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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRAIG NEWMARK, *et al.*,

Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Defendants.

Case No. CV 02-04445 FMC (Ex)

Hon. Florence-Marie Cooper

DECLARATION OF SIMON BLOCK IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

DATE: August 12, 2002
TIME: 10:00 a.m.
PLACE: Courtroom 750

CONFORMING COPY

DECLARATION OF SIMON BLOCK

I, SIMON BLOCK, declare as follows:

1. I am an attorney admitted to practice before this Court. I am one of the attorneys representing the MGM, Fox and Universal Defendants in the above-captioned action. I submit this declaration in opposition to Plaintiffs' motion to consolidate this case with Paramount Pictures, et al. v. ReplayTV, Inc., CV 01-9358 FMC (Ex) (the "ReplayTV Litigation"), the nine-month old litigation between the Copyright Owner Defendants and Defendants ReplayTV, Inc. and SONICblue Inc. (the "ReplayTV Defendants"). I have personal knowledge of the facts set forth in this declaration, and if called and sworn as a witness, I could and would competently testify thereto under oath.

2. Attached hereto as Exhibit 1 is a true and correct copy of the Copyright Owner Defendants' opposition to Plaintiffs' second ex parte application concerning their request to consolidate this case with the ReplayTV Litigation, dated July 16, 2002 (the "Second Opposition"). The Copyright Owner Defendants' opposition to Plaintiffs' first ex parte application concerning the same subject is included within the Second Opposition as Exhibit A to the Declaration of Robert M. Schwartz, dated July 16, 2002.

3. Attached hereto as Exhibit 2 is a true and correct copy of an excerpt of the ReplayTV Defendants' portion of the Joint Stipulation For Plaintiffs' Motion For Protective Order And Defendants' Cross Motion To Compel, dated March 30, 2002, previously submitted to the Court in connection with a discovery motion in the ReplayTV Litigation.

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4. Attached hereto as Exhibit 3 is a true and correct copy of excerpts of the ReplayTV Defendants' portion of the Joint Stipulation For Defendants' Motion To Compel, dated April 1, 2002, previously submitted to the Court in connection with a discovery motion in the ReplayTV Litigation.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct. Executed this 29th day of July, 2002, at Los Angeles, California.

SIMON BLOCK

Exhibit 1

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[Full counsel appearances on signature page]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRAIG NEWMARK, *et al.*,

Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Defendants.

Case No. CV 02-04445 FMC (Ex)

Hon. Florence-Marie Cooper

DEFENDANTS' OPPOSITION TO PLAINTIFFS' SECOND *EX PARTE* APPLICATION FOR AN ORDER OF CONSOLIDATION OR AN ORDER SHORTENING TIME FOR A HEARING ON A MOTION FOR CONSOLIDATION; DECLARATION OF ROBERT M. SCHWARTZ

This lawsuit, brought in the name of five ReplayTV customers, is an attempt by a special interest group, the Electronic Frontier Foundation ("EFF"), to inject itself into an ongoing copyright infringement suit, *Paramount Pictures et al. v. ReplayTV, Inc. et al.*, CV 01-9358 FMC (Ex) (the "ReplayTV Litigation") for reasons unrelated to any legally cognizable interest. And this second *ex parte* application for an order shortening time for Plaintiffs' motion to consolidate this case with the ReplayTV Litigation is as procedurally defective and substantively groundless as was their first. (Plaintiffs never bothered to tell Defendants[1] that the Court had denied their first application, putting them to the task of responding.)

As with their first *ex parte* application, Plaintiffs failed to comply with the Local Rules governing such requests. It is understandable only as an attempt by EFF (one of Plaintiffs' counsel) to get a quick look at Defendants' most sensitive and confidential information before Defendants' upcoming motion to dismiss can be heard. However, Plaintiffs' "case management" proposals should wait until after the Court is fully apprised on that motion that: (a) the sole premise for Plaintiffs' case – that they are in danger of suit for copyright infringement – is, from the face of the complaint, a pure fabrication; and, as a result, (b) Plaintiffs cannot state a justiciable claim.

In the meantime, Plaintiffs' second defective *ex parte* application in 48 hours should be denied for the same reasons as their first:[2]

---

[1] "Defendants" are Turner Broadcasting System, Inc., Disney Enterprises, Inc., Paramount Pictures Corporation, National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks Inc., The United Paramount Network, ABC, Inc., Viacom International Inc., CBS Worldwide Inc., CBS Broadcasting Inc., Time Warner Entertainment Company, L.P., Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., New Line Cinema Corporation, Castle Rock Entertainment, The WB Television Network Partners, L.P., Metro-Goldwyn-Mayer Studios, Orion Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions, Inc., Fox Broadcasting Company, Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar Television, Inc.

[2] For the Court's convenience, a copy of Defendants' opposition to Plaintiffs' first *ex parte* application is attached as Ex. A to the Declaration of Robert M. Schwartz.

- Plaintiffs gave no notice that they were filing the *ex parte* application, as required by Local Rule 7.19.1. The application does not even claim that Plaintiffs' counsel attempted to give notice. Instead, the application arrived unannounced at the end of the day on Friday, July 12. (Schwartz Decl. ¶ 4.)

- Plaintiffs know how to follow the Local Rules. They know that under Local Rule 7-3, more than 20 days before they can file a motion to consolidate, they must conduct a pre-filing meeting of counsel. Plaintiffs requested such a conference, and held it on July 10, 2002. (*See* Rothken Decl. Ex. D; *see also* Schwartz Decl. ¶¶ 2, 3.) Thus, Plaintiffs may file their motion on or after July 30, 2002, and pursuant to Local Rule 6-1, it can be heard on or after August 26, 2002.

