acts of direct infringement by Defendants are unauthorized by
4 Plaintiffs and not otherwise permissible under the Copyright Act.

5 33. Plaintiffs are entitled to their attorneys' fees and full costs pursuant to 17 U.S.C.
6 § 505.

7 34. Defendants' conduct is causing and, unless enjoined and restrained by this Court,
8 will continue to cause Plaintiffs great and irreparable injury that cannot fully be compensated or
9 measured in money. Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. § 502,
10 Plaintiffs are entitled to preliminary and permanent injunctions prohibiting further infringements
11 of Plaintiffs' copyrights.
12

13
14 **Count II**
Contributory Copyright Infringement

15 35. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
16 through 29 as if fully set forth herein.

17 36. By participating in, facilitating, assisting, enabling, materially contributing to, and
18 encouraging the actual or imminent unauthorized copying and electronic distribution of
19 unauthorized copies of copyrighted works by ReplayTV 4000 customers in the manner described
20 above, with full knowledge of their illegal consequences, Defendants are contributing to and
21 inducing a vast number of copyright infringements, including infringements of Plaintiffs'
22 copyrighted works (and including the works listed on Exhibit A), in violation of sections 106 and
23 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.
24

25 37. The unauthorized copying and distribution of Plaintiffs' copyrighted works by
26 ReplayTV 4000 customers that Defendants participate in, facilitate, assist, induce, enable,
27
28

1 materially contribute to, and encourage through the schemes described above is without
2 Plaintiffs' consent and not otherwise permissible under the Copyright Act.

3 38. Defendants know or have reason to know of the actual or imminent infringement
4 of Plaintiffs' copyrights. Indeed, Defendants actively promote the infringements as a reason to
5 purchase their products, provide tools that are indispensable to these infringements, and
6 continuously facilitate the infringements.
7

8 39. As a result of Defendants' conduct, Plaintiffs have suffered and will continue to
9 suffer irreparable injury.

10 **Count III**
11 **Vicarious Copyright Infringement**

12 40. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
13 through 29 as if fully set forth herein.

14 41. Defendants have the right and ability to supervise and/or control the infringing
15 conduct of ReplayTV 4000 customers, including, without limitation, by (a) maintaining a
16 continuous broadband Internet connection between the ReplayTV 4000 devices and their
17 customers on the one hand, and Defendants' servers and facilities on the other hand, that, *inter*
18 *alia*, seeks, locates, and copies Plaintiffs' copyrighted works to the hard drives of the ReplayTV
19 4000 devices, continuously collects information about what Replay customers want or may want
20 to copy and/or distribute, and matches that information with a frequently updated electronic
21 program guide ("EPG") which Defendants call a "Replay Guide;" and (b) specifically designing
22 their equipment (and planning their ongoing connection to their customers) to encourage and
23 cause the unauthorized distribution of infringing copies of copyrighted works when, on
24 information and belief, they could have designed ReplayTV 4000 to prevent or greatly limit such
25 activity.
26
27
28

1 42. Defendants have a direct financial interest in the infringements of Plaintiffs'
2 copyrights by their customers. The infringing conduct that Defendants' seek to encourage is a
3 major "draw" of ReplayTV 4000: indeed, the new infringing capabilities of ReplayTV 4000 are
4 among Defendants' principal selling points. Thus, Defendants derive substantial revenue as a
5 result of infringing activity in the form of increased sales of ReplayTV 4000. On information and
6 belief, Defendants may also derive advertising revenues, revenues from the sale of customer data,
7 or other revenues, by reason of infringing activity.

9 43. Defendants' conduct constitutes vicarious infringement of Plaintiffs' copyrights
10 and exclusive rights under copyright in violation of Sections 106 and 501 of the Copyright Act,
11 17 U.S.C. §§ 106, 501.

12 44. As a result of Defendants' conduct, Plaintiffs will suffer irreparable injury.

14 **Count IV**
Violation of Section 553 of the Communications Act

15
16 45. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
17 through 29 as if fully set forth herein.

18 46. The Communications Act makes it unlawful for any person to intercept or receive
19 or assist in intercepting or receiving any communications service offered over a cable system.
20 unless specifically authorized to do so by a cable operator or as specifically authorized by law.
21 47 U.S.C. § 553. The prohibited conduct includes the manufacture or distribution of equipment
22 intended by the manufacturer or distributor for unauthorized reception of any communications
23 service offered over a cable system.

24
25 47. Defendants' conduct violates Section 553. Among other things, Defendants are
26 selling equipment -- the ReplayTV 4000 device -- with a feature ("Send Show") that they intend
27 to be used to enable persons without authorization to receive communication services offered
28

1 over a cable system, including but not limited to cable-delivered programming of over-the-air
2 television stations, basic nonbroadcast services, premium services, and pay-per-view services.

3
4 **Count V**
Violation of Section 605 of the Communications Act

5 48. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
6 through 29 as if fully set forth herein.

7 49. The Communications Act, with certain exceptions not relevant here, forbids any
8 person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate
9 communication by wire or radio from divulging or publishing the contents thereof except through
10 authorized channels. 47 U.S.C. § 605. The Act also forbids any unauthorized person from
11 receiving or assisting in receiving any interstate communication by radio and using such
12 communication (or any information therein contained) for his own benefit or for the benefit of
13 another unauthorized person. *Id.* By selling (and facilitating the use of) a device which (a) assists
14 in the receipt of interstate communications by wire or radio and the use of such communications
15 for the benefit of unauthorized persons and/or (b) is designed and intended to be used to divulge
16 or publish the contents of such communications through the "Send Show" feature, Defendants are
17 violating Section 605.
18
19

20 **Count VI**
21 **Unfair Business Practices**

22 50. Plaintiffs repeat and reallege each and every allegation contained in paragraphs 1
23 through 29 as if fully set forth herein.

24 51. California Business & Professions Code § 17200 provides for injunctive and other
25 relief against "any unlawful, unfair or fraudulent business act or practice." Defendants are
26 engaged in, or propose to engage in, several such practices.
27
28

1 52. As set forth above, Defendants are engaged in, or propose to engage in, conduct
2 unlawful under Sections 553 and 605 of the Federal Communications Act.

3 53. A significant portion of Plaintiffs' licensing revenue comes from license fees
4 generated by broadcasts of the motion pictures on television, including on "network" television,
5 "cable" television, "independent" stations that acquire syndicated programming content, premium
6 movie "subscription" cable and satellite services, and "pay-per-view" services. Many of those
7 stations, networks and services (including the Fox Network operated by Plaintiff FBC) depend
8 upon revenues from a wide variety of commercial advertising arrangements, including payments
9 from advertisers for the inclusion of commercials during designated breaks within and between
10 programs, and so-called barter arrangements, to cover the costs of licensing Plaintiffs'
11 programming, and producing their own programming. By enabling the instant and complete
12 eradication of an essential revenue-producing aspect of Plaintiffs' business, Defendants are
13 engaged in, or propose to engage in, one or more unfair business acts or practices causing
14 particular harm to the market for the licensing or other exploitation of Plaintiffs' content.

15 54. Plaintiffs have created, developed, invested in, marketed, and branded with a
16 unique and recognizable identity, various television channels and other services. The public has
17 come to recognize these channels and services as inherently distinctive and unique. By recording
18 and organizing recordings of programs from disparate channels and services into coherent
19 collections, including for delivery to others through the "Send Show" function, and by packaging
20 and branding those recordings and collections in such a manner as to cause confusion as to the
21 source or sponsorship of those recordings and collections and to materially contribute to
22 unlicensed channels, and by other conduct alleged above, Defendants are engaged in, or propose
23 to engage in, one or more unfair business acts or practices causing particular harm to the market
24 for the licensing of Plaintiffs' content.

28

1 practices, including but not limited to any activity that encourages viewers to block access to
2 commercial content transmitted during television programming owned by Plaintiffs or offered on
3 a television network owned and/or operated by Plaintiffs, or that encourages or permits customers
4 to transmit copies of such programming to other persons;

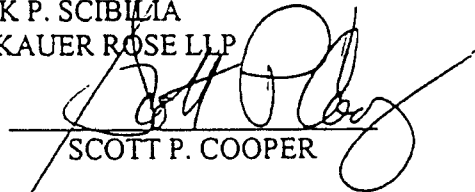
5 (e) award Plaintiffs costs and reasonable attorneys' fees in accordance with 17 U.S.C.
6 § 505, 47 U.S.C. §§ 553 and 605, and other applicable law; and

7 (f) award Plaintiffs such further and additional relief as the Court may deem just and
8 proper.
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Dated: November 14, 2001

SCOTT P. COOPER
JON A. BAUMGARTEN
FRANK P. SCIBILIA
PROSKAUER ROSE LLP

By: 
SCOTT P. COOPER

Attorneys for Plaintiffs METRO-GOLDWYN-MAYER
STUDIOS INC., a Delaware corporation; ORION
PICTURES CORPORATION, a Delaware corporation;
TWENTIETH CENTURY FOX FILM CORPORATION, a
Delaware corporation; UNIVERSAL CITY STUDIOS
PRODUCTIONS, INC., a Delaware corporation; and FOX
BROADCASTING COMPANY, a Delaware corporation

EXHIBIT A

Illustrative Copyright Registrations

<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
Metro-Goldwyn-Mayer Studios Inc.	In the Heat of the Night (Quick Fix)	PA 540-867
Metro-Goldwyn-Mayer Studios Inc.	In the Heat of the Night (Heart of Gold)	PA 526-692
Metro-Goldwyn-Mayer Studios Inc.	Thelma and Louise	PA 538-151
Metro-Goldwyn-Mayer Studios Inc.	Diggstown	PA 584-868
Metro-Goldwyn-Mayer Studios Inc.	Of Mice And Men	PA 627-324
Metro-Goldwyn-Mayer Studios Inc.	Stargate SG-1 (Nemesis)	PA 984-835
Metro-Goldwyn-Mayer Studios Inc.	Stargate SG-1 (New Ground)	PA 984-836
Orion Pictures Corporation	Mississippi Burning	PA 409-351
Orion Pictures Corporation	Back to School	PA 298-065
Orion Pictures Corporation	The Believers	PA 338-035
Orion Pictures Corporation	Bull Durham	PA 392-721
Orion Pictures Corporation	Crimes and Misdemeanors	PA 447-419
Orion Pictures Corporation	Hannah and Her Sisters	PA 288-772

1	<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
2	Orion Pictures Corporation	Married to the Mob	PA 388-993
3	Orion Pictures Corporation	Mermaids	PA 495-687
4	Orion Pictures Corporation	The Silence of the Lambs	PA 512-637
5	Orion Pictures Corporation	Ulee's Gold	PA 857-210
6	Orion Pictures Corporation	Ulee's Gold	PA 857-210
7	Orion Pictures Corporation	Ulee's Gold	PA 857-210
8	Twentieth Century Fox Film Corporation	Ally McBeal (The Obstacle Course)	PA 1-021-810
9	Twentieth Century Fox Film Corporation	Ally McBeal (Queen Bee)	PA 1-022-030
10	Twentieth Century Fox Film Corporation	Ally McBeal (Queen Bee)	PA 1-022-030
11	Twentieth Century Fox Film Corporation	Ally McBeal (Friends And Lovers)	Application Pending
12	Twentieth Century Fox Film Corporation	Ally McBeal (Sideshow)	PA 929-880
13	Twentieth Century Fox Film Corporation	Ally McBeal (Sideshow)	PA 929-880
14	Twentieth Century Fox Film Corporation	Ally McBeal (You Never Can Tell)	PA 904-404
15	Twentieth Century Fox Film Corporation	Boston Public (Chapter Seventeen)	PA 1-021-805
16	Twentieth Century Fox Film Corporation	Boston Public (Chapter Seventeen)	PA 1-021-805
17	Twentieth Century Fox Film Corporation	Boston Public (Chapter Twenty)	PA 1-022-043
18	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Forever)	PA 1-022-018
19	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Forever)	PA 1-022-018
20	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (The Gift)	PA 1-039-849
21	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (The Gift)	PA 1-039-849
22	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Life Serial)	Application Pending
23	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Life Serial)	Application Pending
24	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Enemies)	PA 929-654
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<u>1</u>	<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
2	Twentieth Century Fox Film Corporation	Buffy The Vampire Slayer (Superstar)	PA 982-849
3	Twentieth Century Fox Film Corporation	The Practice (Home Of The Brave)	PA 1-021-988
4	Twentieth Century Fox Film Corporation	The Practice (Poor Richard's Almanac)	PA 1-036-655
5	Twentieth Century Fox Film Corporation	The Practice (Vanished)	Application Pending
6	Twentieth Century Fox Film Corporation	The Practice (Judge And Jury)	PA 918-687
7	Twentieth Century Fox Film Corporation	The Practice (The Blessing)	PA 853-922
8	Twentieth Century Fox Film Corporation	The Simpsons (Trilogy Of Error)	PA 1-021-927
9	Twentieth Century Fox Film Corporation	The Simpsons (I'm Goin' To Praiseland)	PA 1-021-994
10	Twentieth Century Fox Film Corporation	The X-Files (Empedocles)	PA 1-022-024
11	Twentieth Century Fox Film Corporation	The X-Files (Essence)	PA 1-036-776
12	Twentieth Century Fox Film Corporation	The Beach	PA 959-748
13	Twentieth Century Fox Film Corporation	Broadcast News	PA 356-955
14	Twentieth Century Fox Film Corporation	Wall Street	PA 349-001
15	Twentieth Century Fox Film Corporation	X-Men	PA 933-920
16	Universal City Studios Productions, Inc.	American Pie	PA 948-125
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	<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
1			
2	Universal City Studios Productions, Inc.	Dante's Peak	PA 784-073
3			
4	Universal City Studios Productions, Inc.	Ed TV	PA 932-641
5	Universal City Studios Productions, Inc.	Half Baked	PA 870-529
6			
7	Universal City Studios Productions, Inc.	Liar Liar	PA 790-657
8	Universal City Studios Productions, Inc.	October Sky	PA 927-235
9			
10	Universal City Studios Productions, Inc.	The Mummy	PA 933-218
11	Universal City Studios Productions, Inc.	The Mummy Returns	PA 1-033-456
12			
13	Universal City Studios Productions, Inc.	U-571	PA 981-484
14	Fox Broadcasting Company	After Diff'rent Strokes: When The Laughter Stopped	PA 988-593
15			
16	Fox Broadcasting Company	Getting Away With Murder: The Jonbenet Ramsey Story	PA 975-966
17	Fox Broadcasting Company	Police Videos (Episode 16)	PA 1-043-133
18			
19	Fox Broadcasting Company	Police Videos (Episode 17)	PA 1-052-696
20	Fox Broadcasting Company	Powers Of The Paranormal Live On Stage	PA 1-032-116
21			
22	Fox Broadcasting Company	Unauthorized Brady Bunch: The Final Days	PA 988-589
23	Fox Broadcasting Company	Temptation Island (Episode 101)	PA 1-007-617
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	<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
1			
2	Fox Broadcasting Company	Temptation Island (Episode 102)	PA 1-007-618
3			
4	Fox Broadcasting Company	Temptation Island 2 (Episode 201)	Application Pending
5	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 101)	Application Pending
6			
7	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 102)	Application Pending
8	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 103)	Application Pending
9			
10	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 104)	Application Pending
11	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 105)	Application Pending
12			
13	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 106)	Application Pending
14	Fox Broadcasting Company	Love Cruise: The Maiden Voyage (Episode 107)	Application Pending
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11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

14 PARAMOUNT PICTURES
CORPORATION; DISNEY
15 ENTERPRISES, INC.; NATIONAL
BROADCASTING COMPANY,
16 INC.; NBC STUDIOS, INC.;
SHOWTIME NETWORKS INC.;
17 THE UNITED PARAMOUNT
NETWORK; ABC, INC.; VIACOM
18 INTERNATIONAL INC.; CBS
WORLDWIDE INC.; CBS
19 BROADCASTING INC.,

20 Plaintiffs,

21 v.

