

1 Ira P. Rothken, Esq. (State Bar No. 160029)
ROTHKEN LAW FIRM
2 1050 Northgate Drive, Suite 520
San Rafael, CA 94903
3 Telephone: (415) 924-4250
4 Facsimile: (415) 924-2905

5 Cindy A. Cohn, Esq. (State Bar No. 145997)
Fred von Lohmann, Esq. (State Bar No. 192657)
6 Robin D. Gross, Esq. (State Bar No. 200701)
ELECTRONIC FRONTIER FOUNDATION
7 454 Shotwell Street
San Francisco, CA 94110
8 Telephone: (415) 436-9333 x108
9 Facsimile: (415) 436-9993

10 Attorneys for Plaintiffs Craig Newmark, Shawn Hughes, Keith Ogden, Glenn
Fleishman and Phil Wright

11
12 **UNITED STATES DISTRICT COURT**
13 **CENTRAL DISTRICT OF CALIFORNIA**
14

15
16 CRAIG NEWMARK, *et. al.*,
17 Plaintiffs,

18 v.

19 TURNER BROADCASTING
SYSTEM, INC., *et. al.*,
20 Defendants.
21

CASE NO. CV 02-04445 FMC (Ex)
**DECLARATION OF IRA P.
ROTHKEN IN OPPOSITION TO
ENTERTAINMENT COMPANIES'
MOTION TO DISMISS COMPLAINT
OR, ALTERNATIVELY, TO STAY
PROCEEDINGS**

22 Hearing Date: August 12, 2002
23 Time: 10:00 a.m.
24 Courtroom: No. 750, Los Angeles - Roybal
25 Judge: Hon. Florence-Marie Cooper
26
27
28

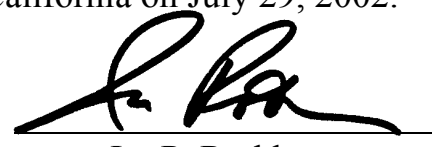
1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, Ira P. Rothken, declare:

1. I am one of the lawyers representing Plaintiffs herein and make this declaration in opposition to the motion by the Entertainment Company Defendants to dismiss or, alternatively, to stay proceedings. All statements made herein are on personal knowledge unless otherwise stated. If called as a witness, I could competently testify as to the matters stated herein.

2. On July 22, 2002, I accessed the attached article "Zapper War" by Michael Freedman appearing on a website maintained Forbes Magazine. The article indicated that it had been originally published on June 20, 2002.

I declare under penalty of perjury that the foregoing statements are true and correct. I execute this declaration in San Rafael, California on July 29, 2002.



Ira P. Rothken

EXHIBIT A

Zapper War
Michael Freedman, 07.08.02

TV producers can't force you to watch ads. But they may be able to outlaw devices that make it easy to skip them.

Kenneth Potashner pinned the future of his company on a nifty device called ReplayTV. An ad zapper's delight, it looks like a VCR but lets viewers save 320 hours of TV programming on a hard drive. If you want to watch every Yankee game in the next two weeks, you type "Yankee" into an on-screen menu that's downloaded daily over a phone line; the machine automatically records each game. You can then send the games in their entirety to 15 friends. The equipment edits out commercials by detecting the black screen between shows and ads.

Horrors. There goes \$50 billion a year in television ad revenue, if the device catches on (and if TV shows don't switch to pay-per-view; see "[Why Not?](#)" column, p. 164).

Shortly after Santa Clara, Calif.-based Sonicblue launched ReplayTV in September, Viacom, Disney and NBC jointly filed a suit in California alleging copyright infringement. Time Warner Entertainment followed with a similar suit, as did Columbia Pictures, on the day Sonicblue began shipping its first units in November. Turner Broadcasting head Jamie Kellner chimed in with a statement that people who watch television without commercials were stealing from entertainment producers--with possible exceptions made for folks who need to use the bathroom.

At the moment, there are no plans to sue toilet manufacturers for contributory infringement. But Sonicblue could be found liable, despite that famous Supreme Court ruling of 1984 to the effect that TV viewers who tape shows are not criminals (and, by extension, neither are manufacturers of the VCRs). Hollywood argues that technology has since zoomed past that landmark--specifically, with equipment that can capture and send perfect copies of movies. "This is a machine that goes beyond the pale of the technology--and they knew it did," says Viacom Senior Vice President Carl Folta. "We need to make sure that when someone puts out a product that clearly violates our copyrights, we stand up and say, 'This is not right.'"