- Plaintiffs are not content to live within the Local Rules. As a back-up to their *ex parte* application, they have filed a regularly-noticed motion to consolidate, for hearing on August 5, 2002 – three weeks earlier than they are entitled to have it heard pursuant to Local Rules 7-3 and 6-1. But by Plaintiffs' own admission, the pre-filing conference of counsel did not occur until July 10; thus, the Court should vacate their requested hearing date, or move the hearing to August 26 and reset the briefing schedule in accordance with the Local Rules.

- Plaintiffs assert a need for expedited consideration of their request to consolidate this case with the ReplayTV Litigation, because of a supposed July 22, 2002 "scheduling conference" in that case. (Application at 3:26-28.) But there is no such conference. No party has requested one, and the Court has not scheduled one. (Schwartz Decl. ¶ 5.) This is a contrived non-event, intended to enable Plaintiffs to avoid the filing of a properly noticed motion.[3]

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[3] In ReplayTV's Statement of Non-Opposition to the first *ex parte* request, it suggests that the Court could convene a conference in the ReplayTV Litigation on that date. That was inconsistent with the undertakings made by ReplayTV and SONICblue to the plaintiffs in the ReplayTV litigation. The ReplayTV defendants recently told the ReplayTV plaintiffs that they wanted a further delay in discovery. They agreed that, before bringing such a request to the Court, they would make concrete proposals to the plaintiffs. They have yet to do so. (Schwartz Decl. ¶ 6.)

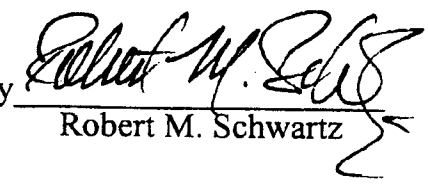
- The real reason Plaintiffs want consolidation on a rushed basis, apart from depriving Defendants of the ability to explain on a more measured basis why blanket consolidation is not prudent or fair, is that Plaintiffs fear that the Court might dismiss their case, depriving them and the EFF of a chance to peer into Defendants' most confidential financial and planning documents. Before they learned that Defendants intended to move to dismiss their claim, Plaintiffs were prepared to seek consolidation through a regularly noticed motion. It was only after Defendants notified Plaintiffs that a motion to dismiss was forthcoming did Plaintiffs put all their energies into filing *ex parte* applications.

Plaintiffs should not be rewarded for their disdain for the Local Rules and improper tactical maneuvers. Instead, Plaintiffs' request for consolidation of this action with the ReplayTV Litigation, which Defendants will oppose and address on the merits, should be made as a noticed motion under Local Rules 6-1 and 7-3.

For foregoing reasons, and for the reasons set forth in Defendants' opposition to Plaintiffs' first *ex parte* request, Defendants respectfully request that the Court deny Plaintiffs' application, strike their improperly filed motion purportedly set for hearing on August 5 (or vacate their requested hearing date of August 5 and move the hearing to August 26, resetting the briefing schedule in accordance with the Local Rules), and order Plaintiffs to follow Local Rules 6-1 and 7-3 in connection with their motion for consolidation.

Dated: July 16, 2002.

Respectfully submitted,

By 
Robert M. Schwartz

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

DECLARATION OF ROBERT M. SCHWARTZ

Robert M. Schwartz declares and states as follows:

1. I am a partner in the law firm of O'Melveny & Myers LLP, counsel for named Defendants Turner Broadcasting System, Inc., Time Warner Entertainment Company, L.P., Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., New Line Cinema Corporation, Castle Rock Entertainment, and The WB Television Network Partners, L.P., in this action. I am admitted to practice before this Court. I make this declaration of my personal knowledge of the facts stated herein and could and would competently testify thereto if called to do so.

2. On June 27, 2002, I received a letter from Ira Rothken, co-counsel for Plaintiffs in this case requesting that I and the other counsel in this case participate in the pre-filing meeting of counsel, as required by the Local Rules, regarding his motion to consolidate. A copy is attached to his declaration as Exhibit D.

3. After various conversations and letters between counsel, the parties conducted that pre-filing conference on July 10, 2002.

4. On Friday, July 12, 2002, at approximately 3:45 p.m., I received a 50 page fax from Mr. Rothken's office, which contained a service copy of Plaintiffs' present *ex parte* application. I received absolutely no prior notice from Mr. Rothken that he was making this application. The application is devoid of the Local Rule 7.19.1 statement of notice to all counsel. Based on discussions with co-counsel, none of us received any notice.

5. There is no hearing, status conference, or other matter on the Court's calendar in the ReplayTV Litigation on Monday, July 22, 2002.

6. With respect to a potential status conference, last week, I participated in a phone discussion with Emmett Stanton and Lawrence Pulgram, counsel for SONICblue and ReplayTV in the ReplayTV litigation. During the discussion, counsel for SONICblue and ReplayTV said that they might want to modify the pre-trial schedule as it pertained to the taking and scheduling of depositions. They

stated that, before bringing the matter to the attention of the Court, they would provide counsel for plaintiffs in the ReplayTV Litigation with a specific proposal for their evaluation and response. They expect to do so this week, but have not yet.

7. Attached hereto as Exhibit A is a true and correct courtesy copy of the opposition Defendants filed to Plaintiffs' July 10, 2002 *ex parte* application, with the two attached exhibits.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed this 16th day of July 2002 at Los Angeles, California.

Robert M. Schwartz

EXHIBIT A

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CRAIG NEWMARK, *et al.*,

Plaintiffs,

v.

TURNER BROADCASTING SYSTEM, INC., *et al.*,

Defendants.