22 REPLAYTV, INC. and SONICBLUE,
INC.,

23 Defendants.
24

Civ. No. 01-09358-FMC (Ex)

AMENDED COMPLAINT FOR:

1. Direct copyright infringement
2. Contributory copyright infringement
3. Vicarious copyright infringement
4. Violation of Section 553 of the Communications Act
5. Violation of Section 605 of the Communications Act
6. Unfair business practices

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1 Plaintiffs Paramount Pictures Corporation, Disney Enterprises, Inc.,
2 National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks
3 Inc., The United Paramount Network, ABC, Inc., Viacom International Inc., CBS
4 Worldwide Inc., and CBS Broadcasting Inc. (hereinafter referred to as
5 "plaintiffs"), by their counsel, allege the following against defendants ReplayTV,
6 Inc. and SONICblue, Inc. (hereinafter referred to as "defendants").

7 **JURISDICTION AND VENUE**

8 1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 &
9 1338, under the Copyright Act, 17 U.S.C. § 101 *et seq.*, under the Declaratory
10 Judgment Act, 28 U.S.C. §§ 2201(a) & 2202, and under the Communications Act,
11 47 U.S.C. §§ 553 & 605. Pursuant to 28 U.S.C. § 1367, this Court has
12 supplemental jurisdiction over Claim VI because it is so related to the federal
13 claims as to form part of the same case or controversy. This Court has personal
14 jurisdiction over defendants ReplayTV, Inc. and SONICblue, Inc. due to their
15 operation of their principal place of business in this State and their extensive
16 commercial activities in this State, including this District. Venue is proper in this
17 judicial district pursuant to 28 U.S.C. § 1391(b) in that a substantial part of the
18 events or omissions giving rise to this lawsuit, as well as substantial injury to the
19 plaintiffs, have occurred or will occur in this District as a result of defendants'
20 past and impending acts of copyright infringement, violations of the
21 Communications Act, and unfair competition, as alleged in detail below. Venue is
22 also proper in this judicial district pursuant to 28 U.S.C. § 1400(a) in that the
23 defendants may be found in this district in light of their extensive commercial
24 activities in this district.

25 **PRELIMINARY STATEMENT**

26 2. Plaintiffs bring this action to obtain preliminary and permanent relief
27 against an unlawful plan by defendants to arm their customers with -- and
28 continuously assist them in using -- an unprecedented set of tools for violating

1 plaintiffs' copyright interests in the programming they supply to various television
2 distribution services, including their own program services. Defendants' unlawful
3 scheme, which is centered on a new device called a "ReplayTV 4000," is
4 specifically designed to enable defendants to profit from violations of plaintiffs'
5 rights.

6 3. The first new feature that defendants offer their customers with the
7 ReplayTV 4000 -- called "AutoSkip" -- enables and induces their customers to
8 make unauthorized digital copies of plaintiffs' copyrighted television programming
9 for the purpose of, at the touch of a button, viewing the programming with all
10 commercial advertising automatically deleted. This unlawful activity harms the
11 potential market for and value of plaintiffs' copyrighted works because commercial
12 advertising is a crucial (and often the sole) means by which plaintiffs receive
13 payment for such programming.

14 4. With the second new feature, called "Send Show," defendants (in
15 their own words) make it "a breeze" to make perfect digital copies of plaintiffs'
16 copyrighted programs, including entire theatrical motion pictures, and distribute
17 them to other people -- even many other people -- through high-speed Internet
18 connections. This unlawful activity likewise deprives plaintiffs of the means of
19 payment for, and diminishes the value of, their copyrighted works. These new
20 infringing features, which defendants plan to bolster through daily contact with
21 their customers, are the principal selling points of the ReplayTV 4000 package.

22 5. Defendants not only enable and induce unauthorized copying by their
23 users, but actively participate in and cause the unauthorized copying of plaintiffs'
24 copyrighted programming. Among other things, defendants orchestrate and
25 arrange for the creation of massive unauthorized collections of theatrical films and
26 other copyrighted television programs. Each copyrighted work so recorded can
27 then be distributed through the "Send Show" feature to third parties, viewed with
28 all commercials deleted through the "AutoSkip" feature, or both.

1 6. The activity committed directly, enabled, facilitated and supervised by
2 defendants differs radically from the copying of over-the-air broadcast television
3 programming found to be permissible (under certain narrow circumstances and
4 using much simpler technology) in the Supreme Court's 1984 *Sony Betamax*
5 decision. (Plaintiffs do not challenge the use of either VCRs or ordinary digital
6 video recorders for that purpose.)

7 7. The unprecedented new methods of copying and distribution enabled
8 and induced by defendants will deprive plaintiffs of the means of payment for their
9 works and erode the value of plaintiffs' copyrighted programming, in which
10 plaintiffs have invested billions of dollars. In essence, the defendants are seeking
11 to profit from the sale of features that are calculated to disrupt the ability of
12 copyright owners to market their works for telecast by free, over-the-air
13 television, by basic and premium subscription services, and by pay-per-view
14 distribution services. They also seek to profit by creating an unlawful private
15 network for the distribution of perfect digital copies of theatrical films and other
16 copyrighted works.

17 8. Plaintiffs are willing to incur the enormous costs of creating and
18 disseminating television programming (including theatrical films) because
19 copyright provides the economic incentive to do so. Indeed, copyright protection
20 powerfully encourages free expression, since plaintiffs cannot be expected to incur
21 the large costs of producing news and entertainment content (such as television
22 series and theatrical motion pictures) for the public unless they have a way to
23 recoup and profit from those expenditures.

24 9. Copyright owners are rewarded for the creation, production and
25 delivery of copyrighted television programming almost exclusively through one or
26 both of two methods: (i) advertiser support and (ii) subscription fees. In addition,
27 there is a significant market for the sale of theatrical films and many other
28 television programs in the form of videocassettes and DVDs. Defendants'

1 unlawful scheme violates plaintiffs' rights and undermines all of these methods of
2 compensating plaintiffs for the exploitation of their copyrighted works.

3 10. The licensing of most copyrighted works for television viewing is
4 dependent on payments by advertisers for the right to include commercials during
5 designated breaks within and between programs. The sale of commercial time is
6 virtually the sole means of paying for the copyrighted programming offered by
7 free, over-the-air television networks and stations, such as the ABC, CBS, NBC,
8 and UPN television networks owned by plaintiffs and the hundreds of local
9 television stations (many owned by plaintiffs) that broadcast the programming of
10 those networks. Commercial advertising is also a vital source of payment for
11 copyrighted works purchased, licensed, or created by "basic" subscription
12 program services, such as plaintiffs' CNBC, Nickelodeon, and SoapNet services,
13 which are transmitted by distributors such as cable systems and satellite carriers.
14 Both over-the-air and basic subscription program services depend on being able to
15 deliver to advertisers consumer audiences of pre-determined size and demographic
16 characteristics.

17 11. Defendants' unlawful scheme attacks the fundamental economic
18 underpinnings of free television and basic nonbroadcast services and, hence, the
19 means by which plaintiffs' copyrighted works are paid for. Advertisers will not
20 pay to have their advertisements placed within television programming delivered to
21 viewers when the advertisements will be invisible to those viewers. In effect, by
22 eliminating the embedded advertising, defendants' copying-and-commercial-
23 deletion feature will (as to those viewers who employ the feature) eliminate the
24 source of payment to the copyright owner for the very program being viewed. As
25 a result, defendants' unlawful scheme impairs the value of plaintiffs' works and
26 reduces the incentive for their creation and dissemination. For subscription
27 television program services that depend in part on advertising revenues, use of the
28 "AutoSkip" feature has the same effect. In both cases, the "AutoSkip" feature

1 would fundamentally and inevitably erode the means by which copyright owners
2 are paid for their works and hence the value of the programming they create.

3 12. Copyrighted works created or licensed by cable television networks
4 are paid for, in part, by a second funding source -- payment of subscription (or
5 similar) fees. Such fees help to fund the purchase and creation of content by basic
6 nonbroadcast program services such as Nickelodeon, Toon Disney, and MSNBC,
7 and are virtually the sole means by which copyright owners are paid for
8 programming licensed to "premium" nonbroadcast program services such as
9 Showtime and The Movie Channel, which do not contain or derive any revenues
10 from advertising. The payment of fees to view individual programs is the central
11 feature of pay-per-view distribution systems and, in effect, the means by which
12 copyright owners are paid for content licensed to those systems. Copyrighted
13 works are licensed to all subscription and pay-per-view services on the assumption
14 that viewers of the content will be charged a fee for the content they watch. The
15 ability of copyright owners to be paid for their works would plainly be undermined
16 by any system that facilitates the unauthorized dissemination of the contents of
17 subscription or pay-per-view services for free. Yet defendants' "Send Show"
18 feature promotes and enables precisely such unlawful conduct.

19 13. Defendants' ReplayTV 4000 package is centered on a "digital video
20 recorder," a computer-like device for making perfect digital copies of television
21 programming. The device is usable only with ongoing assistance from defendants
22 in the form of data delivered from defendants' servers each day. The capabilities
23 of defendants' new ReplayTV 4000 go far beyond traditional home recording
24 technology and are instead specifically designed to violate the rights of copyright
25 owners and program services.

26 14. For example, defendants' ReplayTV 4000 offers the ability (without
27 any authorization from copyright owners) to make digital copies of television
28 programs and then to use an "AutoSkip" feature that -- in defendants' own words

1 -- enables viewers "to watch recorded programs totally commercial-free" with a
2 single press of a button. In fact, the ReplayTV 4000 enables the user to set
3 "AutoSkip" so that it will automatically delete all commercials in *all* future
4 playbacks of television programming, without any need to activate the feature for
5 viewing of a particular program. Here is how defendants describe the ReplayTV
6 4000 "AutoSkip" feature in a "Frequently Asked Question" on their web site
7 (www.replay.com):

8 Q. Can ReplayTV play shows without the commercials?

9 A. Yes! We call the new feature "AutoSkip™." Here's how it
10 works. You go to the Replay Guide and select a recorded show that
11 you want to watch. When you select the show, a pop-up menu will
12 ask you if you want to play it with or without commercials. If you
13 choose to skip commercials or "AutoSkip™", *then you get to sit back,*
14 *relax and enjoy your favorite show commercial-free!* (Emphasis
15 added)

16 15. Among the commercials that are automatically eliminated by
17 defendants are many purchased by plaintiffs, some of which are major purchasers
18 of advertising time for, among other things, films currently playing in theaters.
19 Defendant's "AutoSkip" feature also automatically blocks exposure to public
20 service announcements and to advertisements by political candidates -- all of which
21 become invisible to viewers.

22 16. Although defendants position the "AutoSkip" feature as an option,
23 they expect it to be used routinely. Their web site, for example, says this:
24 "You'll still have the choice to watch recorded shows with the commercials, *if you*
25 *really want to*" (Emphasis added.)

26 17. When a user copies a television program with a ReplayTV 4000 and
27 plays it back with the "AutoSkip" feature, defendants ensure that all commercials
28 are *automatically* omitted when viewing the program. Nor is it necessary for a

1 viewer to wait until the program is over for defendants' copying-and-commercial-
2 deletion scheme to work. For example, if a viewer uses the ReplayTV 4000 to
3 record a half-hour comedy that begins at 8 p.m., but starts watching the program
4 at 8:08 with the "AutoSkip" feature, defendants enable the viewer to watch the
5 recorded program at nearly the same time it is being telecast live with no exposure
6 whatsoever to commercials.

7 18. Copying a copyrighted program with a digital video recorder is a
8 violation of the exclusive rights of the copyright owner under Section 106 of the
9 Copyright Act. Such copying is entirely distinguishable from the type of copying
10 which, in narrow and different circumstances, might be defended as a fair use.
11 Copying programming for playback with defendants' "AutoSkip" feature
12 effectively circumvents the means of payment to copyright owners for the
13 programming being viewed and therefore their ability to fund it. Viewers will
14 continue to be able to watch the program, but the copyright owner will be deprived
15 of the means of obtaining payment for the programming. Defendants'
16 copying-and-commercial-deletion scheme thus constitutes copyright infringement.
17 As discussed below, the conduct also constitutes a violation of California law.

18 19. A second new feature offered by defendants to owners of the new
19 ReplayTV 4000 is a function -- revealingly called "Send Show" -- for making and
20 distributing to third parties perfect reproductions of entire copyrighted television
21 programs, including motion pictures. With this feature, defendants facilitate and
22 induce the unauthorized reproduction and distribution of plaintiffs' valuable works
23 and encourage unauthorized access to subscription programming, in violation of
24 both federal and state law.

25 20. Under the Copyright Act, of course, plaintiffs enjoy the exclusive
26 right to copy and to distribute copies of their copyrighted works. 17 U.S.C. §
27 106(1), 106(3). Nothing in the Copyright Act gives defendants or their customers
28 any right to make, for *distribution to third parties*, digital copies of "Will &

1 Grace," "The Tonight Show," "20/20," "Lizzie McGuire," "Daria," or "Rugrats,"
2 much less entire theatrical motion pictures appearing on television, such as "Quiz
3 Show," "Sister Act 2," "102 Dalmatians," "Powder," "Election," "Planes, Trains,
4 and Automobiles" or "The Talented Mr. Ripley." These practices violate not only
5 the Copyright Act but also the federal Communications Act and California law.

6 21. Defendants assure their customers that using the ReplayTV 4000 to
7 infringe copyrights will be effortless: "[W]ith its broadband connectivity, sending
8 and receiving programs [with the ReplayTV 4000] is a breeze." And the potential
9 customer base for this feature is large and growing: some 10 million U.S.
10 households are expected to have high-speed Internet connections by the end of
11 2001, with continued growth anticipated thereafter. There are also some nine
12 million broadband connections in college dormitory rooms nationwide, and at least
13 30 million more in workplace, government, and academic institutions.

14 22. Defendants' unlawful "Send Show" feature is designed to violate
15 plaintiffs' rights in all types of programming, from over-the-air broadcast
16 programs to basic, premium, and pay-per-view nonbroadcast offerings. For
17 example – with defendants' explicit encouragement and instruction – a ReplayTV
18 4000 owner can record a movie exhibited on Showtime (such as "The Talented
19 Mr. Ripley") and use defendants' "Send Show" feature to reproduce and transmit a
20 perfect digital copy of the movie to many other people, none of whom subscribes
21 to Showtime. This unlawful scheme not only jeopardizes the ability of plaintiffs to
22 obtain payments for subscription and premium channels but also undermines the
23 many other ways in which plaintiffs market their copyrighted works, including
24 pay-per-view transmissions, sale of authorized copies of plaintiffs' works in the
25 form of DVDs and videocassettes, syndication to over-the-air and basic program
26 services, and the developing market for the authorized online distribution of
27 copyrighted works.

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1 23. Defendants not only provide the means to carry out this unlawful
2 conduct but highlight it as a principal selling point of the ReplayTV 4000.
3 Defendants' press release about the ReplayTV 4000, for example, urges customers
4 to use the "Send Show" feature to "*trade movies [and] favorite TV programs.*" In
5 a September 2001 interview with CNET, SONICblue's Vice President of
6 Marketing said: "*If there's a great movie that you've recorded and you want to*
7 *send it over to a friend, you'd be able to do that* over your broadband connection."
8 And an October 9, 2001 email from ReplayTV to potential purchasers tells them
9 they can use the ReplayTV 4000 to transmit copies of "*TV shows & movies [to]*
10 *friends & family over the Internet.*" (Emphasis added in each case.)

11 24. Defendants' web site features an online demonstration that illustrates
12 how to use the "Send Show" feature to reproduce and distribute recorded programs
13 to other people. The demonstration shows a ReplayTV 4000 user employing
14 "Send Show" to distribute to third parties digital copies of a copyrighted program
15 owned by one of the plaintiffs. Indeed, defendants have *specifically designed and*
16 *are actively marketing* their service as a tool to make it easy to infringe
17 copyrighted material.

