

1 DURIE TANGRI LLP
MICHAEL H. PAGE (SBN 154913)
2 mpage@durietangri.com
MARK A. LEMLEY (SBN 155830)
3 mlemley@durietangri.com
JOSEPH C. GRATZ (SBN 240676)
4 jgratz@durietangri.com
217 Leidesdorff Street
5 San Francisco, CA 94111
Telephone: 415-362-6666
6 Facsimile: 415-236-6300

7 Attorneys for Defendants
WTV SYSTEMS, INC. f/k/a WTV
8 SYSTEMS, LLC and VENKATESH
SRINIVASAN
9

10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 WARNER BROS. ENTERTAINMENT
INC., COLUMBIA PICTURES
14 INDUSTRIES, INC., DISNEY
ENTERPRISES, INC., PARAMOUNT
15 PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM
16 CORPORATION, and UNIVERSAL CITY
STUDIOS PRODUCTIONS LLLP,

17 Plaintiffs,

18 v.

19 WTV SYSTEMS, INC. and WTV
20 SYSTEMS, LLC d/b/a ZEDIVA, and
VENKATESH SRINIVASAN,
21

22 Defendants.

23 WTV SYSTEMS, INC. and WTV
SYSTEMS, LLC d/b/a ZEDIVA, and
24 VENKATESH SRINIVASAN,

25 Counterclaimants,

26 v.

27 WARNER BROS. ENTERTAINMENT
28

Case No. 2:11-cv-02817-JFW-E

**OPPOSITION TO MOTION PICTURE
STUDIOS' MOTION FOR
PRELIMINARY INJUNCTION**

Date: July 25, 2011

Time: 1:30 p.m.

Ctrm: 16

Judge: Honorable John F. Walter

1 INC., COLUMBIA PICTURES
2 INDUSTRIES, INC., DISNEY
3 ENTERPRISES, INC., PARAMOUNT
4 PICTURES CORPORATION,
5 TWENTIETH CENTURY FOX FILM
6 CORPORATION, and UNIVERSAL CITY
7 STUDIOS PRODUCTIONS LLLP,

Counterdefendants.

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

Page No.

I. INTRODUCTION 1

II. FACTUAL BACKGROUND..... 3

III. ARGUMENT..... 4

 A. The Preliminary Injunction Standard 4

 B. The Studios are unlikely to succeed on the merits..... 5

 1. Zediva involves only private performances, not public performances..... 5

 2. The Studios have chosen to avoid questions of fair use and secondary liability by alleging only direct infringement by Zediva, but Zediva’s users initiate the transmissions, not Zediva..... 12

 C. The Studios cannot demonstrate irreparable harm..... 16

 D. Granting the motion would put Zediva out of business, so the balance of hardships tilts against the Studios..... 21

 E. The public interest is in equipoise, and does not favor the Studios..... 23

IV. CONCLUSION..... 25

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

TABLE OF AUTHORITIES

Page No.

Cases

Alliance for the Wild Rockies v. Cottrell,
632 F.3d 1127 (9th Cir. 2011) 4

Arista Records LLC v. Myxer Inc.,
No. 2:08-cv-03935 GAF (JCx) (C.D. Cal. Apr. 1, 2011)..... 14

Cadence Design Systems, Inc. v. Avant! Corp.,
125 F.3d 824 (9th Cir. 1997) 23

Cartoon Network LP, LLLP v. CSC Holdings, Inc.,
536 F.3d 121 (2d Cir. 2008),
cert. denied, 129 S. Ct. 2890, 174 L.Ed.2d 595 (2009)..... passim

Citibank, N.A. v. Citytrust,
756 F.2d 273 (2d Cir. 1985) 20

Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.,
866 F.2d 278 (9th Cir. 1989) passim

Columbia Pictures Indus., Inc. v. Aveco, Inc.,
800 F.2d 59 (3d Cir. 1986) 10, 15

Columbia Pictures Indus., Inc. v. Redd Horne, Inc.,
749 F.2d 154 (3d Cir. 1984) 10

CoStar Group, Inc. v. LoopNet, Inc.,
373 F.3d 544 (4th Cir. 2004) 14

Cotter v. Desert Palace, Inc.,
880 F.2d 1142 (9th Cir. 1989) 16

Dotster, Inc. v. ICANN,
296 F. Supp. 2d 1159 (C.D. Cal. 2003) 17

eBay Inc. v. MercExchange, L.L.C.,
547 U.S. 388, 129 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) 5, 23

ECRI v. McGraw-Hill, Inc.,
809 F.2d 223 (3d Cir. 1987) 17

Field v. Google Inc.,
412 F. Supp. 2d 1106 (D. Nev. 2006)..... 13, 14

Fogerty v. Fantasy, Inc.,
510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994) 24

Fox Film Corp. v. Doyal,
286 U.S. 123, 52 S. Ct. 546, 76 L. Ed. 1010 (1932)..... 24

TABLE OF AUTHORITIES (CONT'D)

Page No.