Case No. CV 02-04445 FMC (Ex)

Hon. Florence-Marie Cooper

DEFENDANTS' OPPOSITION TO PLAINTIFFS' *EX PARTE* LETTER REQUEST AND ATTACHED MOTION FOR AN ORDER OF CONSOLIDATION OR AN ORDER SHORTENING TIME FOR A HEARING ON A MOTION FOR CONSOLIDATION; DECLARATION OF ROBERT M. SCHWARTZ

I. INTRODUCTION

This lawsuit is an attempt by a special interest group, the Electronic Frontier Foundation ("EFF") to inject itself into an ongoing copyright infringement suit, *Paramount Pictures et al. v. ReplayTV, Inc. et al.*, CV 01-9358 FMC (Ex) (the "ReplayTV Litigation"), through five ReplayTV customers, for reasons unrelated to any legally cognizable interest. Emblematic of their willingness to ignore the rules to further their ends, on July 10, 2002, the EFF and its co-counsel filed a procedurally defective *ex parte* letter request, proposed motion to consolidate, and application for an order shortening time. All should be denied. Plaintiffs filed the *ex parte* letter request: (1) in the form of a letter to the Court; (2) without giving required notice; (3) after the parties had set the required Local Rule 7-3 pre-filing conference for a properly-scheduled motion; (4) only hours before the parties were to start that conference; and – tellingly – (5) shortly after learning that Defendants[1] intended to move to dismiss Plaintiffs' baseless claim. (*See* Declaration of Robert M. Schwartz ¶¶ 5-8.) Thus, in bringing this application, Plaintiffs deliberately bypassed this Court's rules, by their own admission hoping to gain immediate access to Defendants' most confidential documents before the Court could consider Defendants' motion to dismiss Plaintiffs' claim. (*Id.* ¶ 10.)

Plaintiffs should not be rewarded for their disdain for the Local Rules and underhanded tactical maneuvers. Instead, Plaintiffs' request for consolidation of this action with the ReplayTV Litigation, which Defendants will oppose on the merits, should be made as a noticed motion under Local Rules 6-1 and 7-3.

[1] For purposes of this opposition, these "Defendants" are Turner Broadcasting System, Inc., Disney Enterprises, Inc., Paramount Pictures Corporation, National Broadcasting Company, Inc., NBC Studios, Inc., Showtime Networks Inc., The United Paramount Network, ABC, Inc., Viacom International Inc., CBS Worldwide Inc., CBS Broadcasting Inc., Time Warner Entertainment Company, L.P., Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., New Line Cinema Corporation, Castle Rock Entertainment, The WB Television Network Partners, L.P., Metro-Goldwyn-Mayer Studios, Orion Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City Studios Productions, Inc., Fox Broadcasting Company, Columbia Pictures Industries, Inc., Columbia Pictures Television, Inc., Columbia TriStar Television, Inc., and TriStar Television, Inc.

II. THE *EX PARTE* LETTER REQUEST VIOLATES THE LOCAL RULES

Plaintiffs know the Local Rules. On June 27, in recognition of their duty to follow them, Plaintiffs asked that Defendants participate in the Local Rule 7-3 pre-filing conference in connection with a motion to consolidate. After scheduling conversations between counsel, the parties agreed on July 9 to conduct that conference on July 10 and, at the specific request of Plaintiffs' counsel, who claimed to be occupied on another matter that day, to hold the conference at 5:30 p.m. (Schwartz Decl. ¶¶ 5, 6.) Also on July 9, the parties agreed to combine that conference with the Local Rule 7-3 pre-filing conference for these Defendants' motion to dismiss Plaintiffs' claim. (*Id.* ¶ 7.)

It appears that during the same time Plaintiffs' counsel had said he was engaged on another case, he was actually preparing *ex parte* papers. It thus appears that Plaintiffs' counsel had no intention of complying with Local Rule 7-3 (or Local Rule 6-1, which requires motions to be heard on 21 days' notice). Given Plaintiffs' intentional non-compliance with the Local Rules governing motions, and the numerous procedural defects of their *ex parte* letter request, described below, it should be rejected.

A. Plaintiffs Failed To Comply With Local Rule 7-3 Before Filing Their *Ex Parte* Letter Request.

Local Rule 7-3 states in relevant part that "counsel contemplating the filing of any motion shall first contact opposing counsel to discuss thoroughly, preferably in person, the substance of the contemplated resolution and any potential resolution." Plaintiffs' submission of their *ex parte* letter request a few hours before the parties' scheduled Local Rule 7-3 conference was to begin is a blatant violation of this rule.

In Plaintiffs' *ex parte* letter request, their counsel asserts that "[t]here has been no formal reply to my letter of June 27, 2002." Letter Request at 2. That statement is false. Plaintiffs first requested a pre-filing conference regarding an

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anticipated consolidation motion by letter dated June 27, 2002. (*See* Declaration of Ira P. Rothken, dated July 10, 2002, Ex. B.) As Plaintiffs' own *ex parte* application reveals, on July 3, 2002, Robert Schwartz, counsel for some of these Defendants, responded in writing on behalf of all of these Defendants and suggested that the parties conduct that conference after the 4th of July holiday. (*See* Schwartz Decl. ¶ 4; Rothken Decl. Ex. E.) Moreover, on July 9, 2002, the day before Plaintiffs' submission of the *ex parte* letter request, Mr. Schwartz, responded again in writing to Plaintiffs' June 27 letter on behalf of these Defendants. (*See* Schwartz Decl. Ex. B.) In that letter, Mr. Schwartz proposed that counsel discuss the substance of Plaintiffs' contemplated consolidation motion "during the Local Rule 7-3 conference call that has been proposed for tomorrow afternoon [July 10, 2002]." (*Id.*) And in a separate July 9, 2002 letter, Robert Rotstein, counsel for other Defendants, confirmed that these Defendants planned to discuss Plaintiffs' anticipated consolidation motion during the conference call with Plaintiffs' counsel scheduled for the next afternoon. (*See* Schwartz Decl. Ex. A.)