18 25. Defendants' participation in the unauthorized reproduction and
19 distribution of plaintiffs' works does not end with the sale of a ReplayTV 4000
20 box. Defendants' continued involvement through a broadband connection is
21 necessary for the updated program listing, which they call a "Replay Guide."
22 Users can engage in unauthorized copying of plaintiffs' copyrighted works (for
23 unauthorized viewing without commercials through "AutoSkip" or for
24 unauthorized transmission to third parties through "Send Show") only by using the
25 Replay Guide updated daily by defendants. Defendants also plan to collect
26 information about their customers' use of the ReplayTV 4000 on a daily basis.

27 26. Defendants themselves often directly cause the making of
28 unauthorized copies of plaintiffs' copyrighted works. Each such copy can then be

1 viewed with all commercials deleted or distributed to other parties though the
2 "Send Show" feature. With the "Personal Channels" feature, for example,
3 defendants make discretionary determinations about what programs a user may
4 wish to view, based on limited input from the user, and arrange for the ReplayTV
5 4000 devices to copy particular programs. Defendants also orchestrate the
6 copying of multiple episodes of programming over a period of months.
7 Defendants' customers can view each such unauthorized copy with all commercials
8 deleted. They can also distribute copies of the complete set to third parties --
9 becoming, in effect, unauthorized syndicators of plaintiffs' copyrighted series.

10 27. The plaintiffs in this case are among the largest creators and
11 distributors of copyrighted television programming. Plaintiffs are directly
12 threatened by defendants' marketing, distribution, and sale of tools specifically
13 designed to facilitate and induce infringement of plaintiffs' copyrights by their
14 customers as well as by defendants' own direct infringements. Plaintiffs will be
15 harmed in several different capacities: as creators and copyright owners of the
16 programming that defendants help their users to infringe, as owners of over-the-air
17 broadcast networks and stations and subscription television program services, and
18 as distributors of pay-per-view content.

19 28. Plaintiffs seek prompt judicial relief to stop defendants from violating
20 the Copyright Act, the Communications Act, and California law in these ways,
21 and to prevent defendants from licensing these illegal features to third parties.

22 PARTIES

23 29. Paramount Pictures Corporation ("Paramount") is a Delaware
24 corporation with a principal place of business in Los Angeles, California.
25 Paramount owns the copyright in many episodes of television series telecast on a
26 first-run basis or otherwise by U.S. television outlets, including "Frasier," "Soul
27 Food," "Enterprise," "Raising Dad," "Manhunt," "Becker," and "JAG."
28 Paramount also owns the U.S. copyright in many theatrical motion pictures

1 telecast by U.S. television program services or offered through pay-per-view
2 distributors, such as "The Talented Mr. Ripley," "Election," "Sabrina," and
3 "Planes, Trains, and Automobiles." Among the many programs and movies in
4 which Paramount owns the copyright are those listed in Exhibit A.

5 30. Disney Enterprises, Inc. ("Disney") is a Delaware corporation with its
6 principal place of business in Burbank, California. Disney owns the copyright in
7 many episodes of television programs, including "Lizzie McGuire," "Book of
8 Pooh," "Felicity," and "House of Mouse," that are telecast on a first-run basis or
9 otherwise by U.S. television outlets. Disney also owns the copyright in many
10 theatrical motion pictures telecast by U.S. program services or offered through
11 pay-per-view distributors, such as "Quiz Show," "Sister Act 2," "The Waterboy,"
12 "High Fidelity," "102 Dalmatians," and "Powder." Directly or through
13 subsidiaries, Disney also operates numerous nonbroadcast television program
14 services, including the Disney Channel, Toon Disney, and SoapNet. The
15 programs in which Disney owns the copyright include, by way of illustration,
16 those listed in Exhibit B to this Complaint.

17 31. The National Broadcasting Company, Inc. ("NBC") is a Delaware
18 corporation with its principal place of business in New York, New York and with
19 studio facilities in Burbank, California. NBC is a diversified media company that
20 produces news, entertainment, sports, and financial programming for broadcast
21 and cable television, and is the copyright owner of, among other programs,
22 "Saturday Night Live," "The Today Show," "Dateline NBC," and "Meet The
23 Press." NBC is the sole owner of NBC Studios, Inc. ("NBC Studios"), a New
24 York corporation with its principal place of business in Burbank, California. NBC
25 Studios produces television programming and is the copyright owner of "Will &
26 Grace," "Late Night With Conan O'Brien," "The Tonight Show," "Providence,"
27 "Emeril," "Lost," "The Other Half," "The Weakest Link," "Three Sisters," and
28 "Passions" among others. In addition, NBC's thirteen owned and operated

1 television stations produce (and own the copyright in) a variety of programs,
2 including daily news shows. NBC also owns CNBC, Inc., a cable network with
3 its headquarters in Fort Lee, New Jersey, and produces and owns the copyright in
4 most of its programming. Through a joint venture, NBC owns MSNBC Cable,
5 L.L.C., a cable network headquartered in Secaucus, New Jersey, and is the joint
6 or beneficial owner of much of its programming. Representative examples of
7 copyright registrations and/or applications for recently and soon-to-be broadcast
8 programs in which NBC and NBC Studios, Inc. own the copyright are listed in
9 Exhibits C and D.

10 32. Showtime Networks Inc. ("Showtime") is a Delaware corporation
11 with its principal place of business in New York, New York. Showtime offers
12 (through cable systems, satellite carriers, and other distributors) several premium
13 television program services (including Showtime, The Movie Channel, and Flix)
14 consisting of theatrically released feature films, original movies, series, and other
15 programming to subscribers, generally for a separate monthly fee. Showtime
16 owns copyrights in episodes of its programs such as "Queer as Folk" and in many
17 feature-length films such as "Harlan County War," "Out There" and "Rated X."
18 Among the many programs in which Showtime owns the copyright are those listed
19 in Exhibit E. Showtime also operates SET (Showtime Event Television) Pay Per
20 View, which markets and distributes boxing events and concerts on a pay-per-view
21 basis.

22 33. The United Paramount Network ("UPN") is a Delaware partnership
23 with its principal place of business in Los Angeles, California. UPN operates the
24 UPN Network, which offers advertiser-supported free, over-the-air programming
25 to the public in many television markets throughout the United States.

26 34. ABC, Inc. ("ABC") is a New York corporation with its principal
27 place of business in New York, New York. ABC is the legal or beneficial owner
28 of copyrights in numerous ABC Television Network programs, such as

1 "Primetime Thursday," "The View," "Port Charles," "All My Children," "One
2 Life to Live," "General Hospital," "Good Morning America," "Nightline,"
3 "World News Tonight," and "20/20." In addition, ABC's owned and operated
4 television stations produce (and own the copyright in) a variety of programs,
5 including daily news shows. Among the many programs in which ABC owns the
6 copyright are those listed in Exhibit F.

7 35. Viacom International Inc. ("Viacom International") is a Delaware
8 corporation with its principal place of business in New York, New York. Viacom
9 International operates numerous television programming services, including MTV
10 Music Television, MTV2, VH1 Music First, Nickelodeon, TNN The National
11 Network, CMT Country Music Television, and TV Land. Viacom International
12 owns copyrights in numerous television programs appearing on these services,
13 such as "Rugrats" (shown on Nickelodeon), "Daria" (shown on MTV) and
14 "Behind the Music" (shown on VH1). Viacom International also owns copyrights
15 in television programs shown on other U.S. television services, including "The
16 Chris Isaak Show," "Resurrection Blvd.," and "Sabrina, The Teenage Witch."
17 Among the many programs in which Viacom International owns the copyright are
18 those listed in Exhibit G.

19 36. CBS Broadcasting Inc. ("CBS Broadcasting") is a New York
20 corporation with its principal place of business in New York, New York. CBS
21 Worldwide Inc. ("CBS Worldwide"), a subsidiary of CBS Broadcasting, is a
22 Delaware corporation with a principal place of business in New York, New York.
23 CBS Worldwide owns copyrights in numerous programs broadcast on the CBS
24 Network, such as "The Ellen Show," "Touched by an Angel," and "CSI: Crime
25 Scene Investigation." In addition, CBS Broadcasting's 17 owned and operated
26 television stations produce (and own the copyright in) a variety of programs,
27 including daily news shows. Among the many programs in which CBS owns the
28 copyright are those listed in Exhibit H.

1 American public. Some of these services -- such as the ABC, CBS, NBC, and
2 UPN television networks -- transmit that programming to viewers by terrestrial
3 over-the-air broadcasts, which in many cases are retransmitted by cable, satellite
4 and other multichannel video services. Other television program services, such as
5 MSNBC, CNBC, the Disney Channel, Toon Disney, SoapNet, Nickelodeon,
6 MTV, VH1, TNN, CMT, TV Land, Flix, The Movie Channel, and Showtime,
7 are transmitted by distributors such as cable systems and satellite carriers to
8 subscribers who pay a subscription fee to receive these channels. In all cases, the
9 value of -- and hence the incentive for plaintiffs to create -- copyrighted works will
10 be eroded by a technology that undermines the principal means by which copyright
11 owners are paid for such works by television distributors.

12 **The Structure of the Television Industry**
13 **and the Threat Posed by Defendants**

14 42. In the United States today, there are four principal methods by which
15 television programming is transmitted to the public. The first -- and oldest --
16 method is through "free," over-the-air television networks such as ABC, CBS,
17 NBC, and UPN and the hundreds of local terrestrial broadcast stations that carry
18 their programming. Free, over-the-air television networks and local stations both
19 create and license copyrighted content -- largely entertainment, news and sports
20 programming -- on which the public has come to rely for information and
21 entertainment. Virtually the sole means of payment for such copyrighted content
22 is revenue from advertisers who pay for commercials that appear during, or
23 between, television shows. It is the advertising that pays for a particular show that
24 a viewer may choose to watch, whether a first-run program, a rerun during the
25 same season, or a previously aired program offered through syndication.

26 Although nonbroadcast services have attracted an increasing number of viewers

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1 over the past 20 years, broadcast television networks and local stations
2 nevertheless continue to account for a large percentage of all television viewing in
3 the United States.

4 43. Maintaining a nationwide system of free, over-the-air local television
5 stations, which makes news, information, and entertainment available to virtually
6 all Americans without any need to pay subscription fees, has been a crucial public
7 policy goal in the United States for many decades. The creation and acquisition of
8 the copyrighted content that has come to define free, over-the-air television is
9 made possible through commercial advertisements that are embedded in each
10 program. In short, advertisements provide the means of payment for the
11 copyrighted works that the public enjoys at no direct charge.

12 44. The second method of television distribution is through controlled
13 access via so-called "basic" nonbroadcast channels such as Disney Channel, Toon
14 Disney, SoapNet, Nickelodeon, MTV, MTV2, VH1, TNN, CMT, TV Land,
15 CNBC, and MSNBC. The sale of commercial time to advertisers and the
16 collection of fees from distributors such as cable systems and satellite carriers are
17 the means by which such channels create or license copyrighted works. As with
18 over-the-air broadcasting, copyright owners license their works both on a first-run
19 basis and for later telecast in syndication.

20 45. The third model of transmission of television programming in the
21 United States is via premium television program services such as Showtime and
22 The Movie Channel. These services, which are available to subscribers to cable,
23 satellite, and other multichannel video distribution systems, are typically made
24 available to consumers for a substantial monthly fee. Premium services offer
25 original programming, theatrical motion pictures, or both, all without commercial
26 interruption - but only to those who have paid the subscription fee. Subscription
27 fees are the means by which the copyright owners are paid for licensing their
28 works to these services.

1 46. The fourth model of transmission of television programming in the
2 United States is through pay-per-view delivery, in which viewers obtain one-time
3 access to particular programs (such as feature films, live boxing events and
4 concerts) in return for payment of a fee for that access.

5 47. In addition, there is a significant market for the sale of DVDs and
6 videocassettes of theatrical films and other television programs. In the near future,
7 a market is likely to develop for the authorized distribution of theatrical films and
8 other copyrighted programming through broadband Internet connections.

9 48. The creation and licensing of the overwhelming majority of television
10 programs that are offered to American viewers today is made possible by and is
11 completely dependent on the commercial advertising that is embedded in that
12 programming. Advertisements provide the means of payment for each show that a
13 viewer chooses to watch. A feature that completely blocks the delivery of
14 advertising to viewers therefore deprives copyright owners of the means by which
15 they are paid for their works and diminishes both the value of the works and the
16 incentive to create and distribute original content over the medium. By
17 undermining the engine by which content is produced, this unlawful feature will
18 inevitably dry up the source and diminish the quality of the programming that most
19 Americans have come to expect and demand.

20 49. Similarly, the "Send Show" feature will jeopardize the means by
21 which copyright owners are paid for the creation of copyrighted content by
22 nonbroadcast channels (whether basic or premium). Such payments are generated,
23 at least in part, by monthly subscription fees that viewers pay for the privilege of
24 viewing the nonbroadcast network's programming. The "Send Show" feature,
25 however, enables a single person who has paid the monthly subscription fee to
26 make and to transmit to third parties perfect digital copies of the programs offered
27 by subscription channels. This unlawful feature enables the evasion of payments
28 for subscription programming, depriving the copyright owner of the right to

1 control how the work is disseminated and shrinking the subscription base that pays
2 for such programming.

3 50. Finally, the unauthorized copying and distribution of perfect copies of
4 theatrical motion pictures and other programs offered on a pay-per-view basis is a
5 clear violation of plaintiffs' rights. These works are licensed and paid for on the
6 basis that each viewer who wishes to see a work will pay a fee for such viewing.
7 No permission is granted to reproduce and disseminate copies of the work to those
8 who have not likewise paid for its exhibition. Indeed, it is self-evident that the
9 unauthorized dissemination of works enabled by the "Send Show" feature defeats
10 the means by which the copyright owner has agreed to be compensated for the
11 exhibition of its work. Viewers who obtain unauthorized digital copies of such
12 programs from other viewers have no reason to agree to pay-per-view fees to
13 obtain access to them. Defendants' unlawful service is also a direct threat to the
14 legitimate sale of copies of television programming (including feature films) in the
15 form of videotapes or DVDs.

16 Defendants' ReplayTV 4000

17 51. The ReplayTV 4000 is a type of digital video recorder. (The
18 ReplayTV 4000 line consists of at least four specific models, the "RTV 4040,"
19 "RTV 4080," "RTV 4160," and "RTV 4320.") Far from being a stand-alone
20 device, the ReplayTV 4000 is capable of copying television programs only through
21 continuous assistance from defendants. Via a broadband connection, defendants
22 continuously collect information about what their customers want or may want to
23 copy and/or distribute, and match that information with a daily updated electronic
24 program guide ("EPG"), which defendants call a "Replay Guide." The Replay
25 Guide lists on the television screen all television programming available to the
26 viewer. By clicking on particular programs listed on the Replay Guide, including
27 programs owned by plaintiffs, the viewer can program the ReplayTV 4000 to
28 record and store those programs onto a hard drive built into the box.

1 Significantly, and unlike standard video recorders, defendants' ReplayTV 4000
2 also enables users to make digital copies of television programs for the unlawful
3 purpose of playing them with all commercials deleted, and to copy and distribute
4 copyrighted works without authorization to third parties.

5 **Defendants' Commercial Deletion Technology**

6 52. As defendants themselves boast in their marketing materials, the
7 ReplayTV 4000 "does what no other [digital video recorder] on the market can
8 do": it enables viewers to make unauthorized digital copies of copyrighted
9 television programs and then use defendants' "AutoSkip" function (also called
10 "Commercial Advance") to eliminate any exposure to the advertising that is the
11 lifeblood of most television channels. On their web site, defendants explain the
12 "AutoSkip" function as follows: it "[a]llows ReplayTV 4000 users to playback
13 recorded programming while automatically bypassing all commercials. It's
14 commercial-free television."

15 53. A demonstration program on defendants' web site (www.replay.com)
16 shows potential customers how "AutoSkip" works. The demonstration shows a
17 Replay Guide (the on-screen program guide updated daily by defendants), which
18 lists several copyrighted television programs such as "CSI: Crime Scene
19 Investigation" (CBS), "Friends" (NBC), "Just Shoot Me" (NBC), and "General
20 Hospital" (ABC). The demonstration instructs users to "select the show you want
21 to watch from your Replay Guide" and highlights the listing for ABC's "General
22 Hospital." Another frame then displays a pop-up menu within the Replay Guide
23 and explains that this "pop-up menu gives you the option to play the show without
24 any commercials." The demonstration directs the viewer to select the option "Skip
25 Commercials," and then announces that the viewer can now enjoy
26 "commercial-free entertainment!" According to the demonstration, the program

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1 can be played commercial-free only by using the Replay Guide supplied (and
2 updated daily) by defendants. Copies of this segment of defendants' demonstration
3 are attached as Exhibit I.