1

2

3 *Givemepower Corp. v. Pace Compumetrics, Inc.*,

4 No. 07cv157-WQH-RBB, 2007 WL 951350 (S.D. Cal. Mar. 23, 2007) 20

5 *In re Cellco P’ship*,

6 663 F. Supp. 2d 363 (S.D.N.Y. 2009) 7, 10, 14

7 *In re Palmer*,

8 207 F.3d 566 (9th Cir. 2000) 7

9 *Kerr Corp. v. N. Am. Dental Wholesalers, Inc.*,

10 No. SACV 11-0313 DOC CWx, 2011 WL 2269991

11 (C.D. Cal. June 9, 2011) 20

12 *Marobie-FL, Inc. v. Nat’l Ass’n of Fire Equip. Distribs.*,

13 983 F. Supp. 1167 (N.D. Ill. 1997) 14

14 *MGM Studios, Inc. v. Grokster, Ltd.*,

15 545 U.S. 913, 125 S. Ct. 2764, 162 L. Ed. 2d 781 (2005) 15

16 *Munaf v. Geren*,

17 553 U.S. 674, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008) 4

18 *Oakland Tribune, Inc. v. Chronicle Publ’g Co., Inc.*,

19 762 F.2d 1374 (9th Cir. 1985) 20

20 *On Command Video Corp. v. Columbia Pictures Industries, Inc.*,

21 777 F. Supp. 787 (N.D. Cal. 1991) 11, 12

22 *Random House, Inc. v. Rosetta Books LLC*,

23 283 F.3d 490 (2d Cir. 2002) 22

24 *Religious Tech. Ctr. v. Netcom On-Line Commc’n Servs., Inc.*,

25 907 F. Supp. 1361 (N.D. Cal. 1995) 13, 14

26 *Rosen v. Hosting Servs., Inc.*,

27 No. CV10-2186-CAS-FMOx, 2010 WL 5630637

28 (C.D. Cal. Aug. 16, 2010) 13, 14

Salinger v. Colting,

 607 F.3d 68 (2d Cir. 2010) 5

Sega Enters. Ltd. v. MAPHIA,

 948 F. Supp. 923 (N.D. Cal. 1996) 13, 14

Sony Corp. of Am. v. Universal City Studios, Inc.,

 464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) 1

United States v. ASCAP

 627 F.3d 64 (2d Cir. 2010) 10

TABLE OF AUTHORITIES (CONT'D)

Page No.

1
2
3 *United States v. Stauffer Chem. Co.*,
4 464 U.S. 165, 104 S. Ct. 575, 78 L. Ed. 2d 388 (1984) 7
5
6 *Whitmill v. Warner Bros. Entertainment Inc.*,
7 No. 4:11-cv-00752-CDP (E.D. Mo. filed May 20, 2011) 23
8
9 *Winter v. Natural Res. Def. Council, Inc.*,
10 555 U.S. 7, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) 4, 23
11
12 **Statutes**
13 17 U.S.C. § 101 6, 10
14 17 U.S.C. § 106 5
15 17 U.S.C. § 107 15
16
17 **Other Authorities**
18 H.R. 5707, 97th Cong. (1st Sess. 1982)..... 1, 17
19 H.R. Rep. No. 90-83 (1st Sess. 1967)..... 12
20 H.R. Rep. No. 94-1476 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659 9
21 David Pogue, *DVD Movies From Afar*,
22 N.Y. TIMES, Mar. 17, 2011 21
23 Hayley Tsukayama, *Zediva Offers New Approach to Online Movies*,
24 WASH. POST, Mar. 16, 2011 22
25 Jeremy W. Peters, *General Counsel of News Corp. Resigns in Wake of*
26 *Settlement*, N.Y. TIMES, June 8, 2011 21
27 Martin Peers, *New Headache for Hollywood*,
28 WALL ST. J., Mar. 16, 2011 22
Peter S. Menell & David Nimmer, *Legal Realism in Action: Indirect*
Copyright Liability’s Continuing Tort Framework and Sony’s De Facto
Demise, 55 UCLA L. REV. 143, 157-60 (2007) 1
Scott Kirsner, *Indies Still Looking for Internet Equation*,
VARIETY, Oct. 2, 2009 16
Unkind Unwind, THE ECONOMIST,
March 17, 2011 16

1 **I. INTRODUCTION**

2 Movie studios, including all of the Plaintiffs here, spent the better part of the 1970s
3 and 1980s trying to persuade courts to declare video rentals illegal. They sued Sony for
4 making video cassette recorders (VCRs), taking the case to the Supreme Court.¹ Even
5 after the VCR itself was declared legal, they sued hotels for making videos available to
6 their customers to watch in their hotel rooms.² They even went to Congress in an
7 unsuccessful effort to change the Copyright Act to make renting videos illegal without the
8 payment of a royalty.³ More recently, they sued cable companies that provide remote
9 digital video recorders (DVRs) that allow customers to record and replay shows from
10 television. *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir.
11 2008), *cert. denied*, 129 S. Ct. 2890, 174 L. Ed. 2d 595 (2009) (“*Cablevision*”).