Presumably in anticipation that Defendants would challenge their factual misstatements about the dealings between counsel, Plaintiffs also admit, and then try to excuse, their willful non-compliance. They argue that they "have complied with the spirit of Local Rule[] 7-3 . . . and any additional waiting time appears to be inefficient and fruitless." (Letter Request at 3 (emphasis added).) Local Rule 7-3 does not permit self-help determinations that a required conference would be "fruitless." The application should be stricken as procedurally defective on this ground alone.

B. The *Ex Parte* Request Fails To Comply With Local Rule 7-19.1.

Local Rule 7-19.1 states, in relevant part, that "it shall be the duty of the attorney . . . applying [for an ex parte order]: (a) to make a good faith effort to advise counsel for all other parties, if known, of the date, time and substance of the proposed ex parte application; and, (b) to advise the Court in writing of efforts to

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contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court." (Emphasis added).

Plaintiffs failed to comply with either provision of Local Rule 7-19.1. Plaintiffs failed to advise most of the Defendants of the date and time for Plaintiffs' submission of the *ex parte* letter request. (Schwartz Decl. ¶ 8.) As a result, the *ex parte* letter request does not include the requisite report on Plaintiffs' efforts to contact all of Defendants' counsel.[2] It should be stricken for Plaintiffs' failure to comply with Local Rule 7-19.1.

III. PLAINTIFFS HAVE FAILED TO ESTABLISH A RIGHT TO *EX PARTE* RELIEF

Plaintiffs' *ex parte* request should also be denied on its merits. A party may seek relief from the Court *ex parte* only in very unusual situations. In doing so, the applicant must demonstrate both irreparable prejudice if the motion is not heard on the court's regular motion calendar, and that they are without fault in creating the "crisis" that drove them to seek ex parte relief. *Mission Power Eng'g Co. v. Continental Cas. Co.*, 883 F. Supp. 488, 492-93 (C.D. Cal. 1995). Plaintiffs cannot come close to making either showing. As to the first, Plaintiffs have made no showing of irreparable injury if these cases are not consolidated today. None.

As to the second, Plaintiffs cannot demonstrate that they are without fault in creating this "emergency" – indeed, to the extent there were any "emergency," and there is none, it would be solely of the Plaintiffs' own making. Plaintiffs waited more than six months after the first complaint was filed in the ReplayTV Litigation (on October 31, 2001) before filing this action (on June 6, 2002). And then, despite the supposed "urgency" of their situation, Plaintiffs waited another three weeks

[2] The *ex parte* letter request also fails to comply with: (a) Local Rule 7-4, which effectively bars such *ex parte* letters to the Court by requiring that all submissions comply with Local Rules 7-4 through 7-8 and 11-3; and (b) Local Rule 7-19, which requires an applicant to "lodge the proposed *ex parte* order."

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before serving their complaint, instead devoting their post-filing energies to holding press conferences and contacting the media to promote their lawsuit and draw public attention to themselves. They then waited over a month before filing this *ex parte* letter request.

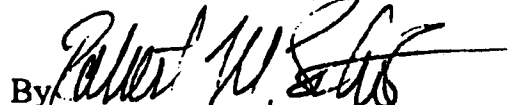
Next week, Defendants will be filing a motion to dismiss Plaintiffs' complaint. It would be far more efficient and just for the Court to address that dispositive motion before hearing Plaintiffs' motion for consolidation and their requests for expedited access to these Defendants most confidential documents. Moreover, these Defendants strongly oppose Plaintiffs' motion for consolidation. Plaintiffs' letter request mischaracterizes the nature of both the ReplayTV Litigation and Plaintiffs' claim in this action. There are several powerful reasons why these two cases should not be consolidated. By way of example only, consolidation at this time would greatly complicate and slow down the ReplayTV Litigation by adding numerous additional parties; would result in needless discovery disputes regarding Plaintiffs' right to Defendants' highly proprietary documents; and would be unnecessary, since Plaintiffs' purported rights are adequately represented by ReplayTV and SONICblue. These Defendants should be given adequate time to present those reasons to the Court. They should not be penalized – and Plaintiffs rewarded – for Plaintiffs' violations of the Local Rules.

IV. CONCLUSION

For foregoing reasons, the Defendants respectfully request that the Court strike Plaintiffs' *ex parte* letter request in its entirety and order Plaintiffs to follow Local Rules 6-1 and 7-3 in connection with their motion for consolidation.

Dated: July 12, 2002.

Respectfully submitted,

By 

Robert M. Schwartz

EXHIBIT A

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EXHIBIT A
13

DECLARATION OF ROBERT M. SCHWARTZ

Robert M. Schwartz declares and states as follows:

1. I am a partner in the law firm of O'Melveny & Myers LLP, counsel for named Defendants Turner Broadcasting System, Inc., Time Warner Entertainment Company, L.P., Home Box Office, Warner Bros., Warner Bros. Television, Time Warner Inc., New Line Cinema Corporation, Castle Rock Entertainment, The WB Television Network Partners, L.P., in this action. I am admitted to practice before this Court. I make this declaration of my personal knowledge of the facts stated herein and could and would competently testify thereto if called to do so.

2. On Thursday, June 27, 2002, I received a letter from Ira P. Rothken, Esq., counsel for Plaintiffs, requesting a pre-filing conference, pursuant to the Local Rules of this Court, for a motion to consolidate this action with *Paramount Pictures Corporation et al. v. ReplayTV, Inc. et al.*, CV 01-9358 FMC and for expedited discovery and entry of a protective order. A copy of this letter is attached to Plaintiffs' *ex parte* letter request as Exhibit B.