4 54. The unauthorized making of copies of television programming for the
5 purpose of viewing with all commercials (and all public service announcements
6 and all political advertisements) automatically deleted is not a fair use, and goes
7 far beyond the narrowly circumscribed conduct discussed by the Supreme Court in
8 the 1984 *Sony Betamax* decision.

9 **Defendants' Facilitation of Unauthorized**

10 **Distribution of Plaintiffs' Programs and Films**

11 55. The "Send Show" feature of the ReplayTV 4000 package enables
12 owners of a ReplayTV 4000 (in Replay's own words) to "share programs with
13 friends who also own ReplayTV 4000." Defendants' "Send Show" feature
14 enables, materially contributes to, and induces the unlawful distribution of
15 copyrighted works owned by plaintiffs.

16 56. For example, according to defendants' web site, a ReplayTV 4000
17 owner could, with a few clicks on a remote control, send any television program
18 whatsoever -- including, for example, a theatrical film such as "Con Air" or "The
19 Talented Mr. Ripley" exhibited on the Showtime service -- to a large number of
20 third parties, regardless of whether the third parties themselves had a subscription
21 to the program service from which the program was copied. This would make it
22 unnecessary for those third parties to subscribe to Showtime, jeopardizing its
23 business and (over time) its existence, as well as the market for the sale of
24 copyrighted works to Showtime and similar premium services. A ReplayTV 4000
25 owner could do the same with many theatrical motion pictures, boxing events,
26 concerts and other copyrighted works owned by plaintiffs and transmitted on a
27 pay-per-view basis.

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1 57. Defendants' on-line demonstration shows potential ReplayTV 4000
2 customers how to use the "Send Show" feature. The demonstration illustrates how
3 easy it is to use the feature by showing how to send a copy of the show "General
4 Hospital" -- owned by one of the plaintiffs -- to a third party. Copies of this
5 segment of defendants' demo program are attached as Exhibit J.

6 58. The "Send Show" function is similar to the music infringement
7 scheme recently enjoined in the *Napster* case. Just as Napster established a
8 commercial business that was predicated on -- and knowingly benefited from -- the
9 unlawful copying and distribution of music files by users, defendants plan to create
10 a network in which they facilitate, induce, and profit from the unlawful
11 distribution of feature films and other television programming costing millions
12 (and in some cases tens or hundreds of millions of dollars) to produce.

13 59. With the "Send Show" feature, defendants facilitate and induce the
14 unauthorized reproduction and distribution of plaintiffs' valuable works and
15 encourage unauthorized access to subscription programming, in violation of both
16 federal and state law. For example, a ReplayTV 4000 user who has a paid
17 subscription to Showtime can (and is encouraged by defendants to) create a
18 permanent copy of all of the episodes that make up an entire season of a Showtime
19 series such as "Queer as Folk," and can (and is urged by defendants to) distribute
20 the complete set to third parties, whether or not the individual receiving the
21 program has paid for a subscription to Showtime. (Defendants themselves arrange
22 for the copying of the many episodes that make up the season.) On information
23 and belief, customers can use the "PC Connectivity" feature of the ReplayTV 4000
24 to distribute copyrighted programs and films to anyone with a PC and a broadband
25 connection.

26 60. The "Send Show" feature also jeopardizes, in many ways, the system
27 by which costly copyrighted programming is offered by free, over-the-air
28 television networks and local stations. For example, advertisers who pay stations

1 to run advertisements of purely local relevance will not be willing to pay for
2 viewers in their local area who see the station's national programming via an
3 unauthorized copy distributed by a viewer (through defendants' "Send Show"
4 service) in another market with different local advertisements. (Of course, if the
5 "AutoSkip" feature is not stopped, few ReplayTV users will see commercial
6 advertising or promotional spots in any event.)

7 61. The unauthorized dissemination of copyrighted over-the-air
8 programming will also impair the ability of copyright owners to realize its value
9 and fund the costs of that programming through reuse of the programming in a
10 variety of ways. Daytime dramas broadcast by ABC television stations, for
11 example, are later shown on SoapNet, a nonbroadcast channel available to cable
12 and satellite viewers; network newscasts are often broadcast again on local cable
13 news channels; many episodes of primetime and late night programs are televised
14 again during the same season as reruns; several popular network prime-time
15 dramas are shown on nonbroadcast program services shortly after their initial
16 network broadcast; and many television series are shown in syndication after their
17 initial network run. By enabling, inducing, and continuously facilitating the
18 unauthorized copying and distribution of this programming, defendants diminish
19 plaintiffs' ability to market these reuse rights.

20 62. The "Send Show" feature will also harm several of the plaintiffs in
21 their capacity as owners of television stations in a number of U.S. television
22 markets and as copyright owners who seek to achieve maximum value from their
23 programming through repurposing.

24 63. Sending a copy of a copyrighted television program to a third party
25 goes far beyond the scope of the fair use defense. Indeed, defendants have
26 specifically designed and customized the "Send Show" function to encourage and
27 provide for the easy infringement of copyrighted works delivered by program
28 services.

1 copyright owners of the works listed in Exhibits A-H as well as many other
2 copyrighted works telecast by U.S. television program services. The plaintiffs
3 have obtained (or applied for) copyright registration certificates for each work
4 listed in Exhibits A-H.

5 68. On information and belief, employees or agents of defendants, other
6 users of the ReplayTV 4000, including testers, have already infringed (or will
7 soon infringe) plaintiffs' exclusive rights under 17 U.S.C. § 106 in many
8 copyrighted works, including the illustrative works identified in Exhibits A-H
9 hereto.

10 69. More generally, defendants actively participate in the actual or
11 imminent unauthorized copying, distribution, and creation of derivative works
12 based on, unauthorized copies of plaintiffs' works (including the works listed on
13 Exhibits A-H) in the ways described above. By these acts, defendants are
14 engaging in a vast number of copyright infringements, including infringements of
15 plaintiffs' copyrighted television programs and motion pictures, in violation of
16 sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

17 70. Each infringement by defendants of each of plaintiffs' rights in and to
18 their copyrighted works constitutes a separate and distinct act of infringement.

19 71. The foregoing acts of infringement by defendants have occurred
20 without plaintiffs' consent and are not otherwise permissible under the Copyright
21 Act.

22 72. The foregoing acts of infringement by defendants have been willful,
23 intentional, and purposeful, in disregard of and with indifference to plaintiffs'
24 rights, and are causing and will continue to cause irreparable injury to plaintiffs.

25 **COUNT II: Contributory Copyright Infringement**

26 73. Plaintiffs repeat and incorporate by reference, as if fully set forth
27 herein, the allegations of ¶¶ 1-65 and 67-72 above.

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1 74. Use of the ReplayTV 4000 to copy and distribute plaintiffs'
2 copyrighted works without authorization is a violation of plaintiffs' exclusive
3 rights under 17 U.S.C. § 106.

4 75. Among other things, and without limitation, this conduct amounts to
5 (a) unauthorized reproduction of plaintiffs' copyrighted works, (b) unauthorized
6 distribution of copies of plaintiffs' copyrighted works to the public, and (c)
7 unauthorized creation of derivative works based on plaintiffs' works.

8 76. Defendants' activities described above cause and facilitate
9 infringements of plaintiffs' copyrights.

10 77. The unauthorized copying and distribution of plaintiffs' copyrighted
11 works that defendants enable, encourage, and facilitate through the schemes
12 described above is without plaintiffs' consent and not otherwise permissible under
13 the Copyright Act.

14 78. On information and belief, employees or agents of defendants, other
15 users of the ReplayTV 4000, including testers, have already infringed (or will
16 soon infringe) plaintiffs' exclusive rights under 17 U.S.C. § 106 in many
17 copyrighted works, including the illustrative works identified in Exhibits A-H
18 hereto.

19 79. Defendants know or have reason to know of the direct infringement of
20 plaintiffs' copyrights. Indeed, defendants actively promote the infringements as a
21 reason to purchase their products, provide tools that are indispensable to these
22 infringements, and continuously facilitate the infringements.

23 80. Defendants, through their own conduct, have induced, caused,
24 encouraged, assisted and/or materially contributed to this infringing activity.

25 81. The foregoing acts of infringement by defendants have been willful,
26 intentional and purposeful, in disregard of and with indifference to the rights of
27 plaintiffs.

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1 82. Defendants' conduct constitutes contributory infringement of
2 plaintiffs' copyrights and exclusive rights under copyright in violation of Sections
3 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 & 501.

4 83. As a result of defendants' conduct, plaintiffs have suffered and will
5 continue to suffer irreparable injury.

6 **COUNT III: Vicarious Copyright Infringement**

7 84. Plaintiffs repeat and incorporate by reference, as if fully set forth
8 herein, the allegations of ¶¶ 1-65, 67-72, and 74-83 above.

9 85. Defendants have the right and ability to supervise and/or control the
10 infringing conduct of users of the ReplayTV 4000. *First*, defendants have made a
11 deliberate decision to offer their users features that are specifically designed to
12 enable widespread infringements, when they have the ability to control or greatly
13 limit that conduct by declining to offer or to facilitate or support use of those
14 unlawful features. *Second*, although defendants could, on information and belief,
15 have designed (or could alter) their equipment to control the unauthorized
16 distribution of copyrighted works delivered by television program services (such as
17 NBC, the Disney Channel, and Showtime) or on a pay-per-view basis, they instead
18 specifically designed their equipment (and planned their ongoing assistance to their
19 customers) to encourage distribution of such copyrighted works. *Third*,
20 defendants' regular involvement is an indispensable link in their customers'
21 infringing conduct.

22 86. Defendants have a direct financial interest in the infringements of
23 plaintiffs' copyrights by their customers. Defendants' economic success is directly
24 tied to the popularity of the infringing conduct that they seek to encourage.
25 Indeed, the defendants have candidly admitted that the ReplayTV 4000 is designed
26 to enable users to copy programming for viewing with automatic deletion of

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1 commercials, and that the ReplayTV 4000 is designed to enable users to distribute
2 perfect digital copies of entire copyrighted works to others. These new infringing
3 capabilities of the ReplayTV 4000 are among defendants' principal selling points.

4 87. Defendants' acts have been willful, intentional and purposeful, in
5 disregard of and with indifference to the plaintiffs' rights.

6 88. Defendants' conduct constitutes vicarious infringement of plaintiffs'
7 copyrights and exclusive rights under copyright in violation of Sections 106 and
8 501 of the Copyright Act, 17 U.S.C. §§ 106, 501.

9 89. As a result of defendants' conduct, plaintiffs will suffer irreparable
10 injury.

11 **COUNT IV -- Violation of Section 553 of the Communications Act**

12 90. Plaintiffs repeat and incorporate by reference, as if fully set forth
13 herein, the allegations of ¶¶ 1-65, 67-72, 74-83, and 85-89 above.

14 91. The Communications Act makes it unlawful for any person to
15 intercept or receive or assist in intercepting or receiving any communications
16 service offered over a cable system, unless specifically authorized to do so by a
17 cable operator or as specifically authorized by law. 47 U.S.C. § 553. The
18 prohibited conduct includes the manufacture or distribution of equipment intended
19 by the manufacturer or distributor for unauthorized reception of any
20 communications service offered over a cable system.

21 92. Defendants' conduct violates Section 553. Among other things,
22 defendants are selling equipment -- the ReplayTV 4000 device -- with a feature
23 ("Send Show") that they intend to be used to enable persons without authorization
24 to receive communication services offered over a cable system, including but not
25 limited to cable-delivered programming of over-the-air television stations, basic
26 nonbroadcast services, premium services, and pay-per-view services.

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1 **COUNT V -- Violation of Section 605 of the Communications Act**

2 93. Plaintiffs repeat and incorporate by reference, as if fully set forth
3 herein, the allegations of ¶¶ 1-65, 67-72, 74-83, 85-89, and 91-92 above.

4 94. Defendants' conduct violates 47 U.S.C. § 605, which, with certain
5 exceptions not relevant here, forbids any person receiving, assisting in receiving,
6 transmitting, or assisting in transmitting, any interstate communication by radio
7 from publishing the contents thereof except through authorized channels. By
8 selling (and facilitating the use of) a device intentionally designed and intended to
9 be used to publish the contents of communications by radio through the "Send
10 Show" feature, defendants are violating Section 605.

11 **COUNT VI -- Unfair Competition under Cal. Bus. & Prof. Code § 17200**

12 95. Plaintiffs repeat and incorporate by reference, as if fully set forth
13 herein, the allegations of ¶¶ 1-65, 91-92, and 94 above.

14 96. California Business & Professions Code § 17200 provides for
15 injunctive and other relief against "any unlawful, unfair or fraudulent business act
16 or practice." Defendants are engaged in, or propose to engage in, several such
17 practices.

18 97. Plaintiffs operate numerous television program services that are
19 available only by subscription, including the Disney Channel, Toon Disney,
20 SoapNet, Nickelodeon, MTV Music Television, MTV2, VH1 Music First,
21 Nickelodeon, TNN The National Network, CMT Country Music Television, TV
22 Land, CNBC, MSNBC, The Movie Channel, Showtime, and Flix.

23 98. In their capacity as owners and operators of television program
24 services, plaintiffs operate a lawful business of packaging attractive content with
25 advertising paid for by third parties. A basic premise of this business is that the
26 advertising is tied to the attractive content. Defendants have engaged in one or
27 more unfair business acts and/or unfair business practices by providing a device
28 that enables users to instantly and completely eradicate an essential

1 revenue-producing aspect of plaintiffs' business. By doing so, defendants have
2 engaged (or propose to engage) in a highly unfair business practice. Plaintiffs are
3 also harmed by this unlawful practice in their capacity as advertisers (*e.g.*, of
4 current theatrical films).

5 99. The public policy of the State of California favors the maximum
6 production of news and entertainment programming by means of television.
7 Defendants' conduct works to defeat that policy by sabotaging the ability of
8 plaintiffs to obtain compensation for their news and entertainment programming.

9 100. As set forth above, defendant's conduct is unlawful under Sections
10 553 and 605 of the Federal Communications Act. In addition, unlawful reception
11 of subscription television services, and facilitation of such unlawful reception, is a
12 violation of California law. Cal. Penal Code §§ 593d, 593e. By facilitating and
13 encouraging conduct that amounts to receipt by nonsubscribers of content offered
14 on a subscription-only basis, defendants are engaging in conduct that has the
15 functional effect of a violation of Cal. Penal Code §§ 593d and 593e. This is a
16 grossly unfair business practice.

17 101. Each of the aforementioned business acts and/or practices is
18 oppressive and/or substantially injurious to plaintiffs and/or the general public.
19 With respect to each of the aforementioned business acts and/or practices, the
20 gravity of the harm to plaintiffs and the general public outweighs the utility, if any,
21 of defendants' conduct.