12 The Studios lost. It is not illegal to rent movies to others without the copyright
13 holder’s permission. Blockbuster is free to rent the same movie to many different
14 customers in its stores. Netflix is free to mail DVDs to its rental customers. They must
15 buy the DVDs from the Studios, but once they do, the Studios have been paid, and they
16 have no right to demand a share of the rental fee. Only if a company goes beyond renting
17 the disc they purchased, and actually broadcasts its one lawful copy to the public at large
18 (by showing it on television, for instance), does the copyright owner have the right to be
19 paid a second time.

20 That is the law, but the Studios would prefer it otherwise. They have built a
21 business model based on “windowing” the release of their films in a particular sequence,

22
23
24 ¹ See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 104 S. Ct. 774, 78
L. Ed. 2d 574 (1984).

25 ² See *Columbia Pictures Indus., Inc. v. Prof’l Real Estate Investors, Inc.*,
26 866 F.2d 278 (9th Cir. 1989).

27 ³ H.R. 5707, 97th Cong. (1st Sess. 1982). See Peter S. Menell & David Nimmer, *Legal*
28 *Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s*
De Facto Demise, 55 UCLA L. REV. 143, 157-60 (2007) (recounting history).

1 and complain that Zediva’s⁴ business model is at odds with their own. Perhaps. But a
2 business model, no matter how large and powerful the business, cannot substitute for or
3 alter the law. And when that business model demands that the business be paid twice for
4 a product it sells once, it must yield to the law.

5 Zediva purchases DVDs sold by the Studios and rents them to the public. Like
6 Blockbuster and Netflix, it rents those videos to one person at a time, for private
7 enjoyment in their own home. It does so not by requiring the customer to come to a
8 physical store, but by bringing the store to the customer via the Internet. Zediva gives its
9 customers control over an actual DVD player containing an actual, purchased disc—not in
10 their living room, but online. During the period of that rental, the customer controls the
11 DVD player, and only that customer can view the disc. Only after the customer returns
12 the disc can Zediva rent it out to someone else.

13 Plaintiffs want to prevent this rental, just as they have tried to prevent every other
14 form of video rental before it. Plaintiffs hope to create a loophole in the Copyright Act
15 that would define playback of a single, authorized copy of a DVD to a single individual as
16 “public”—the legal equivalent of a television broadcast to the world at large.

17 Neither the statutory language nor the case law supports the Studios’ position.
18 Indeed, the Studios filed this case in hopes of persuading this Court to expressly reject the
19 Second Circuit’s ruling on a closely analogous service in *Cablevision*. In furtherance of
20 that effort, the Studios have deliberately chosen to forego claims of indirect copyright
21 infringement, even though the law is clear that those who provide systems and facilities
22 for challenged conduct are liable, if at all, only under theories of indirect infringement.
23 Finally, even were Zediva’s service ultimately held illegal, the measure of harm is quite
24 clear, and it can be compensated with money damages.

25
26 _____
27 ⁴ Defendant WTV Systems, Inc. f/k/a WTV Systems, LLC markets its service under the
28 name “Zediva.” See <http://www.zediva.com>. Like the Studios, we refer to the
Defendants collectively as “Zediva.”

1 This Court should not grant a preliminary injunction on a legal theory that has
2 already been tested and found wanting, in a case in which plaintiffs can show neither
3 irreparable injury nor hardship.

4 **II. FACTUAL BACKGROUND**

5 Zediva allows its users to rent DVDs and DVD players, and to control those DVD
6 players over the Internet. Declaration of Vivek Gupta (“Gupta Decl.”) ¶ 3. Zediva
7 maintains racks full of DVD players at its data center. *Id.* When a user has rented a DVD
8 and DVD player, that user has sole and exclusive control of that DVD and DVD player,
9 and the user is able to watch that DVD. *Id.* The video signal is encrypted so that only the
10 particular user who has rented the DVD can view the output of that DVD player. *Id.* ¶
11 13(f). While the movie is playing, the user’s web browser displays buttons with which the
12 user can send commands to the DVD player. *Id.* ¶ 14. These buttons allow the user to
13 pause the DVD, to skip to another part of the DVD, to turn on or off subtitles, and so on.
14 *Id.* The user watches the movie straight from the original DVD. *Id.* ¶ 11.