Perhaps. But Hollywood picks its battles. An early ad zapper, described in FORBES in 1989, fizzled in 1994 without any legal assault from producers. Microsoft sells a Replay-like device called UltimateTV, but Microsoft can fend off a thousand lawsuits. TiVo, a \$26 million (sales) company with 422,000 subscribers, lets viewers skip ads by fast-forwarding through them 60 times as fast as they could with an ordinary VCR. Yet it, too, has evaded litigation, perhaps because it is 28% owned by entertainment producers AOL Time Warner, Sony and NBC.

Sonicblue is an easier target. It's bigger than TiVo, but it's hurting, having lost \$437 million in the last 12 months on \$229 million in sales. (It sells a variety of digital video and audio products, including portable MP3 players.) The stock is down 80% for the year to a recent \$1.11, valuing the company at just \$106 million. ReplayTV, which costs up to \$2,000, is only now hitting stores; a mere 5,000 of them have been sold, mostly through Sonicblue's Web site.

Into this mess comes Sonicblue Chief Kenneth F. Potashner. The son of an RCA entertainment executive, he studied electrical engineering and worked for a series of technology companies before heading defense outfit Maxwell Technologies in 1996. He earned the nickname "Roving Chaos" there as he developed myriad commercial uses for Maxwell products and upped sales by 55% to \$125 million. He left in 1998 to head the unprofitable Sonicblue, where he dropped its lousy graphic chips business and acquired digital audio and video companies.

Despite the prospect of litigation, last August he paid \$50 million in stock and cash for ReplayTV, a struggling Mountain View, Calif. company. Now, he aims to lower ReplayTV's price to compete with the \$400 TiVo. He says he has no plans to settle. "At many companies the model is, 'How do we grow this 10% year on year?'" says Potashner, 44. "This is, 'We're either going to have a phenomenal success or we may not be here.'"

If Hollywood has its way, it will be the latter. In April the industry asked Sonicblue for every design and development document at the company, including every piece of paper related to marketing, sales, financing, investment and licensing--thousands of pages in all. Weeks later the industry persuaded a federal magistrate to require Sonicblue to write software that would monitor its customers' viewing habits and hand the private data over. Sonicblue argued it would take four months to do this, at an initial cost of up to \$128,000, plus \$37,000 each month thereafter. The company refused. It got a stay on the order, and before Sonicblue wrote a single line of code, a federal court judge overturned the decision.

Consumers are furious. In June the Electronic Frontier Foundation, which campaigns against laws that restrict the use of technology, filed a suit on behalf of consumers against the "Entertainment Oligopoly," asking the court to decide whether ReplayTV features are legal. Other customers have ponied up small amounts of cash for a Sonicblue legal defense fund.

Potashner may disappoint them. Despite claims to have no plans to settle, he is talking to Hollywood, and one possible outcome is that ReplayTV survives but with different features. Such a move might tick off the early adopters who forked over \$2,000 for the product. But Potashner says ReplayTV's service agreement allows it to add or subtract features at any time. "We reserve the right to turn this into a toaster," he jokes.

IN THE CROSSHAIRS

Napster and ReplayTV are just two of the more notable outfits targeted for alleged copyright violations. Here are some others.

TARGET

2600 magazine

RESULT

Eight motion picture studios sued the trade sheet to stop it from publishing a computer program that circumvents DVD encryption. The trial judge ruled in favor of the plaintiffs.

Edward W. Felten

Trade group Secure Digital Music Initiative invited people to try to crack its security technologies. The Princeton professor did, but when he wanted to publish his findings, the music industry threatened litigation. It later backed down.

MusicCity.com

Twenty-eight entertainment companies filed a copyright infringement suit after the Morpheus creator developed a tool that transfers digital audio and video files. The trial is set for October.

Dmitry Sklyarov

Russian doctoral student arrested for writing software on behalf of his employer that could translate Adobe eBook documents into PDF files. Charges have been dropped, but a case is pending against his employer, ElcomSoft. -M.F.