22 **PRAYER FOR RELIEF**

23 WHEREFORE, plaintiffs pray that this Court enter judgment in their favor
24 and against defendants as follows:

25 A. Adjudge and declare, pursuant to the Declaratory Judgment Act, 28
26 U.S.C. § 2201(a) & 2202, that defendants have contributorily and vicariously
27 infringed plaintiffs' exclusive rights under the Copyright Act, plaintiffs' rights
28 under the Communications Act, and plaintiffs' rights under California law;

1 B. Preliminarily and permanently enjoin, pursuant to 17 U.S.C. § 502,
2 defendants, their officers, agents, servants, employees and those persons in active
3 concert or participation with them, from directly, contributorily and/or vicariously
4 infringing by any means plaintiffs' exclusive rights under the Copyright Act, and
5 from licensing any other person to do the same,

6 C. Preliminarily and permanently enjoin defendants from violating
7 Sections 553 and 605 of the Communications Act;

8 D. Preliminarily and permanently enjoin, pursuant to Cal. Bus. & Prof.
9 Code § 17200, defendants, their officers, agents, servants, employees and those
10 persons in active concert or participation with them, from engaging in one or more
11 unfair and/or unlawful business acts or practices, including but not limited to,
12 through any provision, use or support of the "AutoSkip" or "Send Show" functions
13 or any similar functions, or from licensing any other person to do the same;

14 E. Require defendants and their officers, agents, servants, employees and
15 those persons in active concert to cease any activity that encourages viewers to
16 block access to commercial content transmitted during television programming
17 owned by plaintiffs or offered on a television network owned and/or operated by
18 plaintiffs, or that encourages or permits users to transmit copies of such
19 programming to other persons;

20 F. Award plaintiffs their costs and reasonable attorney's fees in
21 accordance with 17 U.S.C. § 505, 47 U.S.C. §§ 553 & 605, and other applicable
22 law; and

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1 G. award plaintiffs such further and additional relief as the Court may
2 deem just and proper.

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4 Respectfully submitted,

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7 By: _____

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26
27 Dated: November 27, 2001
28

TABLE OF EXHIBITS

1
2 A. Table of illustrative copyright registrations for programs owned by
3 Paramount Pictures Corporation

4 B. Table of illustrative copyright registrations for programs owned by
5 Disney Enterprises, Inc.

6 C. Table of illustrative copyright registrations for programs owned by
7 National Broadcasting Co.

8 D. Table of illustrative copyright registrations for programs owned by
9 NBC Studios, Inc.

10 E. Table of illustrative copyright registrations for programs owned by
11 Showtime Networks Inc.

12 F. Table of illustrative copyright registrations for programs owned by
13 ABC, Inc.

14 G. Table of illustrative copyright registrations for programs owned by
15 Viacom International Inc.

16 H. Table of illustrative copyright registrations for programs owned by
17 CBS Broadcasting Inc.

18 I. Segments about "AutoSkip" feature from demonstration video

19 J. Segments about "Send Show" feature from demonstration video

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

DT (MAN)

COLUMBIA PICTURES
INDUSTRIES, INC., a Delaware
corporation; COLUMBIA PICTURES
TELEVISION, INC., a Delaware
corporation; COLUMBIA TRISTAR
TELEVISION, INC., a California
corporation; and TRISTAR
TELEVISION, INC., a Delaware
corporation,

Plaintiffs,

v.

REPLAYTV, INC., a Delaware
corporation; and SONICBLUE INC., a
Delaware corporation,

Defendants.

CASE NO. **01-10221**

COMPLAINT FOR:

- 1. COPYRIGHT INFRINGEMENT**
- 2. CONTRIBUTORY COPYRIGHT INFRINGEMENT**
- 3. VICARIOUS COPYRIGHT INFRINGEMENT**
- 4. VIOLATION OF SECTION 553 OF THE COMMUNICATIONS ACT**
- 5. VIOLATION OF SECTION 605 OF THE COMMUNICATIONS ACT**
- 6. UNFAIR BUSINESS PRACTICES UNDER CALIFORNIA BUSINESS AND PROFESSIONS CODE § 17200, et seq.**

McDERMOTT, WILL & EMERY
ATTORNEYS AT LAW
LOS ANGELES

1 Plaintiffs Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc.,
2 Columbia TriStar Television, Inc., and TriStar Television, Inc. (collectively, "Plaintiffs")
3 allege:

4 **JURISDICTION AND VENUE**

5 1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and
6 1338, under the Copyright Act, 17 U.S.C. § 101, *et seq.*, and under the Communications
7 Act, 47 U.S.C. §§ 553 and 605. Pursuant to 28 U.S.C. § 1367, this Court has
8 supplemental jurisdiction over Plaintiffs' state law claim (Count VI) because it is so
9 related to Plaintiffs' federal claims as to form part of the same case or controversy.

10 2. This Court has personal jurisdiction over defendants ReplayTV, Inc.
11 ("Replay") and SONICblue Inc. ("SONICblue") (collectively, "Defendants"), and venue is
12 proper in this Judicial District pursuant to 28 U.S.C. § 1391(b). Defendants both maintain
13 their principal places of business in California and conduct extensive commercial
14 activities in this State, including in this Judicial District. Further, a substantial part of the
15 events or omissions giving rise to this lawsuit, as well as substantial injury to Plaintiffs,
16 have occurred or will occur in this District as a result of Defendants' acts of copyright
17 infringement and impending acts of copyright infringement, violations of the
18 Communications Act, and unfair competition, as alleged in detail below. Venue is also
19 proper in this Judicial District pursuant to 28 U.S.C. § 1400(a) in that Defendants may be
20 found in this District in light of their extensive commercial activities in this District.

21 **THE PARTIES**

22 3. Plaintiff Columbia Pictures Industries, Inc. ("Columbia Industries") is a
23 Delaware corporation with its principal place of business in Culver City, California.

24 4. Plaintiff Columbia Pictures Television, Inc. ("Columbia Television") is a
25 Delaware corporation with its principal place of business in Culver City, California.

26 5. Plaintiff Columbia TriStar Television, Inc. ("CTTV") is a California
27 corporation with its principal place of business in Culver City, California

28 6. Plaintiff TriStar Television, Inc. ("TriStar Television") is a Delaware

1 corporation with its principal place of business in Culver City, California.

2 7. Plaintiffs are informed and believe, and on that basis allege, that defendant
3 Replay is a Delaware corporation with its principal place of business in Mountain View,
4 California. Plaintiffs are further informed and believe, and on that basis allege, that
5 Replay is a wholly-owned subsidiary of defendant SONICblue.

6 8. Plaintiffs are informed and believe, and on that basis allege, that defendant
7 SONICblue is a Delaware corporation with its principal place of business in Santa Clara,
8 California. Plaintiffs are further informed and believe, and on that basis allege, that
9 SONICblue is the parent company of Replay.

10 BACKGROUND FACTS

11 Plaintiffs' Motion Picture and Television Program Content

12 9. Plaintiffs are among the largest and most successful producers and
13 distributors of motion pictures and television programming in the United States and the
14 world. Plaintiffs are engaged in the business of developing, producing, and distributing,
15 and licensing to others the right to distribute and exhibit, motion pictures and television
16 programming.

17 10. Plaintiffs are the owners of United States copyrights in a substantial number
18 of motion pictures and television programs. For example, Columbia Industries owns the
19 copyrights or the exclusive distribution rights in such major motion pictures as *Big Daddy*,
20 *First Knight*, *28 Days*, *The End of the Affair*, and *Charlie's Angels*; Columbia Television
21 owns the copyrights or exclusive distribution rights in many episodes of television series
22 telecast by United States television networks and individual stations, including such
23 television series as *Ripley's Believe It Or Not*, *V.I.P.*, and *The Ricki Lake Show*; CTTV
24 owns the copyrights in television series, including *Dawson's Creek*, *Family Law*, and *King*
25 *of Queens*; and TriStar Television owns the copyrights in such television series as *Mad*
26 *About You* and *The Nanny*.

27 11. Plaintiffs have registered or filed applications to register with the United
28 States Copyright Office their copyrights in each of the works identified in Paragraph 10

1 above. Attached hereto as Exhibit A, and incorporated herein by this reference, is a
2 schedule of illustrative copyright registrations for certain works in which Plaintiffs own
3 the copyright or exclusive distribution rights.

4 12. Plaintiffs, either directly or through their affiliates or licensees, distribute
5 their audiovisual works for exhibition in theaters, through television broadcasts, on cable
6 and direct-to-home satellite services (including basic, premium, and "pay-per-view"
7 television services), and/or on portable media (e.g., digital versatile discs ("DVDs") and
8 videocassette tapes).

9 13. Plaintiffs have invested (and continue to invest) substantial sums of money
10 and effort each year to develop, produce, and distribute motion pictures and television
11 programs protected under copyright and other laws. Defendants' actions, as described
12 below, deprive Plaintiffs of exclusive rights under copyright and other laws, and the
13 economic value of such rights, including the following:

14 a. Advertiser Supported Broadcasts. Plaintiffs derive value from
15 licensing their copyrighted material for broadcast exhibition to television networks like
16 ABC, CBS, Fox, NBC, and The WB Television Network (and stations affiliated with
17 them), and hundreds of local, independent terrestrial broadcast stations around the
18 country. Networks and stations finance payment for those licenses by selling time for
19 commercial advertisements inserted in or adjacent to each program. Plaintiffs derive
20 additional value from so-called "barter" arrangements whereby, in exchange (in whole or
21 in part) for the licensing of Plaintiffs' content, Plaintiffs receive broadcasting commercial
22 advertising time, which Plaintiffs then resell.

23 b. Basic Cable Channels. Plaintiffs also generate value by licensing
24 their motion pictures and television programs for exhibition through so-called "basic"
25 non-broadcast television channels such as TBS, TNT, and Lifetime. The principal means
26 by which non-broadcast channels derive revenues to pay Plaintiffs for licensing of
27 Plaintiffs' content are from the sale of commercial time to advertisers and from fees paid
28 by distributors such as cable systems and satellite carriers (who in turn receive monthly

1 fees paid by subscribers).

2 c. Premium Pay Television Program Services. Plaintiffs also generate
3 value by licensing their motion pictures and television programs for exhibition via
4 premium pay television program services such as Showtime, HBO, and Starz/Encore.
5 Premium services, which are available to subscribers to cable, satellite, and other multi-
6 channel video distribution systems, are typically made available to consumers for a
7 monthly fee. The premium services use these subscription fees to fund licensing of
8 Plaintiffs' works.

9 d. Pay-Per-View, Video On Demand, and Near Video On Demand.
10 Plaintiffs further derive value by licensing their motion pictures and television programs
11 for viewing by the public through pay-per-view delivery (in which a viewer obtains one-
12 time access to a particular program, such as a feature film, a live boxing event, or a
13 concert, in return for payment of a fee for that access), video on demand (in which a
14 viewer can choose to watch a particular program at any time of the viewer's choosing, also
15 in return for payment of a fee for that access), and near video on demand (in which a
16 viewer can choose to watch a particular program at one of several times offered by the
17 program distributor, also in return for payment of a fee for that access). Video on
18 demand, near video on demand, and pay-per-view services (collectively, "pay-per-view")
19 fund the licensing of Plaintiffs' content with the access fees charged to individual viewers.

20 e. Home Video Exhibition. Plaintiffs also generate value from the sale
21 or rental for home viewing of authorized copies of their copyrighted works in various
22 formats, including video cassette and DVD.

23 14. To encourage Plaintiffs and others to create and exploit their works, the law
24 permits Plaintiffs, as the owners of copyrights or exclusive distribution rights in their
25 works, to control, among other things, the copying, distribution, and public performance
26 of those works. Interference with this control will erode the value of Plaintiffs' works,
27 and hence undermine the incentive for Plaintiffs to create expressive works. In addition,
28 the amount of monies available to Plaintiffs for the development, production, and

1 distribution of Plaintiffs' works will be substantially reduced if the amount of advertising
2 revenues and subscription fees to Plaintiffs' licensees is reduced, or if, by reason of the
3 making available of free copies of Plaintiffs' works, the home video market is adversely
4 affected.

5 **Defendants' ReplayTV 4000**

6 15. Defendants' ReplayTV 4000 is comprised of a ReplayTV 4000 hard disc
7 digital video recorder ("DVR") and related services that make and distribute to third
8 parties unauthorized digital copies of copyrighted motion pictures and television
9 programs. The ReplayTV 4000 DVR (including the models "RTV 4040," "RTV 4080,"
10 "RTV 4160," or "RTV 4320" DVR (collectively the "ReplayTV 4000 unit")) is integrated
11 with continuous online Internet connections to Defendants' servers and facilities. (The
12 ReplayTV 4000 unit and related services are collectively referred to as "ReplayTV
13 4000".)

14 16. ReplayTV 4000 includes the following: (a) a feature that permits
15 ReplayTV 4000 to record and store programs identified by key words entered by
16 Defendants' customers; (b) expanded storage, including a massive hard drive that at
17 present permits permanent librarying of up to 320 hours of programs, thus fostering the
18 copying and distribution of a vast amount of material protected by copyright; (c) a feature
19 that sorts and organizes these unauthorized recordings; (d) an Internet service that from
20 remote locations causes the recording of programs, thus further increasing the
21 unauthorized copying and distribution of Plaintiffs' works; (e) a feature that automatically
22 permits the viewing of recorded programs "commercial free," and that therefore ensures
23 that all, or almost all, commercials are automatically omitted when viewing the program;
24 and (f) a function that allows the unauthorized distribution and public performance from a
25 user's ReplayTV 4000 unit over the Internet of copies of motion pictures or television
26 programs protected by copyright, including Plaintiffs' motion pictures and television
27 programs, to at least 15 third party members of the public who also own the ReplayTV
28 4000 unit.

1 17. No Plaintiff has granted any license, permission, or authorization to
2 Defendants, or to past, present, or future customers of Defendants, to use ReplayTV 4000
3 to copy, to distribute, or to perform publicly, over the Internet or otherwise, any of
4 Plaintiffs' works (including those listed in Exhibit A).

5 18. Defendants cause, accomplish, facilitate, and induce the unauthorized
6 reproduction, distribution, and public performance of Plaintiffs' valuable works and
7 encourage unauthorized access to subscription programming, in violation of both federal
8 and state law. For example, a ReplayTV 4000 customer who has a paid subscription to a
9 premium pay television service (like HBO or Showtime) can send a perfect digital copy of
10 any program transmitted on that service (or on any other subscription or pay-per-view
11 service) to any other individual who has the ReplayTV 4000 unit. This type of activity,
12 which can be accomplished whether or not the individual receiving the program has paid
13 for a subscription to that service, obviously diminishes sales of subscription and "pay-per-
14 view" services. Such activity also diminishes the sale of prerecorded DVD, videocassette
15 tape, and other copies of programs transmitted by these services, and negatively impacts
16 the value of these programs in subsequent distribution cycles (e.g., syndication).
17 ReplayTV 4000's expanded storage and sorting features and Internet service organize
18 disparate recordings into coherent collections, and cause, facilitate, induce, and encourage
19 the "librarying" of digital copies of copyrighted material. These "librarying" features
20 indisputably harm the sale of DVDs, videocassette tapes, and other copies, usurp
21 Plaintiffs' right to determine the degree of "air time" a particular program receives in
22 various cycles of that program's distribution (thereby diminishing the value of that
23 programming for subsequent cycles of distribution through syndication or other
24 licensing), and materially contribute to unlicensed channels that unfairly compete with
25 Plaintiffs' licensing of their motion picture and television product.

26 19. Defendants maintain continuous, direct involvement with their customers
27 well after the sale of each ReplayTV 4000 unit, in that Defendants maintain a permanent
28 online broadband Internet connection between the ReplayTV 4000 units and Defendants'

1 customers, on the one hand, and Defendants' servers and facilities, on the other hand.
2 Upon installation, the ReplayTV 4000 unit communicates with Defendants via the
3 broadband Internet connection. The ReplayTV 4000 unit is programmed to communicate
4 with Defendants each night and to download automatically from Defendants' server a
5 current electronic program guide, such that the user can cause ReplayTV 4000 to record
6 and store those motion pictures and television programs listed on the program guide onto
7 a hard drive built into the unit. Defendants also use the broadband Internet connection to
8 collect information about the types of programs that are copied onto the ReplayTV 4000
9 unit's hard drive and about what programs customers want or may want ReplayTV 4000
10 to copy and/or distribute. In addition, Defendants have the ability, from their own
11 facilities, to update and overwrite the software installed on their customers' devices, which
12 ability will permit Defendants to add features to their service, or remove features from it.

13 20. ReplayTV 4000 threatens to cause extraordinary and continuous harm to
14 Plaintiffs' businesses. Unless enjoined, Defendants' distribution of the ReplayTV 4000
15 unit and their active facilitation of the use of that unit to illegally copy, distribute, and
16 publicly perform Plaintiffs' copyrighted works will irreparably injure Plaintiffs and the
17 public.