3. On Tuesday, July 2, 2002, I spoke to Mr. Rothken about the subjects of his letter, and suggested that he propose a date and time for the parties to conduct the pre-filing conference. I told him that I would send him a written response to his June 27, 2002 letter.

4. On Wednesday, July 3, 2002, I sent an e-mail to Mr. Rothken from outside the office (my family had planned to be out of town for the 4th of July holiday), telling him that the only way to meaningfully respond to the numerous requests of his June 27 letter was to have a live conversation involving all counsel. I again asked him to propose a date or time when he could be available. A copy of this e-mail is attached to Plaintiffs' *ex parte* letter request as Exhibit E.

5. On Monday, July 9, 2002, Robert Rotstein, Esq., counsel for the Columbia Defendants, called Mr. Rothken to advise him that the Defendants would be moving to dismiss Plaintiffs' claim and that Defendants' counsel would like to

EXHIBIT A

conduct the Local Rule 7-3 pre-filing conference in the next few days. Mr. Rotstein then followed that with a detailed letter regarding the grounds for the motion and the request for the conference. A true and correct copy of this letter is attached hereto as Exhibit A. Defendants' counsel proposed Wednesday, July 10, 2002. In response to that letter, Mr. Rothken's office notified Defendants' counsel that he would not be available until after 5:00 p.m. on the afternoon of July 10 because he would be involved in another matter.

6. Also on July 9, 2002, I wrote a letter to Mr. Rothken. He did not include a copy of it with Plaintiffs' *ex parte* letter request. A true and correct copy is attached hereto as Exhibit B. In my letter, I again suggested that the parties convene a meeting as soon as he could make himself available to discuss the issues raised in his June 27 letter. I mentioned also that, since we had proposed that the parties hold the Local Rule 7-3 pre-filing conference in connection with Defendants' motion to dismiss the case on the following afternoon, we combine the conferences.

7. Later in the day of July 9, 2002, Mr. Rotstein's office spoke with Mr. Rothken's office and arranged to hold both pre-filing conferences at 5:30 p.m. on the next day to accommodate Mr. Rothken's unavailability at any point earlier that afternoon.

8. On Wednesday, July 10, 2002, at approximately 3:50 p.m., I received a 48 page fax from Mr. Rothken's office, which contained a service copy of Plaintiffs' *ex parte* letter request. Although Mr. Rothken had told me two weeks earlier that he was considering making an *ex parte* application for consolidation, when he requested in writing on June 27 that the parties convene a Local Rule 7-3 pre-filing conference for such a motion, I concluded that he had abandoned the idea of seeking *ex parte* relief and had intended to follow the proper motion procedures of this Court with respect to any such relief, as he so stated in his June 27 letter. He did not give me or any other attorney at this firm notice that he would be presenting

EXHIBIT A

this *ex parte* application, as is required under Local Rule 7-19.1. I have spoken with counsel for the MGM, Universal, Fox, Viacom, Paramount, Disney, CBS, ABC, and NBC defendants, and they have told me that they did not receive notice, either.

9. At 5:30 p.m. that day, I participated in the telephonic pre-filing conference with Mr. Rothken. Also participating were Mr. Rotstein and Emmett Stanton, Esq., counsel for Defendants SONICblue Inc. and ReplayTV, Inc. The call lasted over one hour and fifteen minutes. At the start of the conference, I told Mr. Rothken that his *ex parte* letter request was procedurally improper, and defective for its non-compliance with the Local Rules. He said he did not have to follow them because he had done so "in spirit."

10. Turning to the substance of his *ex parte* request, I told Mr. Rothken that one of the core problems we had with consolidation of the cases on such a rushed basis was that we believed that his claim was entirely baseless, as the Defendants had made no attempt to pursue claims against his clients for copyright infringement, and that Defendants were not willing to provide their most sensitive documents and information to persons Defendants believed had no proper connection to the dispute with SONICblue and ReplayTV. In response, Mr. Rothken expressed eagerness to obtain immediately a copy of all of the highly confidential documents produced by my clients and the other Plaintiffs in the ReplayTV litigation. I told him that, once the Court had decided whether he had actually stated a viable claim, Defendants would be more than willing to discuss ways of managing the pre-trial preparation of the cases, but that we did not think case management issues should precede a determination of whether his case and his clients even belonged in court.

11. During this pre-filing conference, we discussed the motion to consolidate and the motion to dismiss. The conference included a thorough discussion by the parties of the issues raised by these motions.

EXHIBIT A

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration is executed this 12th day of July 2002 at Los Angeles, California.

Robert M. Schwartz

EXHIBIT A

EXHIBIT A

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MCDERMOTT, WILL & EMERY

July 9, 2002

VIA FACSIMILE and U.S. MAIL

Ira Rothken
Rothken Law Firm
1050 Northgate Drive, Suite 520
San Rafael, CA 94903

Re: *Newmark, et al. v. Turner Broadcasting, et al.* Action No. 02-04445 FMC (Ex)
U.S. District Court, Central District of California

Dear Mr. Rothken:

This letter will confirm our telephone conversation yesterday afternoon during which I requested a pre-filing conference of counsel, pursuant to Local Rule 7-3, on behalf of all of the Defendants in the action. As I stated, Defendants intend to file a motion to dismiss Plaintiffs' Complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), or alternatively, to stay proceedings in the action. I informed you that Defendants wished to schedule such a conference, either telephonically or in person at McDermott, Will & Emery's Silicon Valley office, at your convenience, at any time on or before Wednesday, June 10, 2002, the last day for holding the conference pursuant to Local Rule 7-3. While you agreed that an in-person meeting would not be necessary, you declined to schedule a telephonic meeting and conference, insisting that Defendants first set forth the bases for their motion in a letter.