15 Each DVD player holds a single DVD, and the DVDs are generally removed from
16 the player only when a DVD is removed from the rental inventory. *Id.* The following
17 photograph shows one cabinet of Zediva’s DVD players, with three discs ejected to show
18 the contents of the DVD players:



1 Gupta Decl. ¶ 4. The Zediva service allows users to rent movies for \$1.99 per rental, or
2 \$9.99 for a “pack” of 10 rentals. *Id.* ¶ 12. Each rental lasts for four hours, and users are
3 permitted to re-rent the same DVD without paying an additional fee for 14 days. *Id.* In
4 addition to its remote DVD rental offering, Zediva permits users to rent the same DVDs
5 by mail for the same price. *Id.* ¶ 12.

6 As with any other DVD rental business, if a DVD is rented out, nobody else can
7 rent that DVD. *Id.* ¶ 3. The only way for Zediva to increase capacity to meet demand is
8 to do the same thing any other DVD rental business would have to do—buy lots and lots
9 of DVDs. *Id.*

10 **III. ARGUMENT**

11 **A. The Preliminary Injunction Standard**

12 A “preliminary injunction is an extraordinary and drastic remedy.” *Munaf v.*
13 *Geran*, 553 U.S. 674, 676, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (2008). Thus, a district court
14 may enter a preliminary injunction only “upon a clear showing that the plaintiff is entitled
15 to such relief.” *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 129 S. Ct. 365, 374,
16 172 L. Ed. 2d 249 (2008). “A plaintiff seeking a preliminary injunction must establish
17 that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the
18 absence of preliminary relief, that the balance of equities tips in his favor, and that an
19 injunction is in the public interest.” *Id.* at 374. In the alternative, a showing of “‘serious
20 questions going to the merits’ and a balance of hardships that tips *sharply* towards the
21 plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also
22 shows that there is a likelihood of irreparable injury and that the injunction is in the public
23 interest.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)
24 (emphasis added).

25 The plaintiff bears the burden of proving that each of the four *Winter* requirements
26 is met. None of those four requirements may be presumed, even in an intellectual
27 property case. *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391, 129 S. Ct. 1837,
28

1 1839, 164 L. Ed. 2d 641 (2006) (holding, in the context of a patent case, that “[a] plaintiff
2 must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available
3 at law, such as monetary damages, are inadequate to compensate for that injury; (3) that,
4 considering the balance of hardships between the plaintiff and defendant, a remedy in
5 equity is warranted; and (4) that the public interest would not be disserved by a permanent
6 injunction”); *Salinger v. Colting*, 607 F.3d 68, 77 (2d Cir. 2010) (“*eBay* applies with equal
7 force (a) to preliminary injunctions (b) that are issued for alleged copyright
8 infringement.”). As the Court explained in *eBay*, drawing from principles of copyright
9 law, the four-factor test must be applied case-by-case, without reliance on presumptions
10 of irreparable injury, balance of the hardships, or the public interest. *eBay*, 547 U.S. at
11 391. Courts have recognized that adjudicating a motion for preliminary judgment in a
12 copyright case is a particularly difficult task. *Salinger*, 607 F.3d at 80 (“courts should be
13 particularly cognizant of the difficulty of predicting the merits of a copyright claim at a
14 preliminary injunction hearing”).

15 **B. The Studios are unlikely to succeed on the merits.**

16 Using Zediva, a customer gets full remote control of a DVD and DVD player in a
17 data center, and only that customer can watch that DVD over the Internet. Zediva does
18 not infringe the Studios’ right of public performance by making this system available to
19 its users, for two principal reasons: the system permits only *private* transmissions, not
20 public ones, and those transmissions are made as a direct result of the *user’s* volitional
21 conduct, not Zediva’s.

22 **1. Zediva involves only private performances, not public**
23 **performances.**

24 The Studios allege that Zediva has infringed one of the exclusive rights granted by
25 the Copyright Act: the right “to perform the copyrighted work publicly.” 17 U.S.C. §
26 106(4). Notably, and critically, the Copyright Act does not grant to copyright holders the
27 exclusive right to perform the copyrighted work *privately*.

1 To be sure, the Zediva service permits its users to play back DVDs, and that
2 playback constitutes a “performance,” as the term is defined in the Copyright Act. “To
3 ‘perform’ a work means . . . in the case of a motion picture or other audiovisual work, to
4 show its images in any sequence or to make the sounds accompanying it audible.” 17
5 U.S.C. § 101. The Zediva service unquestionably involves watching movies; each time a
6 user presses “Play,” that user is causing the work to be shown to him by way of an
7 Internet transmission, thereby “performing” the movie which is recorded on the DVD.

8 But is the user performing the work “publicly?” The Copyright Act defines the
9 term:

10 To perform or display a work “publicly” means—

11 (1) to perform or display it *at a place open to the public* or at
12 any place where a substantial number of persons outside of a
13 normal circle of a family and its social acquaintances is
gathered; or

14 (2) to *transmit* or otherwise communicate a performance or
15 display of the work to a place specified by clause (1) or *to the*
16 *public*, by means of any device or process, whether the members
17 of the public capable of receiving the performance or display
receive it in the same place or in separate places and at the same
time or at different times.