18 **CLAIMS FOR RELIEF**

19 **COUNT I**

20 **COPYRIGHT INFRINGEMENT IN VIOLATION OF THE COPYRIGHT ACT.**

21 **17 U.S.C. §§ 101, ET SEQ.**

22 21. Plaintiffs incorporate by reference each and every allegation set forth in
23 paragraphs 1 through 20, inclusive, as though fully set forth herein.

24 22. Plaintiffs are the copyright owners or exclusive distributors of the works
25 listed in Exhibit A, as well as many other motion pictures and television programs
26 transmitted by United States television program services, each of which contain a large
27 number of creative elements wholly original to Plaintiffs and which are copyrightable
28 subject matter under the laws of the United States.

1 23. Plaintiffs have obtained (or have applied for) copyright registration
2 certificates for each work listed in Exhibit A. In doing so, Plaintiffs have complied in all
3 respects with 17 U.S.C. § 101, *et seq.*, the statutory deposit and registration requirements
4 thereof and all other laws governing federal copyrights.

5 24. Each of the works listed in Exhibit A, have, with authorization of Plaintiffs,
6 been recorded, printed, reproduced, published, and distributed throughout the United
7 States and all copies made by Plaintiffs or their licensees under their authority or license,
8 have been made and published in strict conformity with the provisions of 17 U.S.C. §§
9 401 and 409, *et seq.*, and all other laws governing federal copyright.

10 25. By causing, accomplishing, participating in, and enabling the actual or
11 imminent unauthorized copying, electronic distribution, and public performance of
12 unauthorized copies of Plaintiffs' works (including the works listed on Exhibit A) in the
13 manner described above, Defendants are engaging in and imminently will engage in a vast
14 number of direct copyright infringements, including infringements of Plaintiffs'
15 copyrighted works, in violation of sections 106 and 501 of the Copyright Act, 17 U.S.C.
16 §§ 106 and 501.

17 26. The foregoing unauthorized acts by Defendants are not otherwise
18 permissible under the Copyright Act.

19 27. Defendants' acts have caused and will continue to cause substantial
20 irreparable harm that cannot fully be compensated or measured in money to Plaintiffs
21 unless further infringement by Defendants is enjoined and restrained by this Court.
22 Plaintiffs have no adequate remedy at law. Pursuant to 17 U.S.C. § 502, Plaintiffs are
23 entitled to preliminary and permanent injunctions prohibiting further infringements of
24 Plaintiffs' copyrights.

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COUNT II

CONTRIBUTORY COPYRIGHT INFRINGEMENT IN VIOLATION OF THE
COPYRIGHT ACT, 17 U.S.C. §§ 101, ET SEQ.

28. Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 through 20, inclusive, and 22 through 24 as though fully set forth herein.

29. By participating in, facilitating, assisting, enabling, materially contributing to, and encouraging the actual or imminent unauthorized copying, electronic distribution, and public performance of unauthorized copies of Plaintiffs' works (including the works listed on Exhibit A) by ReplayTV 4000 customers in the manner described above, with full knowledge of their illegal consequences, Defendants are contributing to and inducing a vast number of copyright infringements, including infringements of Plaintiffs' copyrighted works, in violation of sections 106 and 501 of the Copyright Act, 17 U.S.C. §§ 106 and 501.

30. Defendants know or have reason to know of the actual or imminent infringement of Plaintiffs' copyrights. Defendants actively promote the infringements as a reason to purchase their products, provide tools that are indispensable to these infringements, and continuously facilitate the infringements.

31. The unauthorized copying and distribution of Plaintiffs' copyrighted works by ReplayTV 4000 customers that Defendants participate in, facilitate, assist, induce, enable, materially contribute to, and encourage through the acts described above is without Plaintiffs' consent and is not otherwise permissible under the Copyright Act.

32. The foregoing acts of infringement by Defendants have been willful, intentional, purposeful, and with indifference to the rights of Plaintiffs.

33. Defendants' acts have caused and will continue to cause substantial irreparable harm that cannot fully be compensated or measured in money to Plaintiffs unless further infringement by Defendants is enjoined and restrained by this Court. Plaintiffs have no adequate remedy at law.

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LOS ANGELES

COUNT III

VICARIOUS COPYRIGHT INFRINGEMENT IN VIOLATION OF THE
COPYRIGHT ACT, 17 U.S.C. §§ 101, ET SEQ.

34. Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 through 20, inclusive, and 22 through 24 as though fully set forth herein.

35. Defendants have the right and ability to supervise and/or control the infringing conduct of the users of ReplayTV 4000. Defendants have the particular right and ability to supervise and/or control such activity as it pertains to the unauthorized copying and distribution of Plaintiffs' copyrighted works by ReplayTV 4000 users.

36. Defendants' regular involvement is an indispensable link in their customers' infringing conduct. Although Defendants could have designed ReplayTV 4000 so as to prevent the making of unauthorized digital copies and the unauthorized distribution of Plaintiffs' copyrighted works, instead Defendants specifically designed ReplayTV 4000 (and planned their ongoing communication with and assistance to their customers) to facilitate the digital copying and distribution of such copyrighted works.

37. Defendants have a direct financial interest in the infringements of Plaintiffs' copyrights by ReplayTV 4000 customers. Defendants' economic success is directly tied to the popularity of the infringing conduct that Defendants seek to encourage. For example, Defendants admit that ReplayTV 4000 is designed to enable users to copy a massive volume of programs (up to 320 hours' worth) and view them without the commercials, and that ReplayTV 4000 is designed to enable users to distribute digital copies of entire copyrighted works to others -- all without permission of the copyrighted owner. These new infringing capabilities of ReplayTV 4000 are among Defendants' principal selling points.

38. Defendants' acts constitute vicarious infringement of Plaintiffs' copyrights and exclusive rights under copyright in violation of 17 U.S.C. §§ 106 and 501.

39. Defendants' acts have caused and will continue to cause substantial irreparable harm that cannot fully be compensated or measured in money to Plaintiffs

1 unless further infringement by Defendants is enjoined and restrained by this Court.
2 Plaintiffs have no adequate remedy at law.

3 **COUNT IV**

4 **VIOLATION OF SECTION 553 OF THE COMMUNICATIONS ACT,**

5 **47 U.S.C. § 553**

6 40. Plaintiffs incorporate by reference each and every allegation set forth in
7 paragraphs 1 through 20 as though fully set forth herein.

8 41. The Communications Act makes it unlawful for any person to intercept or
9 receive or assist in intercepting or receiving any communications service offered over a
10 cable system, unless specifically authorized to do so by a cable operator or as specifically
11 authorized by law. 47 U.S.C. § 553. The prohibited conduct includes the manufacture or
12 distribution of equipment intended by the manufacturer or distributor for unauthorized
13 reception of any communications service offered over a cable system.

14 42. Defendants' conduct violates Section 553. Among other things, Defendants
15 are selling equipment -- the ReplayTV 4000 unit -- with a distribution feature that
16 Defendants intend to be used to enable persons without authorization to receive
17 communication services offered over a cable system, including but not limited to cable-
18 delivered programming of over-the-air television stations, basic nonbroadcast services,
19 premium services, and pay-per-view services.

20 43. ~~Injury to Plaintiffs is continuing and will continue unless Defendants'~~
21 ~~actions are restrained by the Court. Unless Defendants are enjoined from engaging in~~
22 ~~their wrongful conduct, Plaintiffs will suffer further irreparable injury and harm, for which~~
23 ~~Plaintiffs have no adequate remedy at law.~~

24 44. Plaintiffs are entitled to a preliminary and permanent injunction enjoining
25 and restraining Defendants from the acts violative of Section 553 of the Communications
26 Act set forth above.

27
28

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COUNT V

VIOLATION OF SECTION 605 OF THE COMMUNICATIONS ACT,
47 U.S.C. § 605

45. Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 through 20 as though fully set forth herein.

46. The Communications Act, with certain exceptions not relevant here, forbids any person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate communication by wire or radio from divulging or publishing the contents thereof except through authorized channels. 47 U.S.C. § 605. The Act also forbids any unauthorized person from receiving or assisting in receiving any interstate communication by radio and using such communication (or any information therein contained) for his own benefit or for the benefit of another unauthorized person. *Id.*

47. Defendants' conduct violates Section 605. Defendants are selling (and facilitating the use of) a device -- the ReplayTV 4000 -- which (a) assists in the receipt of interstate communications by wire or radio and the use of such communications for the benefit of unauthorized persons and/or (b) is designed and intended to be used to divulge or publish the contents of such communications through the feature allowing distribution to unauthorized persons.

48. Injury to Plaintiffs is continuing and will continue unless Defendants' actions are restrained by the Court. Unless Defendants are enjoined from engaging in their wrongful conduct, Plaintiffs will suffer further irreparable injury and harm, for which Plaintiffs have no adequate remedy at law.

49. Plaintiffs are entitled to a preliminary and permanent injunction enjoining and restraining Defendants from the acts violative of Section 605 of the Communications Act set forth above.

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COUNT VI

UNFAIR BUSINESS PRACTICE UNDER CAL. BUS. & PROF.
CODE §§ 17200, ET SEQ.

50. Plaintiffs incorporate by reference each and every allegation set forth in paragraphs 1 through 20, inclusive, as though fully set forth herein.

51. California Business and Professions Code § 17200 provides for injunctive and other relief against "any unlawful, unfair or fraudulent business act or practice." As set forth above, Defendants are engaged in, or propose to engage in, conduct unlawful under Sections 553 and 605 of the Federal Communications Act.

52. A significant portion of Plaintiffs' licensing revenue comes from license fees paid by networks, individual stations, and cable/satellite networks and services for programming. These license fees, in turn, depend upon revenues from a wide variety of commercial advertising arrangements, including payments from advertisers for the inclusion of commercials during designated breaks within and between programs. In addition, Plaintiffs derive a substantial portion of their licensing revenue from so-called "barter" arrangements whereby, in exchange (in whole or in part) for the licensing of Plaintiffs' content, Plaintiffs receive commercial advertising time, which Plaintiffs then resell. By enabling the instant and complete eradication of an essential revenue-producing aspect of Plaintiffs' businesses, Defendants are engaged in, or propose to engage in, one or more unfair business acts or practices causing particular harm to the market for the licensing of Plaintiffs' content.

53. Plaintiffs have created, developed, invested in, marketed, and branded with a unique and recognizable identity, various motion picture and television programs. The public has come to recognize these products and services as inherently distinctive and unique. By recording and organizing recordings of programs from these disparate channels and services into coherent collections, including for delivery to others over the Internet, and by packaging and branding those recordings and collections in such a manner as to cause confusion as to the source or sponsorship of those recordings and

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1 collections and by materially contributing to the formation of these unlicensed channels,
2 Defendants are engaged in, or propose to engage in, one or more unfair business acts or
3 practices causing particular harm to the market for the licensing of Plaintiffs' content.

4 54. Each of the aforementioned business acts and/or practices is oppressive
5 and/or substantially injurious to Plaintiffs and/or the general public. With respect to each
6 of the aforementioned business acts and/or practices, the gravity of the harm to Plaintiffs
7 and the general public outweighs the utility, if any, of Defendants' conduct.

8 55. Defendants' conduct, as alleged above, was malicious, fraudulent,
9 deliberate, willful, intentional, or oppressive.

10 56. Injury to Plaintiffs is continuing and will continue unless Defendants'
11 actions are restrained by the Court. Unless Defendants are enjoined from engaging in
12 their wrongful conduct, Plaintiffs will suffer further irreparable injury and harm, for which
13 Plaintiffs have no adequate remedy at law.

14 57. Plaintiffs are entitled to a preliminary and permanent injunction enjoining
15 and restraining Defendants from the acts of unfair business practice set forth above, and to
16 reasonable attorneys' fees and costs of suit.

17 **PRAYER FOR RELIEF**

18 **WHEREFORE**, Plaintiffs pray that this Court enter judgment in their favor and
19 against Defendants, and each of them, as follows:

20 (a) ~~adjudge and declare that Defendants' activities constitute direct,~~
21 contributory, and vicarious copyright infringement, violate Sections 553 and 605 of the
22 Communications Act, and constitute an unlawful, unfair, or fraudulent business act or
23 practice under Section 17200 of the California Business & Professions Code;

24 (b) preliminarily and permanently enjoin, pursuant to 17 U.S.C. § 502,
25 Defendants, their officers, agents, servants, employees, and those persons in active concert
26 or participation with them, from directly, contributorily, and/or vicariously infringing by
27 any means Plaintiffs' exclusive rights under the Copyright Act, including, but not limited
28 to any of Plaintiffs' rights in any of the works listed on Exhibit A, and from licensing any

1 other person to do the same;

2 (c) preliminarily and permanently enjoin Defendants, their officers, agents,
3 servants, employees, and those persons in active concert or participation with them, from
4 violating Sections 553 and 605 of the Communications Act, including but not limited to
5 by engaging in any activity that enables persons to transmit copies of cable television
6 programming to other persons, or enables persons without authorization to receive such
7 programming;

8 (d) preliminarily and permanently enjoin, pursuant to California Business &
9 Professions Code § 17200, Defendants, their officers, agents, servants, employees, and
10 those persons in active concert or participation with them, from engaging in one or more
11 unfair and/or unlawful business acts or practices, including, but not limited to any activity
12 that encourages or enables viewers to block access to commercial content transmitted
13 during television programming owned by Plaintiffs or offered on a television network
14 owned and/or operated by Plaintiffs, or that encourages or permits customers to transmit
15 copies of such programming to other persons;

16 (e) award Plaintiffs costs and reasonable attorneys' fees in accordance with 17
17 U.S.C. § 505, 47 U.S.C. §§ 553 and 605, and other applicable law; and

18 (f) award Plaintiffs such further and additional relief as the Court may deem
19 just and proper.