As we discussed, Local Rule 7-3 does not require that the moving party initiate the meeting and conference process in writing. Rather, Local Rule 7-3 requires only that the "counsel contemplating the filing of any motion shall contact opposing counsel to discuss thoroughly . . . the substance of the contemplated motion and any potential resolution." Nevertheless, in order to facilitate the meeting and conference process, we identify below in general terms the primary legal bases for Defendants' motion. We are prepared to discuss with you in greater detail tomorrow the grounds for the relief we intend to seek. The potential resolution of the matters raised by the motion would be the dismissal with prejudice of Plaintiffs' Complaint.

LA999 1239647-7.051240.0038

Defendants' motion will be based on the grounds of lack of subject matter jurisdiction and failure to state a claim upon which relief may be granted. Specifically, Defendants will move to dismiss Plaintiffs' declaratory relief action on the grounds that Plaintiffs have failed to adequately plead the existence of an "actual controversy" as required under Article III of the U.S. Constitution and the Declaratory Judgment Act, 28 U.S.C. § 2201(a). Plaintiffs must meet the "actual controversy" requirement to establish subject matter jurisdiction, *K-Lath, Division of Tree Island Wire (ISA), Inc. v. Davis Wire Corp.*, 15 F. Supp. 2d 952, 958 (C.D. Cal. 1998), and to state a claim upon which relief may be granted. *Hal Roach Studios v. Richard Feiner and Company, Inc.*, 896 F.2d 1542, 1554-1555 (9th Cir. 1989). Here, Plaintiffs have failed to satisfy the "actual controversy" requirement because Plaintiffs cannot allege facts sufficient to establish a real and objectively reasonable apprehension of imminent legal action by Defendants against the Plaintiffs. *See Hal Roach Studios*, 896 F.2d at 1556; *Societe de Conditionnement en Aluminum v. Hunter Engineering Co.*, 655 F.2d 938 (9th Cir. 1981).

Defendants also intend to request that the Court exercise its discretion under the Declaratory Judgment Act to dismiss Plaintiffs' declaratory relief claim or, at a minimum, to stay the action pending resolution of Defendants' lawsuit against ReplayTV and SONICblue. As you know, beginning on or about October 30, 2001, Defendants brought suit in the Central District of California, against ReplayTV and SONICblue in the action entitled *Paramount Pictures, et al. v. ReplayTV, Inc.*, CV 01-9358 FMC (Ex) ("ReplayTV Litigation"). The "interests" of the Plaintiffs are more than adequately represented by ReplayTV and SONICblue. The addition of this action and the individual Plaintiffs will serve only to add to the cost, effort and complexity of litigating the claims. Moreover, the filing of this suit as a separate action, coupled with a notice of related cases and request for consolidation, appears to be an attempt to circumvent the requirements for intervention, which the claims and circumstances present here would not satisfy. Because the first-filed ReplayTV Litigation will resolve the issues raised in the *Newmark* case, the Court should either dismiss the *Newmark* case or stay the proceedings pending the outcome of the ReplayTV Litigation.

My telephone call to you yesterday afternoon and this letter satisfy Defendants' obligation to request a pre-filing conference pursuant to Local Rule 7-3. At the end of our telephone conversation yesterday, you indicated that, given your deposition schedule, you would only be available to confer further on Wednesday, July 10, 2002, after 5:00 p.m. As I mentioned, I am available Wednesday evening after 5:00 p.m. to discuss these issues further. I suggest we speak at 5:30 p.m.

Please call me at (310) 284-6101 to confirm that you will be available at 5:30 p.m. tomorrow so that we may complete the Local Rule 7-3 meeting and conference process.

EXHIBIT A
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Finally, in our telephone conversation yesterday, you raised your desire to speak with Defendants concerning Plaintiffs' anticipated motion for consolidation. As stated in Bobby Schwartz's letter to you earlier today, Defendants are willing to also address this topic on tomorrow's call.

Sincerely,

Robert H. Rotstein

Robert H. Rotstein

cc: Scott P. Cooper, Esq.
Thomas P. Olson, Esq.
Robert M. Schwartz, Esq.

EXHIBIT A
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EXHIBIT B

O'MELVENY & MYERS LLP

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July 9, 2002

OUR FILE NUMBER
19,019-20

WRITER'S DIRECT DIAL
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WRITER'S E-MAIL ADDRESS
rschwartz@omm.com

VIA FACSIMILE

Ira P. Rothken, Esq.
Rothken Law Firm
1050 Northgate Drive, Suite 520
San Rafael, California 94903

Re: *Newmark et al. v. Turner Broadcasting System, Inc. et al.*
CV 02 04445 (ER)

Dear Ira:

On behalf of the defendants in the above-described case who are the plaintiffs in the consolidated cases captioned as *Paramount Pictures Corporation et al. v. SONICblue Inc. et al.* CV 01-09358 (FMC) (collectively, the "Defendant Copyright Owners"), I write in response to your June 27, 2002 letter. I would have had this letter to you last week but for my absence from the office on business and the Fourth of July weekend.

First, no productive purpose would be served by my responding to the portions of your letter with which we do not agree – substantial though they are – such as your characterizations of the dispute in the *Paramount* cases, the nature of the plaintiffs' claim in the *Newmark* case, and the supposed benefits of consolidating these matters.

Second, you say on page 4 that the Defendant Copyright Owners have made "threats of copyright infringement liability against ReplayTV 4000 owners. . . ." To what are you referring?