18 17 U.S.C. § 101 (emphasis added). The second clause of this definition, dealing with
19 performance through transmission of a work, is referred to as the “transmit clause.” The
20 Studios do not contend that there have been any performances in public places; instead,
21 they contend that Zediva makes a public performance when a user watches a DVD by
22 transmitting the output of his rented DVD player to his computer so he (and he alone) can
23 watch it.

24 Zediva’s service involves only private performances, not public performances.
25 Each playback (or “performance”) of a DVD can be viewed only by the user who has full
26 and exclusive control of that DVD and DVD player. Multiple people cannot watch the
27 same particular DVD at the same time. There can be no broadcasting. Indeed, Zediva
28

1 encrypts its transmissions to make sure there is no opportunity to copy or share the
2 performance with others. Gupta Decl. ¶ 13(f). The system permits a point-to-point
3 transmission of the output of a DVD player only to the person who has rented that DVD
4 player and the DVD it contains. That is not a transmission “to the public;” it is a
5 transmission to the single person who has rented a particular copy of the movie being
6 transmitted. “Because only one subscriber is capable of receiving this transmission or
7 performance, the transmission is not made to the public and is not covered by the
8 Transmission Clause, at least when considered by itself.” *In re Cellco P’ship*, 663 F.
9 Supp. 2d 363, 371 (S.D.N.Y. 2009).

10 In a case brought by the very Studios before this Court in the present case, the
11 Second Circuit faced precisely the question presented here, and resolved it squarely in
12 favor of Zediva. That case was *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536
13 F.3d 121 (2d Cir. 2008), *cert. denied*, 129 S.Ct. 2890, 174 L.Ed.2d 595 (2009) which is
14 known as the “*Cablevision*” case. Plaintiffs Twentieth Century Fox Film Corporation,
15 Universal City Studios Productions, LLLP, Paramount Pictures Corporation, and Disney
16 Enterprises Inc. were also plaintiffs in *Cablevision*.⁵

17 Where this case deals with remote DVD playback, *Cablevision* dealt with remote
18

19 _____
20 ⁵ The Studios argue that *Cablevision* was wrongly decided, but they are precluded from
21 doing so by collateral estoppel. “[T]he doctrine of collateral estoppel can apply to
22 preclude relitigation of both issues of law and issues of fact if those issues were
23 conclusively determined in a prior action.” *United States v. Stauffer Chem. Co.*, 464 U.S.
24 165, 170-71, 104 S. Ct. 575, 578, 78 L. Ed. 2d 388 (1984). “Collateral estoppel is
25 appropriate when the following elements are met: (1) there was a full and fair opportunity
26 to litigate the issue in the previous action; (2) the issue was actually litigated in that
27 action; (3) the issue was lost as a result of a final judgment in that action; and (4) the
28 person against whom collateral estoppel is asserted in the present action was a party or in
privity with a party in the previous action.” *In re Palmer*, 207 F.3d 566, 568 (9th Cir.
2000). The interpretation of the “transmit clause” in the context of one-to-one
transmissions was fully, fairly, and actually litigated in *Cablevision*; the Plaintiffs lost as a
result of a final judgment in that action; and Fox, Universal, Paramount, and Disney were
parties in *Cablevision*. As such, they should not be heard to challenge the *Cablevision*
holding.

1 DVR playback—playback from a Remote Storage Digital Video Recorder (“RS-DVR”)
2 which, much like a TiVo, allowed users to record and play back television shows. The
3 Second Circuit observed that “the RS-DVR is not a single piece of equipment, but rather a
4 complex system requiring numerous computers, processes, networks of cables, and
5 facilities staffed by personnel twenty-four hours a day and seven days a week.” *Id.* at 125
6 (internal quotations omitted). But the complexity of Cablevision’s back-end systems did
7 not figure in the Second Circuit’s analysis; instead, the court emphasized that the
8 customer could do no more with the remote DVR than they could with a standard set-top
9 DVR: “To the customer, however, the processes of recording and playback on the RS-
10 DVR are similar to that of a standard set-top DVR.” *Id.* “The principal difference in
11 operation is that, instead of sending signals from the remote to an on-set box, the viewer
12 sends signals from the remote, through the cable, to the Arroyo Server at Cablevision’s
13 central facility.” *Id.* The system in *Cablevision* operated, from the user’s perspective,
14 like playing a movie back from a DVR with a very long cable attached. Likewise, the
15 Zediva system operates, from the user’s perspective, like playing back a movie from a
16 DVD with a very long cable attached.