20 Dated: November 28, 2001

McDERMOTT, WILL & EMERY
ROBERT H. ROTSTEIN
LISA E. STONE

21
22
23 By 
24 ROBERT H. ROTSTEIN
Attorneys for Plaintiffs

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EXHIBIT A

Illustrative Copyright Registrations

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<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
Columbia Pictures Industries, Inc.	Big Daddy	PA 944-737
Columbia Pictures Industries, Inc.	First Knight	PA 722-727
Columbia Pictures Industries, Inc.	28 Days	PA 986-137
Columbia Pictures Industries, Inc.	The End Of The Affair	PA 975-167
Columbia Pictures Industries, Inc.	Charlie's Angels	PA 1-002-272
Columbia Pictures Television, Inc.	Strong Medicine (Fix)	Application Pending
Columbia Pictures Television, Inc.	Strong Medicine (Maternity)	Application Pending
Columbia Pictures Television, Inc.	Strong Medicine (Complications)	Application Pending
Columbia Pictures Television, Inc.	Ripley's Believe It Or Not (Episode #205)	Application Pending
Columbia Pictures Television, Inc.	Ripley's Believe It Or Not (Episode #206)	Application Pending
Columbia Pictures Television, Inc.	Ripley's Believe It Or Not (Episode #207)	Application Pending
Columbia Pictures Television, Inc.	Ripley's Believe It Or Not (Episode #208)	Application Pending
Columbia Pictures Television, Inc.	V.I.P. (Val In Space)	PA 1-036-767
Columbia Pictures Television, Inc.	V.I.P. (It's Val's Wonderful Life)	PA 1-036-762
Columbia Pictures Television, Inc.	V.I.P. (Molar Ice Cap)	PA 1-036-757
Columbia Pictures Television, Inc.	V.I.P. (Val's Big Bang)	PA 1-036-758

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1	<u>Rights Holder</u>	<u>Title</u>	<u>Copyright No.</u>
2	Columbia Pictures Television, Inc.	The Ricki Lake Show (Episode #8191)	Application Pending
3	Columbia TriStar Television, Inc.	Dawson's Creek (Self-Reliance)	PA 1-037-003
4	Columbia TriStar Television, Inc.	Dawson's Creek (Self-Reliance)	PA 1-037-003
5	Columbia TriStar Television, Inc.	Dawson's Creek (Promicide)	PA 1-036-995
6	Columbia TriStar Television, Inc.	Dawson's Creek (Separation Anxiety)	PA 1-036-990
7	Columbia TriStar Television, Inc.	Dawson's Creek (The Graduate)	PA 1-036-996
8	Columbia TriStar Television, Inc.	Dawson's Creek (Coda)	PA 1-036-993
9	Columbia TriStar Television, Inc.	Family Law (Recovery)	PA 1-036-928
10	Columbia TriStar Television, Inc.	Family Law (Clemency)	PA 1-036-929
11	Columbia TriStar Television, Inc.	Family Law (Planting Seeds)	PA 1-036-930
12	Columbia TriStar Television, Inc.	King of Queens (Paint Misbehavin')	Application Pending
13	Columbia TriStar Television, Inc.	King of Queens (Swim Neighbors)	Application Pending
14	Columbia TriStar Television, Inc.	King of Queens (S'no Job)	Application Pending
15	Columbia TriStar Television, Inc.	King of Queens (Pregnant Pause-Part 1)	Application Pending
16	Columbia TriStar Television, Inc.	King of Queens (Pregnant Pause-Part 2)	Application Pending
17	TriStar Television, Inc.	Mad About You (Dry Run)	PA 838-680
18	TriStar Television, Inc.	Mad About You (Guardianhood)	PA 838-681
19	TriStar Television, Inc.	Mad About You (Birth - Part II)	PA 838-685

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1	TriStar Television, Inc.	Mad About You (Coming Home)	PA 887-101
2			
3	TriStar Television, Inc.	The Nanny (The Two Mrs. Sheffields)	PA 817-912
4	TriStar Television, Inc.	The Nanny (Having His Baby)	PA 817-913
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6	TriStar Television, Inc.	The Nanny (The Unkindest Cut)	PA 817-915
7	TriStar Television, Inc.	The Nanny (Where's Fran)	PA 817-666
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9	TriStar Television, Inc.	The Nanny (Your Feet Too Big)	PA 817-823
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17 UNITED STATES DISTRICT COURT
 18 CENTRAL DISTRICT OF CALIFORNIA

19 PARAMOUNT PICTURES
 CORPORATION *et al.*,
 20
 Plaintiffs,
 21
 v.
 22
 REPLAYTV, INC. *et al.*,
 23
 Defendants.
 24
 25
 26 AND CONSOLIDATED ACTIONS
 27

Case No. CV 01-9358 FMC (Ex)
 Hon. Charles F. Eick
**PLAINTIFFS' SUPPLEMENTAL
 MEMORANDUM OF LAW IN
 SUPPORT OF THEIR MOTION
 TO COMPEL**
 Date: April 23, 2002
 Time: 9:00 a.m.
 Courtroom: 20
 Discovery Cutoff: May 31, 2002
 Pretrial Conference: July 29, 2002
 Trial Date: August 20, 2002

1 In this short brief, we highlight the most striking respects in which
2 Defendants seek to block legitimate discovery. With respect to those matters for
3 which there insufficient space here, Plaintiffs rest on the Joint Stipulation. (Pages
4 1-3 of the Joint Stipulation summarize all of materials withheld by Defendants.)

5 1. **Withholding of key documents about the actual design -- and**
6 **alternative designs -- of the ReplayTV 4000.** As Plaintiffs have explained, if
7 Defendants are allowed to make only the narrow, carefully-edited production they
8 propose, neither Plaintiffs nor the Court will ever learn about a wide range of
9 critically relevant documents. See Joint Stipulation for Plaintiffs' Motion to
10 Compel ("Joint Stip.") at 15-21. Remarkably, *Defendants do not dispute that these*
11 *documents will be held back.* Instead, invoking exaggerated claims of burden,
12 Defendants insist that they are *entitled* to keep these documents hidden. Defendants
13 refuse to produce, among (many) other things:

14 • **communications among the technical personnel who designed the**
15 **ReplayTV 4000:** if two engineers exchanged emails about how easy it would be to
16 design the "Send Show" feature to prevent copyright infringement -- but dropped
17 the idea after a lunchtime chat with a top executive -- Plaintiffs and the Court will
18 remain in the dark about it. Joint Stip. at 5 (emails between engineers about design
19 of ReplayTV 4000 will not be produced).

20 • **communications among Defendants' executives about design decisions**
21 **about the ReplayTV 4000:** although Defendants have offered to produce a
22 narrowly defined set of "management decisions and instructions" (Joint Stip. at 4),
23 they refuse to produce any of the (no doubt highly revealing) documents *behind the*
24 *final decision documents.*^{1/}

25 Defendants try to justify their refusal to produce these (and many other)

26
27 ^{1/} Defendants falsely state (Joint Stip. at 24 n.14) that Plaintiffs did not seek the
28 ReplayTV 4000's source code in these Requests. In fact, they did. See, e.g.,
Plaintiffs' Doc. Req. 4 ("documents relating to . . . any actual or proposed . . .
software . . . for use with the ReplayTV 4000 . . ."). Based on that erroneous
claim, Defendants improperly refuse to produce key documents (e.g., flow charts,
algorithms, and memos) explaining the source code. Joint Stip. at 24 n.14.

1 relevant documents with the following baffling logic: that Plaintiffs should review
2 the few documents that Defendants' counsel are willing to produce, and then guess
3 whether those documents are representative of *other* documents *that Plaintiffs have*
4 *never seen*. Joint Stip. at 21, 25. Defendants' rationale for their crabbed "sufficient
5 to show" production makes no sense.

6 Defendants argue that it is irrelevant that they considered and discarded
7 alternative designs for the ReplayTV 4000 (even though they can change the design
8 at will via an online download). Joint Stip. at 26-29. But courts, including the
9 Ninth Circuit in its most recent decision in *Napster*, have routinely found
10 information about design alternatives to be relevant in copyright cases.^{2/} Consider
11 this: Defendants are virtually certain to argue that the "Send Show" feature of the
12 ReplayTV 4000 -- which is designed and marketed as a way to transmit copies of
13 TV shows and movies to third parties -- is legal because it can also be used to
14 engage in the benign activity of transmitting home movies. To enable the Court to
15 evaluate that argument, it is surely *relevant* -- if not dispositive -- if Defendants
16 considered and rejected a design that *completely solves the problem*: that is, a
17 design that *permits* use of "Send Show" to distribute home movies over the Internet
18 but does *not* permit distribution of TV programs and movies.

19 **2. Withholding of data about what works Defendants' customers**
20 **copy and distribute with the ReplayTV 4000.** For reasons explained in detail in
21

22 ^{2/} See, e.g., *A&M Records, Inc. v. Napster, Inc.*, No. 01-15998 et al., slip op. at
23 4806 (9th Cir. Mar. 25, 2002), available at 2002 WL 445550 (requiring Napster to
24 install new filtering mechanism to remove copyrighted works and rejecting
25 company's argument that it was "cabined by the current system's architecture");
26 *Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc.*, 907 F. Supp.
27 1361, 1376 (N.D. Cal. 1995) (rejecting defendants' argument that it could not
28 supervise the infringing activities of its subscribers and relying on expert's opinion
that "with an easy software modification Netcom could identify postings that
contain particular words") (emphasis added); *Playboy Enters., Inc. v. Webbworld,
Inc.*, 991 F. Supp. 543, 553 (N.D. Tex. 1997), *aff'd*, 168 F.3d 486 (5th Cir. 1999)
(pointing out that defendant "might simply have refrained from conducting business
until it had developed software or a manual system of oversight to prevent, or at
least to minimize the possibility of, copyright infringement.") (emphasis added).

1 the Joint Stipulation, it is critically relevant in any copyright case -- and particularly
 2 in this one -- to know what works are being copied and distributed. Defendants
 3 can easily collect this information electronically, and on a strictly anonymous basis.

4 Incredibly, Defendants characterize as "spying" and "Orwellian" the same
 5 strictly anonymous collection of data that (until a few days ago) they told their
 6 customers, this Court, and the SEC they routinely conduct. Joint Stip. at 45-46;
 7 SONICblue 10-Q (4/1/2002) at 37. And Defendants' claim that the data Plaintiffs
 8 seek do not exist (Joint Stip. at 45, 47) is incorrect, as Defendants' own materials
 9 and admissions show.

10 *First*, Defendants concede that their customers' ReplayTV hard drives -- to
 11 which Defendants are continuously connected -- "contain information about what
 12 recordings are presently stored on [the] hard drive." Joint Stip. at 47 n.34.
 13 Defendants also concede (at 51) that they upload this information daily from their
 14 customers who subscribe to the MyReplayTV.com service, and do not dispute that
 15 they could easily upload this same information for *all* of their customers (again, on
 16 an anonymous basis). The information requested -- what works have been
 17 recorded, and are thus available to be transmitted through Send Show, viewed
 18 without commercials, or stored permanently -- is in existence, and is extraordinarily
 19 relevant. Defendants can and should produce it, with appropriate anonymity
 20 protections.

21 *Second*, Defendants are simply mistaken in asserting (at 47) that their
 22 customers' hard drives do not now contain information about what shows have
 23 been transmitted through "Send Show" -- and that they would have to write costly
 24 new software to capture that data. In fact, as Defendants' user manual explains,
 25 programs that have been received through the "Send Show" feature *are separately*
 26 *marked on the user's hard drive* with a special tag: "Received." *See Guide to*
 27 *ReplayTV* at 61 ("Shows that have been sent to you from other users are stored in
 28

1 the **Received** category"). Defendants can thus easily extract from their customers'
2 hard drives the *existing* lists of "Received" programs. Moreover, Defendants'
3 customers' hard drives necessarily contain information about whether a program
4 has been *sent* by the user. The reason is simple: Defendants claim the ReplayTV
5 4000 prevents a single recording from being sent more than 15 times. If so, *the*
6 *ReplayTV 4000 must maintain a record of how many times the recording has been*
7 *sent*. Defendants should provide that information (on an anonymous basis) as well.

8 Defendants also argue, incorrectly, that the Federal Rules impose no
9 obligation to collect critically relevant objective information about how ReplayTV
10 4000 owners use their devices. Joint Stip. at 48-49. Whether or not the information
11 that Plaintiffs have requested is already stored in existing documents, Plaintiffs
12 have served targeted *interrogatories* that require Defendants to take the steps
13 necessary to gather the information requested. As the Supreme Court has explained
14 in an analogous context, there is nothing unusual about directing a party to create
15 software to "retrieve information stored in computers," *see Oppenheimer Fund, Inc.*
16 *v. Sanders*, 437 U.S. 340, 362 (1978), and the same principle applies equally to the
17 duty to extract relevant information to respond to an interrogatory.^{3/}

18 Defendants' suggestion (at 52) that a telephone survey would provide *better*
19 data is nonsensical. *First*, electronically gathering *complete* and *objective* data
20 about what users do (which was not an option in *Sony*) is far superior to collecting
21 incomplete and subjective recollections from hurried users over the telephone.

22 *Second*, since there are currently only 5,000 ReplayTV 4000 owners, there is a

23 ^{3/} *Jones v. Syntex Labs., Inc.*, No. 99C3113, 2001 WL 1338987, at *3 (N.D. Ill.
24 2001) ("duty to fully answer [interrogatory] implies a duty to make reasonable
25 efforts to obtain information within the knowledge and possession of others.");
26 *PHE, Inc. v. Dep't of Justice*, 139 F.R.D. 249, 257 (D.D.C. 1991) (requiring party
27 responding to interrogatories to retrieve computerized information about their
28 distribution operations "[a]lthough no program may presently exist to obtain the
information requested"); *Henderson v. Nat'l R.R. Passenger Corp.*, 113 F.R.D.
502, 507 (N.D. Ill. 1986) (ordering responding party to provide information and
documents necessary to enable plaintiff to develop "sufficient statistical base" as
evidence of claim).

1 grave risk of bias if users in this small community contact each other about the
2 survey and urge others to give the "right answers" to "help" Defendants. See
3 www.planetreplay.com (web site of ReplayTV 4000 users). Third, given the
4 widespread publicity about this lawsuit, customers might fear that candid answers
5 might lead to personal liability for them – and thus decline to give such answers.
6 Fourth, it is almost impossible for adversaries to agree on a joint survey (as
7 Defendants insist be done), and expensive to conduct any survey.

8 **3. Gathering of information from Defendants' customers.** Defendants
9 seem to have written their strident portion of the Joint Stipulation on this issue
10 without reading Plaintiffs' portion. As Plaintiffs painstakingly explained, they do
11 not want to contact or interview Defendants' customers; anonymous electronic
12 data-gathering will be far more complete and accurate and much less intrusive. But
13 Defendants should not be permitted to gather evidence from a set of key witnesses
14 whose identities they refuse to disclose to Plaintiffs.

15 **4. Financial benefits from the ReplayTV 4000 and communications**
16 **with investors.** While conceding that financial benefit is an element of vicarious
17 liability, Defendants pretend that any financial benefits from features such as
18 AutoSkip and Send Show are remote and attenuated. In fact, Defendants promote
19 these features as among the chief reasons to pay hundreds of dollars more to get a
20 ReplayTV 4000 instead of a competing DVR -- making the documents sought here
21 plainly relevant. The case law Defendants cite, such as a recent decision by Judge
22 Cooper (*Ellison*) holding that an infinitesimally minute portion of the AOL service
23 is not a major draw for AOL, is completely inapposite.^{4/}

24 Dated: April 11, 2002. By Thomas P. Olson
25 Thomas P. Olson

26 ^{4/} Defendants also imply that Plaintiffs' counsel would improperly disclose
27 "outside-counsel-only" data about Defendants' contacts with potential investors to
28 Plaintiffs, who would then "impose their powerful influence." Joint Stip. at 86.
There is no basis for this accusation or for withholding documents based on it.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10100 Santa Monica Boulevard, Los Angeles, California 90067.

I served the below listed document described as: **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO COMPEL** on April 11, 2002, on all other parties to this action by delivering a true copy original of the above document to the parties listed below as follows:

SEE ATTACHED SERVICE LIST

X BY FACSIMILE: I caused the foregoing document to be served by facsimile transmission from sending facsimile machine number (310) 712-6199 to each interested party listed above at the facsimile machine telephone number shown. Each transmission was reported as complete and without error. A transmission report was properly issued by the sending facsimile machine for each interested party served.

X BY E-MAIL: I caused the foregoing document to be served by e-mail to each interested party listed herein, at the e-mail addresses shown thereat.

BY MAIL: I caused the foregoing document to be served by mail by placing such envelope addressed as above with postage thereon fully prepaid for deposit in the United States mail in accordance with the office practice of White O'Connor Curry Gatti & Avanzado LLP for collecting and processing correspondence for mailing with the United States Postal Service. I am familiar with the office practice of White O'Connor Curry Gatti & Avanzado LLP for collecting and processing correspondence for mailing with the United States Postal Service, which practice is that when correspondence is deposited with the White O'Connor Curry Gatti & Avanzado LLP personnel responsible for delivering correspondence to the United States Postal Service, such correspondence is delivered to the United States Postal Service that same day in the ordinary course of business.

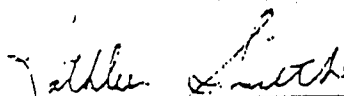
BY FEDERAL EXPRESS, I caused to be served, via Priority delivery, by depositing for Federal Express courier daily pick-up service at our offices.

BY HAND: I placed a true and correct copy thereof in a sealed envelope and instructed a messenger to hand deliver said envelope(s) to the address(es) noted above.

Executed on April 11, 2002 at Los Angeles, California.

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

Kathleen Smith
(Type or print name)


(Signature)

SERVICE LIST

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 01-9358-FMC (Ex)

Date: April 26, 2002

Title: PARAMOUNT PICTURES CORPORATION, et al. v. REPLAYTV, INC., et al.

DOCKET ENTRY

PRESENT:

HON. CHARLES F. EICK, JUDGE

STACEY HAMILTON
DEPUTY CLERK

N/A
COURT REPORTER

ATTORNEYS PRESENT FOR PLAINTIFFS

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

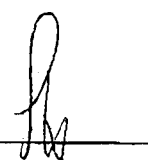
PROCEEDINGS: (IN CHAMBERS)

(Page 1 of 4)

The Court has read and considered all papers filed in support of and in opposition to "Plaintiffs' Motion to Compel" ("the Motion"), filed April 5, 2002. The Court heard oral argument on April 23, 2002.