Third, turning to your specific requests, I suggest that you, I, and counsel for the other Defendant Copyright Owners discuss the various stipulations or elements of relief you want during the Local Rule 7-3 conference call that has been proposed for tomorrow afternoon to discuss the defendants' contemplated motion(s). It is just not as easy as ticking off the items set forth in the last paragraph of your letter.

EXHIBIT A
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Very truly yours,

Robert M. Schwartz
of O'MELVENY & MYERS LLP

RMS:tbs
CC1:575877.1

cc: Plaintiffs' Counsel in *Paramount Pictures Corp. et al. v. ReplayTV, Inc. et al.*

EXHIBIT A
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PROOF OF SERVICE

I, Barbara S. Schwarcz, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 1999 Avenue of the Stars, Seventh Floor, Los Angeles, CA 90067-6035. On July 12, 2002, I served the within document(s):

DEFENDANTS' OPPOSITION TO PLAINTIFFS' *EX PARTE* LETTER REQUEST AND ATTACHED MOTION FOR AN ORDER OF CONSOLIDATION OR AN ORDER SHORTENING TIME FOR A HEARING ON A MOTION FOR CONSOLIDATION; DECLARATION OF ROBERT M. SCHWARTZ

☒ by transmitting via facsimile machine the document(s) listed above to the fax number(s) set forth below on this date. The outgoing facsimile machine telephone number in this office is (310) 246-6779. The facsimile machines used in this office create a transmission report for each outgoing facsimile transmitted. A copy of the transmission report(s) for the service of this document, properly issued by the facsimile machine(s) that transmitted this document and showing that such transmission was (transmissions were) completed without error, is attached hereto.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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I declare under penalty of perjury under the laws of the United States that the above is true and correct.

Executed on July 12, 2002, at Los Angeles, California.

Barbara S. Schwarcz

Barbara S. Schwarcz

CC1:577174.1

EXHIBIT A
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Exhibit 2

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Attorneys for the Columbia Plaintiffs

[Full counsel appearances on signature page]

ORIGINAL

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PARAMOUNT PICTURES CORPORATION, *et al.*,

Plaintiffs,

v.

REPLAYTV, INC., *et al.*,

Defendants.

AND CONSOLIDATED ACTIONS.

Case No.: CV 01-09358 FMC (Ex)

JOINT STIPULATION FOR PLAINTIFFS' MOTION FOR PROTECTIVE ORDER AND DEFENDANTS' CROSS-MOTION TO COMPEL

Discovery Cutoff: May 31, 2002

Pretrial Conference: July 29, 2002

Trial Date: August 20, 2002

2. The Legal Issues Relating To the Disputed Discovery.

The vast majority of the disputed discovery relates directly to Defendants' fair use defense. The necessity of this discovery to the appropriate resolution of these actions cannot be overstated. If, as Defendants believe, the evidence demonstrates that consumers' use of the challenged features of the ReplayTV 4000 are fair uses, Defendants are not liable for infringement. 17 U.S.C. § 107 ("fair use of a copyrighted work . . . is not an infringement"); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 970 (9th Cir. 1992) (where consumers' use of an allegedly infringing device is a fair use, the manufacturer of that device cannot be secondarily liable for infringement). Accordingly, the discovery relating to this defense—which is targeted primarily at the impact of consumers' use of the Commercial Advance and Send Show features *on the very markets Plaintiffs have alleged will be injured by their use*—is not merely relevant, but critical to the appropriate resolution of these actions.

Incredibly, Plaintiffs vigorously oppose this discovery on the ground that it is "legally irrelevant" to the fair use defense. First, they assert that the use of their copyrighted works is "emphatically commercial"—thus barring *any* inquiry by Defendants into the actual impact of Commercial Advance and Send Show on Plaintiffs' markets. They then argue that it is only the "fact" of harm to their markets—not the extent—that bears any relevance in the fair use analysis, and that they have "proven" the requisite harm by choosing to produce certain documents "evidencing the fact of [their] participation in existing markets and their plans to enter new markets." This position is, in a word, outrageous. Not only does it completely misconstrue (and misapply) the fair use doctrine, it is entirely inappropriate: it amounts to a request by Plaintiffs that the Magistrate conclude, in the context of a discovery motion filed only a few months after these actions commenced—and before Plaintiffs have even produced a single internal business document—that Defendants' fair use defense is invalid, on its face.

Exhibit 3

5/5/02

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Attorneys for Defendants
REPLAY TV, INC. and SONICBLUE INCORPORATED

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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.,

Plaintiffs,

v.

REPLAYTV, INC., and SONICBLUE INC.,

Defendants,

AND CONSOLIDATED ACTIONS.

Case No. CV 01-09358 CAS (Ex)

JOINT STIPULATION FOR DEFENDANTS' MOTION TO COMPEL DISCOVERY

[L.R. 37-2.1]

DISCOVERY CUT OFF:
May 31, 2002

PRETRIAL CONFERENCE:
July 29, 2002

TRIAL DATE:
August 20, 2002

Messenger to obtain the songs rather than downloading from public web sites such as Morpheus or Grokster. Premo Decl., Ex. G. Anecdotal evidence such as this highlights the power behind existing technologies.

Any documents in Plaintiffs' possession, custody or control reflecting the usage of AOL's file-sharing directly relate to the evaluation of the purported harm caused by Send Show. As discussed, Send Show's extremely limited capabilities for sending files to which a user is not otherwise already entitled pale in comparison to other products and services that have been adopted on a much wider scale by Plaintiffs' own corporate conglomerates. If Plaintiffs have failed to attempt to constrain AOL, and similar services, this will undermine their claims that Send Show's more limited capability is a substantial threat. Moreover, AOL/Time Warner's indulgence of and profit from such behavior may constitute unclean hands or estoppel. AOL's defense of such practices may also endorse Defendants' own legal position.

