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

19 PARAMOUNT PICTURES
20 CORPORATION *et al.*,

21 Plaintiffs,

22 v.

23 REPLAYTV, INC. *et al.*,

24 Defendants.

25
26 AND CONSOLIDATED ACTIONS
27
28

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 ^{1/} Defendants falsely state (Joint Stip. at 24 n.14) that Plaintiffs did not seek the
27 ReplayTV 4000's source code in these Requests. In fact, they did. *See, e.g.,*
28 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 449550 (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 harried 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

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.