Defendants shall conduct a reasonable, diligent, good faith search for documents and information within their possession, custody or control, responsive to the document requests and interrogatories referenced herein. Then, within thirty (30) days of the date of this order, Defendants shall produce all non-privileged documents (including drafts) responsive to the document requests referenced herein and shall answer the interrogatories referenced herein.

To the extent the Court now orders discovery to take place, the Court has found: (a) the subject discovery is "relevant" within the meaning of Rule 26(b)(1) of the Federal Rules of Civil Procedure; (b) Defendants have failed to carry their burden of establishing that the subject discovery is unduly burdensome and otherwise have failed to demonstrate "good cause" for a protective order; (c) the discovery sought should not otherwise be limited under Rule 26(b)(2) of the Federal Rules of Civil Procedure; (d) the asserted objections should be overruled; and (e) to the extent responsive



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ATTORNEYS PRESENT FOR PLAINTIFFS

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

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(Page 2 of 4)

information and documents may enjoy protection under any alleged qualified privacy privilege, the Court has determined that the need for disclosure outweighs the interest in maintaining the alleged confidentiality of the information/documents.

The document requests and interrogatories "referenced herein" are: Document Request No. 5; Document Request No. 6; Document Request No. 10; Document Request No. 11; Document Request No. 12; Document Request No. 13; Document Request No. 14; Document Request No. 15 (limited to software or proposed software related to any of the functions mentioned in Document Requests 10-14); Document Request No. 20; Document Request No. 17 (limited to documents sufficient to show the identity of any person provided access to the ReplayTV 4000 for purposes of testing, sampling, reviewing, advertising, promoting, or evaluating the features or functions of the ReplayTV 4000); Paramount Interrogatory No. 16 (limited in the same manner that Document Request No. 17 has been limited); Document Request No. 7 (limited to documents reflecting any such agreement or discussion); Document Request No. 8 (limited to documents reflecting any such contract, agreement, offer, invitation, solicitation, proposal or plan for advertising); Document Request No. 16 (limited to summary-type documents); Document Request No. 27 (limited to

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 01-9358-FMC (Ex)

Date: April 26, 2002

Title: FARAMOUNT PICTURES CORPORATION, et al. v. REPLAYTV, INC., et al.

DOCKET ENTRY

PRESENT:

HON. CHARLES F. EICK, JUDGE

STACEY HAMILTON
DEPUTY CLERK

N/A
COURT REPORTER

ATTORNEYS PRESENT FOR PLAINTIFFS

ATTORNEYS PRESENT FOR DEFENDANTS:

None

None

PROCEEDINGS: (IN CHAMBERS)

(Page 3 of 4)

documents reflecting any such communications); Document Request No. 28 (limited to documents reflecting any such communications); Disney Interrogatory No. 11; Disney Interrogatory No. 12; Document Request No. 29 (limited to documents reflecting any such submission, but including documents reflecting communications between Defendants and Macrovision); Disney Interrogatory No. 15; Document Request No. 26 (limited to documents reflecting any such effort); Document Request No. 25 (limited to documents reflecting any such license agreement); and Disney Interrogatory No. 19.

Additionally, within sixty (60) days of the date of this order, Defendants shall do that which Plaintiffs sought to be ordered at page 43, line 7 through page 44, line 10 of the "Joint Stipulation for Plaintiffs' Motion to Compel," filed April 5, 2002. Unless Plaintiffs elect to excuse Defendants from compliance with this part of the order, Plaintiffs shall bear three-quarters of the reasonable cost of Defendants' compliance with this part of the order.

To the extent Plaintiffs previously agreed or subsequently agree to limit the scope of any of the discovery requests referenced herein, the scope of this order is limited correspondingly.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES-GENERAL

Case No. CV 01-9358-FMC (Ex)

Date: April 26, 2002

Title: PARAMOUNT PICTURES CORPORATION, et al. v. REPLAYTV, INC., et al.

DOCKET ENTRY

PRESENT:

HON. CHARLES F. EICK, JUDGE

STACEY HAMILTON
DEPUTY CLERK

N/A
COURT REPORTER

ATTORNEYS PRESENT FOR PLAINTIFFS

None

ATTORNEYS PRESENT FOR DEFENDANTS:

None

PROCEEDINGS: (IN CHAMBERS)

(Page 4 of 4)

Except as expressly stated herein, the Motion is denied, except: (a) the Court expects that, within thirty (30) days of the date of this order, Defendants will fulfill all of their prior promises to provide discovery pertaining to the subject matter of the Motion; and (b) to the extent the Motion is denied as to portions of Document Request No. 17, Document Request No. 31, and Paramount Interrogatory No. 16, such denial is without prejudice.

Any party seeking review of this order shall cause the preparation and filing of a transcript of the April 23, 2002 hearing.

cc: Judge Cooper
All Counsel of Record

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Initials of Deputy Clerk

EXHIBIT G
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ENTERED
CLERK, U.S. DISTRICT COURT
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MAY
CENTRAL DISTRICT OF CALIFORNIA
BY

FILED
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MAY 30 2002
CENTRAL DISTRICT OF CALIFORNIA
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BY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES)
CORPORATION, et al.,

CV 01-9358 FMC (Ex)

Plaintiff,

ORDER ON PARTIES' MOTIONS
FOR REVIEW OF MAGISTRATE
JUDGE'S DISCOVERY ORDER OF
APRIL 26, 2002

vs.

REPLAY TV, et al.,

Defendants.

This case is before the Court on the parties' requests for review of the Magistrate Judge's Discovery Order of April 26, 2002. The Court deems these matters suitable for resolution without oral argument, and the hearing set for June 3, 2002, is off calendar.

I. Order re Customer Use Data Collection:

A. Documents Considered:

In connection with this motion, the Court has read and considered the following documents:

- *Defendants' memorandum in support of objections and motion for review
- *Declaration of Laurence F. Pulgrum
- *Defendants' objections to Declaration of Craig O. Thomas
- *Plaintiffs' memorandum in opposition
- *Declaration of Simon Block in opposition
- *Defendants' reply memorandum
- *Brief of Technology Industry, *Amici Curiae*, in support of defendant's motion

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1 *Plaintiffs' response to the brief of Technology Industry
2 *Brief of Liberties and Consumer Groups, *Amici Curiae*, in support of
3 defendants' motion.
4 *Transcript of oral argument conducted April 23, 2002.

5 *B. Standard of Review:*

6 The Court has not considered the declaration of Craig O. Thomas in
7 opposition to defendants' motion, because that declaration was not considered
8 by, nor even presented to, the Magistrate Judge. This Court's function, on a
9 motion for review of a magistrate judge's discovery orders, is not to decide what
10 decision this Court would have reached on its own, nor to determine what is the
11 best possible result considering all available evidence. It is to decide whether
12 the Magistrate Judge, based on the evidence and information before him,
13 rendered a decision that was clearly erroneous or contrary to law. *Bhan v.*
14 *Hospitals, Inc.*, (9th Cir. 1991) 929 F.2d. 1404, 1414; F.R.C.P. 72(a); 28 USC
15 §636(b)(1)(A). Therefore, parties objecting to a magistrate judge's order may
16 not present affidavits containing evidence not presented below. *Paddington*
17 *Partners v. Bouchard*, (2nd Cir. 1994) 34 F.3d. 1132, 1137-8.

18 The Court sustains the defendants' objection to the Thomas declaration,
19 because it was not part of the record before the Magistrate Judge. The Court
20 has, for the same reason, not considered the Supplemental and Reply
21 declarations of Philippe Pignon.

22 *C. Order Reviewed:*

23 The Magistrate Judge ordered defendants, within 60 days, to "do that
24 which Plaintiffs sought to be ordered at page 43, line 7 through page 44, line 10
25 of the Joint Stipulation..." By the terms of that order, therefore, defendants are
26 required to:

- 27 (1) take the steps necessary to use their broadband connections with
28 ReplayTV 4000 customers to gather all available information about how
users of the ReplayTV employ the devices, including all available

1 information about what works are copied, stored, viewed with
2 commercials omitted, or distributed to third parties with the ReplayTV
3 4000, when each of those events took place, and the like;

4 (2) implement Defendants' offer to collect available data from a second
5 source – the MyReplayTV.com web site – about how users of the
6 RepayTV employ the devices, but for all time periods for which that data
7 can be collected, rather than just for a short period;

8 (3) provide the foregoing data to Plaintiffs in a readily understandable
9 electronic format and provide any technical assistance that may be
10 necessary for Plaintiffs to review the data;

11 (4) provide Plaintiffs with all documents about Defendants' consideration
12 of what data to gather or not to gather about their customers' uses of the
13 ReplayTV 4000; and

14 (5) provide Plaintiffs with any other documents (such as emails or logs)
15 reflecting what works have been copied with the ReplayTV 4000 and how
16 those works have been stored, viewed, or distributed.

17 *D. Discussion:*

18 Defendants and *amici* raise numerous objections to this Order. Generally,
19 they contend that the order requires not that they produce material in discovery
20 but that they create new data; that the order is, therefore, not a discovery order
21 but an impermissible mandatory injunction; that the burdens on defendants
22 and their customers outweigh any benefit to the plaintiffs, and that the order
23 constitutes a serious and unnecessary invasion of ReplayTV4000 users' privacy
24 rights.

25 Although each of the issues raises serious questions, which have been very
26 well briefed on all sides, the Court is persuaded to reverse the Magistrate
27 Judge's Order on the grounds that it impermissibly requires defendants to
28 create new data which does not now exist. A party cannot be compelled to

1 create, or cause to be created, new documents solely for their production.
2 Federal Rule of Civil Procedure Rule 34 requires only that a party produce
3 documents that are already in existence. *Alexander v. FBI* (D.D.C. 2000) 194
4 F.R.D. 305, 310.

5 The only evidence before the Magistrate Judge on this issue was the
6 uncontroverted declaration of Philippe Pignon, Ph.D., Vice President of
7 Engineering Operations at defendant SONICblue, Inc. According to that
8 declaration, defendants were able to collect some customer-use data from earlier
9 versions of the ReplayTV. In May 2001, following negative publicity about the
10 data collection practices of defendants' competitor, TiVo, defendants stopped
11 all customer data-collection, except for technical information such as error
12 messages. Defendants have never collected customer data (other than limited
13 technical information) from ReplayTV4000 customers. Further, when
14 customer-use data was being gathered from ReplayTV customers, it did not
15 include information concerning Send Show or Commercial Advance, which
16 were not then in existence.¹

17 In order to gather information from customers about "what works are
18 copied, stored, viewed with commercials omitted, or distributed to third parties
19 with the ReplayTV4000 [and] when each of those events took place," defendants
20 would be required to undertake a major software development effort, incur
21 substantial expense, and spend approximately four months doing so.

22 It is evident to the Court, based on Pignon's declaration, that the
23 information sought by plaintiffs is not now and never has been in existence.
24 The Order requiring its production is, therefore, contrary to law. See *National*
25 *Union Elect. Corp. v. Matsushita Elec. Indust. Co.*, 494 F.Supp. 1257, 1261 (E.D.

26
27 ¹These two features are the most significant and relevant in connection
28 with the issues raised in this lawsuit.

1 Pa. 1980)²

2 The Court does not question the relevance of information concerning
3 how customers of ReplayTV4000 use their units. However, this information
4 can be obtained by plaintiffs by conducting surveys, a traditional method of
5 gleaning customer data in copyright-infringement cases.

6 That portion of the Magistrate Judge's Discovery Order of April 26, found
7 at page 3, paragraph 2, is hereby reversed.

8

9 **II. Defendants' Motion for Review of Order re Responses to Document**
10 **Requests No. 35 and 44:**

11 *A. Documents Reviewed:*

12 In connection with this motion, the Court has read and considered the
13 following documents:

- 14 *Defendants' Amended notice of motion for review of the order
- 15 *Defendant's points and authorities in support of the motion
- 16 *Corrected declaration of Emmett C. Stanton in support
- 17 *Plaintiff's opposition
- 18 *Defendant's Reply memorandum
- 19 *Declaration of Jennifer M. Lloyd in support of reply.
- 20 *Transcript of April 23, 2002, oral argument

21 *B. Standard of Review:*

22 A magistrate judge's nondispositive order may be set aside or modified
23 by a district court only if it is found to be clearly erroneous or contrary to law.
24 28 USC §636(b)(a)(A); Federal Rules of Civil Procedure, Rule 72(a).

25 *C. Order Reviewed:*

26 The Magistrate Judge denied defendant's motion to compel the
27 production of the following two items:

28

29 ²This Order does not affect the defendants' obligation to provide to
30 plaintiffs customer-use information presently being collected from the
31 approximately 10% of customers who are subscribers to MyReplayTV.com.

1 believe that the Magistrate made a mistake.³

2 Defendants next argue that the order is inconsistent with the Magistrate
3 Judge's ruling on similar requests and therefore erroneous. The Court
4 disagrees. The Magistrate Judge may well have concluded that his Order
5 compelling the production of other similar information provided the
6 defendants with all the relevant evidence they needed, and that anything
7 further would be excessive and burdensome.

8 The request to reverse this portion of the Magistrate Judge's Order is
9 denied.

10

11 **III. Plaintiff's Objections and Request for Review:**

12 *A. Documents Considered:*

13 In connection with this motion for review, the Court has read and
14 considered the following documents:

- 15 *Plaintiff's notice of motion for review and reconsideration
- 16 *Declaration of Robert H. Rotstein in support of motion
- 17 *Defendants' objections to declarations
- 18 *Plaintiffs' motion to strike portions of defendants' objections
- 19 *Defendants' Opposition
- 20 *Declaration of Emmett Stanton in support of opposition
- 21 *Plaintiffs' Reply

22 The Court has not considered the proffered declarations of Mike Cruz,
23 Frederick A. F. Cooke, Jr., Richard A. Frankie, Michelle Stratton, Del
24 Mayberry, Jane Waxman, Steve Rath, Michael Doodan or David C. Vigilante,
25 because these declarations were not presented to the Magistrate Judge for his
26 consideration. See discussion at section I.B, *supra*.

27

28

29 ³It appears to the Court that it would not be inappropriate for counsel to
30 inquire of the Magistrate Judge whether this portion of his ruling was intentional
31 or inadvertent.

1 *B. Standard of Review:*

2 A magistrate judge's nondispositive order may be set aside or modified
3 by a district court only if it is found to be clearly erroneous or contrary to law.
4 *Bhan v. Hospitals, Inc.* (9th Cir. 1991) 929 F.2d. 1404, 1414.

5 *C. Order Reviewed:*

6 Plaintiffs seek review of five categories of compelled discovery.⁴ These
7 are: (1) confidential financial documents; (2) confidential business plans;
8 (3) documents relating to MovieFly/MovieLink and Movies.com;
9 (4) documents and information in various categories concerning plaintiffs'
10 businesses dating from 1984 to 1996; and (5) documents relating to lobbying.

11 *D. Discussion:*

12 The Court has carefully reviewed all of plaintiffs' objections and
13 arguments concerning the Magistrate Judge's rulings in each of these categories.
14 Although the arguments made concerning the breadth and scope of the orders
15 are not unreasonable, and certainly different orders could have been issued, the
16 unfailing conclusion reached by this Court with respect to each issue is that the
17 Magistrate Judge's orders are not clearly wrong or contrary to law. No legal
18 basis exists for this Court to reverse any of the discovery orders of which
19 plaintiffs complain.

20 Dated this 30th day of May 2002.

21
22 
23 FLORENCE-MARIE COOPER, Judge
24 United States District Judge

25
26
27 ⁴In their Notice of Motion, plaintiffs set out three categories; however, in
28 the body of their motion, they identify five categories of discovery as to which
they seek review and reconsideration.

Craig Newmark, et al. v. Turner Broadcasting System, Inc., et al.
Distribution List

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