In addition, Defendants have a right to discover and prove Plaintiffs' recognition and acceptance of other products that can be used to allow sharing of content, such as the PVR manufactured by TiVo. TiVo is the competitor of Defendants in whom Plaintiffs have made substantial investments and served as Board Members. TiVo operates an open source, Linux-based system, meaning that it is easy to transfer recordings to a PC, from whence they can be shared over the Internet. ReplayTV is not Linux-based, and is designed not to allow recordings to be transferred to a PC. Nonetheless, Plaintiffs appear to allege that Defendants are contributorily liable if users circumvent the protections specifically included in the design of the software. Plaintiffs claim that users would then be able to transfer digital files from the ReplayTV unit to their home computer, and from there transmit files over the Internet. See Time Warner Cmplt ¶ 28; Paramount Am. Cmplt. ¶ 59; Response to SONICblue Interrog. No. 19.

¶¶ 26-29. When these giant corporations combine their copyrights instead of engaging in free competition, the public loses. See United States v. Columbia Pictures Industries, Inc., 507 F. Supp. 412, 429 (S.D.N.Y. 1980) (enjoining Plaintiffs' joint venture to distribute movies over paid cable channel due to concerns for price fixing and group boycott activity). As Chief Judge Marilyn Hall Patel of the Northern District stated with respect to similar joint ventures undertaken by members of the music recording industry (and also under investigation by the DOJ), "these joint ventures look bad, sound bad, and smell bad." Noll Decl., Ex. B (Napster, 2/21/02 Order) at 23.

Although Defendants stand to be injured by these Joint Ventures in their capacity as potential distributors of Video on Demand through ReplayTV 4000's connectivity to the Internet,[27] actual injury to Defendants is not required to assert copyright misuse. Antitrust violations, anti-competitive activity and other conduct violating public policy need *not* relate to the defendant claiming copyright misuse to serve as a defense to copyright infringement. To the contrary, copyright misuse may bar enforcement of copyrights *independent* of any agreement or negotiations with the party raising the defense. See Lasercomb, 911 F.2d at 979 (reversing district court's rejection of defense based upon fact defendant was not party to anticompetitive licensing agreement because "**the defense of copyright misuse is available even if the defendants themselves have not been injured by the misuse**") (emphasis added); see also Napster 2/21/02 Order at 24 ("Napster has raised serious questions with respect to possible copyright misuse, based on both the MusicNet agreement and plaintiffs' possible antitrust violations in their entry into digital music delivery.").[28] Defendants need only "**establish a 'nexus between**

[27] A real possibility of injury to Defendants exists: Defendants are potential entrants into the market for VOD and PPV distribution of Plaintiffs' copyrighted works, whose entry into those markets may be restricted by Plaintiffs' anticompetitive activities. See Noll Decl., ¶¶ 26-30.

[28] Thus, although the Court in Napster found that restrictive terms in a license agreement entered by Napster could give rise to copyright misuse, it also recognized, and analyzed independently, the likelihood that the joint ventures amounted to potential copyright misuse independent of the impact on Napster. Noll Decl., Ex. B at 22-24.

equity positions from CBS, Disney, among others in TiVos); Ex. P (6/9/99 press release announcing multi-million dollar equity stake for NBC in TiVo, giving NBC immediate access to TiVo's subscriber base to target users); Ex. Q (9/8/99 press release announcing Sony Corporation's equity investment in TiVo and formation of strategic alliance in the manufacture of PVRs); Ex. R (AOL Time Warner releases another $43.5 million to TiVo provided under their previously announced agreement). The TiVo website also lists an NBC Cable executive on its Board of Directors. See Premo Decl. ¶ (http://www.tivo.com/tivo_inc/management.asp?frames=yes).

What is not known is the level of communication and influence asserted by these investors over TiVo's commercial offerings. TiVo has been publicly criticized for being "too closely tied to TV networks and advertisers, sometimes to the detriment of consumers." Premo Decl., Ex. S (SHO 000134). Defendants' discovery seeks documents to determine the magnitude of Plaintiffs' investments and control over TiVo, as well as the existence of any agreements, which might affect the features offered by TiVo products. Such evidence would provide further support for a copyright misuse or unclean hands defense.

Moreover, Plaintiffs have attacked Defendants for not obtaining license agreements before allowing consumers to record Plaintiffs' content. See Time Warner Cmplt. ¶ 44. It is therefore highly material to expose the extent, if any, that Plaintiffs have insisted upon such agreements with TiVo. Failure to obtain such a license from TiVO—or the terms of such a license—could substantially undermine Plaintiffs insistence that Defendants require a license. Similarly, if Plaintiffs are reacting differently to TiVo (perhaps because of significant investments in that company), than they are to Defendants, tolerance of TiVo's conduct while attacking the ReplayTV 4000 could substantially undermine Plaintiffs' claims of harm. This evidence is particularly relevant to analyzing the ReplayTV 4000 features attacked by Plaintiffs. Plaintiffs' claims, though focused on Commercial Advance and Send

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On July 29, 2002, I served the foregoing document described as:

DECLARATION OF SIMON BLOCK IN OPPOSITION TO PLAINTIFFS' MOTION TO CONSOLIDATE

on the interested parties in this action:

(By Mail) By placing the true copies thereof enclosed in sealed envelopes address as follows:

SEE ATTACHED SERVICE LIST

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

(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.

Executed on July 29, 2002, at Los Angeles, California.

Karen J. Jones

KAREN J. JONES

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