17 The question in *Cablevision* was whether the transmission of those shows during
18 playback from the cable company’s data center to the user’s home constituted a
19 performance “to the public.” The Second Circuit held that “under the transmit clause, we
20 must examine the potential audience of a given transmission by an alleged infringer to
21 determine whether that transmission is ‘to the public.’” *Cablevision*, 536 F.3d at 137. In
22 other words, “it is relevant, in determining whether a transmission is made to the public,
23 to discern who is ‘capable of receiving’ the performance being transmitted.” *Id.* at 134.
24 In so holding, the court found support in the House Report on the 1976 Copyright Act,
25 which states that “a performance made available *by transmission to the public at large* is
26 ‘public’ even though the recipients are not gathered in a single place, and even if there is
27 no proof that any of the *potential recipients* was operating his receiving apparatus at the
28

1 time of the transmission.” *Id.* at 135 (citing H.R. Rep. No. 94-1476, at 64-65 (1976),
2 *reprinted in* 1976 U.S.C.C.A.N. 5659, 5678) (emphasis in opinion). Accordingly, the
3 Second Circuit held that “[b]ecause each RS-DVR playback transmission is made to a
4 single subscriber using a single unique copy produced by that subscriber, we conclude
5 that such transmissions are not performances ‘to the public,’ and therefore do not infringe
6 any exclusive right of public performance.” *Id.* at 139.

7 Zediva presents a virtually identical set of facts to *Cablevision*, and leads to the
8 same conclusion. Because each remote DVD playback transmission is made to a single
9 subscriber using a single copy in the exclusive control of that subscriber, such
10 transmissions are not public performances.

11 It is true, as the Studios point out, that the *Cablevision* case involved the making of
12 many copies of the copyrighted work, and that the transmissions at issue were made from
13 those unauthorized copies. Zediva’s service, by contrast, involves transmissions made
14 directly from authorized, store-bought copies of movies sold by the Studios on DVD. But
15 to the extent that difference matters at all, it matters in a way that favors Zediva.

16 *Cablevision*’s customers made copies without permission, and transmitted movies from
17 the data center to their television sets. Nonetheless, the court held the transmission of
18 those copies to be lawful because the unauthorized copy was transmitted only to one
19 individual at a time. It would be bizarre indeed to hold that Zediva was engaged in an
20 infringing public performance because it used the actual disk it purchased from the
21 Studios in its system, but that Zediva, like *Cablevision*, would be acting lawfully if each
22 of its users were to make an intermediate copy of each disk and transmit from that
23 intermediate copy.⁶ We agree with what the Studio Plaintiffs told the *Cablevision* court:
24 that “[i]t is wholly irrelevant, in determining the existence of a public performance,
25

26 ⁶ Nonetheless, should this Court conclude that *Cablevision* applies only to services that
27 make such an intermediate copy, Zediva requests that any injunction should be tailored to
28 the specific facts of this case, so that Zediva, like *Cablevision*, will remain free to
implement such a system.

1 whether ‘unique’ *copies* of the same work are used to make the transmissions.” Brief of
2 Appellees Twentieth Century Fox Film Corp. *et al.* in *Cablevision*, No. 07-1480-cv, at 27
3 (2d Cir. filed June 20, 2007), *available at* 2007 WL 6101619 (emphasis in original).

4 Subsequent opinions have sharpened some of *Cablevision*’s holdings in ways that
5 are instructive to the analysis here. For example, *In re Cellco Partnership*, 663 F. Supp.
6 2d 363 (S.D.N.Y. 2009), dealt with the question whether the transmission of ringtones
7 from a cellular telephone company to a subscriber’s telephone constituted a public
8 performance. The *Cellco* court emphasized that “[i]n analyzing whether the transmission
9 to a cellular telephone qualifies as a transmission of the work to the public, the focus is on
10 the transmission itself and its potential recipients, and not on the potential audience of the
11 underlying work” *Cellco*, 663 F. Supp. 2d at 371. And in *United States v. ASCAP*,
12 the Second Circuit further clarified that “when Congress speaks of transmitting a
13 performance to the public, it refers to the performance created by the act of transmission,
14 not simply to transmitting a recording of a performance.” 627 F.3d 64, 73 (2d Cir. 2010)
15 (internal quotation omitted). Applying that principle here, the focus of the public-
16 performance analysis is on that particular transmission itself and its potential recipients,
17 not on the potential audience of the underlying movie. Under the statute, the question is
18 whether a particular playback—“a performance”—of the work is transmitted to multiple
19 members of “the public.” 17 U.S.C. § 101. It is not, as Plaintiffs seem to argue, whether
20 a series of *different* performances of a particular work are transmitted to multiple different
21 members of the public.

22 Plaintiffs cite to a number of cases in an effort to avoid the effect of *Cablevision*.
23 They put primarily reliance on the Third Circuit decisions in *Columbia Pictures*
24 *Industries, Inc. v. Redd Horne, Inc.*, 749 F.2d 154 (3d Cir. 1984) and *Columbia Pictures*
25 *Industries, Inc. v. Aveco, Inc.*, 800 F.2d 59 (3d Cir. 1986), discussing them no fewer than
26 seven times in their brief and quoting from *Redd Horne* at length. Plaintiffs fail to
27 mention that the rationale of those cases was considered and rejected by the Ninth Circuit
28

1 in *Columbia Pictures Industries, Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d
 2 278 (9th Cir. 1989).⁷ *Professional Real Estate Investors* held that a hotel room was not a
 3 place “open to the public” and so performances from rented videos in those rooms were
 4 not public performances. *Id.* at 280. That conclusion applies with even more force to the
 5 private homes in which Zediva customers view their rented videos. And that conclusion
 6 disposes of *On Command Video Corp. v. Columbia Pictures Industries, Inc.*, 777 F. Supp.
 7 787 (N.D. Cal. 1991), the pre-*Cablevision* district court case on which Plaintiffs place
 8 primary reliance. *On Command* held that transmitting a video from a video player to a
 9 hotel room was a transmission to the public, even though the hotel room had been held a
 10 private place. *On Command* held that every commercial transmission is a “public
 11 performance” because “the relationship between the transmitter of the performance, On
 12 Command, and the audience, hotel guests, is a commercial, ‘public’ one regardless of
 13 where the viewing takes place.” *On Command*, 777 F. Supp. at 790. But that conclusion
 14 simply cannot be squared with *Cablevision* or with *Professional Real Estate Investors*,
 15 which (unlike *On Command*) is binding law in this Circuit.⁸ As *Cablevision* explained in
 16 rejecting *On Command*:

17 Thus, according to the *On Command* court, any commercial
 18 transmission is a transmission “to the public.” We find this
 19 interpretation untenable, as it completely rewrites the language

20 ⁷ All six Plaintiffs here were also plaintiffs in *Professional Real Estate Investors*.

21 ⁸ Curiously, the Studios do identify *Professional Real Estate Investors* as “highly
 22 relevant” to this case, but they ignore the court’s actual holding in favor of badly
 23 mischaracterizing a footnote rejecting the argument of amicus Spectradyne. Contrary to
 24 the Studios’ claims in their brief that Spectradyne “essentially asked the court to hold that
 25 its activities were not public performances,” Motion of Motion Picture Studio Plaintiffs
 26 for Preliminary Injunction (“Mot.”), ECF No. 25, at 13-14, Spectradyne was an amicus *in*
 27 *support of the movie studios*. It had a licensing arrangement with the Studios, and argued
 28 that it would be harmed if forced to compete with other, unlicensed means of video rental
 which, in its view, were tantamount to public performances. The Ninth Circuit correctly
 “reject[ed] all of Spectradyne’s arguments”: “While it might be true that Spectradyne’s
 system could be hurt by the arrangements at La Mancha, Congress, not the courts, has the
 constitutional authority and the institutional ability to accommodate this clash of
 economic interests.” *Prof’l Real Estate Investors*, 866 F.2d at 282 n.7.

1 of the statutory definition. If Congress had wished to make all
2 commercial transmissions public performances, the transmit
3 clause would read: “to perform a work publicly means . . . to
transmit a performance for commercial purposes.”

4 *Cablevision*, 536 F.3d at 139.

5 As the *Cablevision* court explained, the legislative history cited by the *On*
6 *Command* court does not lead to a different outcome. *On Command* cited a 1967 House
7 Report that referred in passing to public performance by means of transmissions “capable
8 of reaching different recipients at different times, as in the case of sounds or images stored
9 in an information system.” H.R. Rep. No. 90-83 at 29 (1st Sess. 1967). But the Second
10 Circuit found reason to “question how much deference this report deserves,” having been
11 “issued nearly a decade before the Act we are interpreting,” and at any rate found that
12 passage consistent with its holding that there had been no public performance.

13 *Cablevision*, 536 F.3d at 135.

14 Put simply, as *Cablevision* and its progeny recognize, a transmission that by
15 definition goes to one and only one recipient cannot be a transmission “to the public.” It
16 is true that the same DVD can later be viewed by others once it has been returned, just as
17 it can be when it is rented by Blockbuster in a physical store, or mailed to a customer by
18 Netflix, or rented to a hotel patron as in *Professional Real Estate Investors*. But those
19 sequential acts are different performances by, and to, different people. Were it otherwise,
20 Blockbuster, Netflix, and the hotel service held legal by the Ninth Circuit in *Professional*
21 *Real Estate Investors* would all be infringing public performances. That has never been
22 the law in the Ninth Circuit. It would allow plaintiffs to exploit a loophole in the law to
23 get paid twice by Zediva when every analogous service needs pay only once.

24 **2. The Studios have chosen to avoid questions of fair use and**
25 **secondary liability by alleging only direct infringement by Zediva,**
but Zediva’s users initiate the transmissions, not Zediva.

26 Even were this Court to conclude that the act of viewing a lawfully-purchased DVD
27 remotely by a single individual were a public performance, Plaintiffs would not have
28

1 shown that they are likely to succeed on the merits of the case they actually filed. For it is
2 Zediva's customers, not Zediva itself, that control and therefore perform that DVD.

3 Plaintiffs have brought an action against Zediva for *direct* infringement of the
4 performance right. Plaintiffs deliberately decided not to allege indirect infringement as an
5 alternative theory. This was a strategic choice on their part. Plaintiffs hope to persuade
6 this Court to reject the Second Circuit *Cablevision* case, which dealt only with direct
7 infringement.

8 In determining whether a defendant has directly infringed copyright, courts look to
9 whether that defendant undertook the volitional act that infringed the right. This
10 requirement defines the boundary between direct infringement, which requires that the
11 defendant has himself done an act through his own volition which directly infringes one
12 of the copyright holder's exclusive rights, and secondary infringement liability, which has
13 different requirements. *Religious Tech. Ctr. v. Netcom On-Line Commc'n Servs., Inc.*,
14 907 F. Supp. 1361, 1369-70 (N.D. Cal. 1995) (those who "do no more than operate or
15 implement a system" by which allegedly infringing activity may occur are not direct
16 infringers, because "[a]lthough copyright is a strict liability statute, there should still be
17 some element of volition or causation which is lacking where a defendant's system is
18 merely used to create a copy by a third party."); *id.* at 1368 (it is not direct infringement to
19 run a system which "can operate without any human intervention"); *Rosen v. Hosting*
20 *Servs., Inc.*, No. CV10-2186-CAS-FMOx, 2010 WL 5630637, at *2 (C.D. Cal. Aug. 16,
21 2010) (finding no direct infringement because "the automatic nature of [defendant's]
22 servers forecloses a finding of volitional action as required under *Netcom* and its
23 progeny"); *Sega Enters. Ltd. v. MAPHIA*, 948 F. Supp. 923, 932 (N.D. Cal. 1996) (where
24 there is no showing that the defendant "himself uploaded or downloaded the files, or
25 directly caused such uploading or downloading to occur," there is no direct infringement);
26 *Field v. Google Inc.*, 412 F. Supp. 2d 1106, 1115 (D. Nev. 2006) (holding that
27 "automated, non-volitional conduct by Google in response to a user's request does not
28

1 constitute direct infringement under the Copyright Act” because the defendant’s
 2 “computers respond automatically to the user's request,” and “[w]ithout the user's request,
 3 the copy would not be created and sent to the user, and the alleged infringement at issue in
 4 this case would not occur”); *CoStar Group, Inc. v. LoopNet, Inc.*, 373 F.3d 544, 555 (4th
 5 Cir. 2004) (“Agreeing with the analysis in *Netcom*, we hold that the automatic copying,
 6 storage, and transmission of copyrighted materials, when instigated by others, does not
 7 render an ISP strictly liable for copyright infringement under §§ 501 and 106 of the
 8 Copyright Act.”); *In re Cellco P’ship*, 663 F. Supp. 2d at 370 (“To be held liable for direct
 9 infringement of the public performance right, a defendant must have engaged in conduct
 10 that is volitional or causally related to that purported infringement.”); *Marobie-FL, Inc. v.*
 11 *Nat’l Ass’n of Fire Equip. Distribs.*, 983 F. Supp. 1167, 1178 (N.D. Ill. 1997) (where the
 12 defendant “only provided the means to copy, distribute or display plaintiff’s works,” and
 13 “did not actually engage in any of these activities itself,” the defendant “may not be held
 14 liable for direct infringement”).⁹

15 No one at Zediva controls or operates the DVD players. When a customer rents a
 16 DVD, it is the customer who starts the disc playing, the customer who decides to fast-
 17 forward, pause, or rewind the disc, and the customer who decides when to stop playing
 18 the disc and return it. Zediva has no control over what the customer does with the disc
 19 during the period of rental. In fact, most of the time, no one from Zediva is even on the
 20 premises. Gupta Decl. ¶¶ 13, 17.

21
 22 ⁹ Although the *Netcom*, *Rosen*, *Sega*, and *Field* opinions in this Circuit have applied the
 23 volition requirement, one unpublished district court opinion in this Circuit has expressly
 24 declined to apply the volition requirement, on the ground that the Ninth Circuit has
 25 (unlike the Second and Fourth Circuits) not decided the question whether that requirement
 26 applies. *See Arista Records LLC v. Myxer Inc.*, No. 2:08-cv-03935 GAF (JCx), ECF No.
 27 548 (C.D. Cal. Apr. 1, 2011) (“the Court is not inclined to adopt a volitional conduct
 28 requirement without clear instruction from the Ninth Circuit”). This Court should follow
 the overwhelming weight of authority, in this circuit and out, and require some volitional
 infringing act before finding direct copyright infringement, as opposed to secondary
 infringement.

1 In the context of the public performance right, “the ones performing the works” are
2 those who “operate the controls,” not those who provide the facilities and equipment for
3 the performance. *Columbia Pictures Indus., Inc. v. Aveco, Inc.*, 800 F.2d 59, 62 (3d Cir.
4 1986). These very Studios argued that the one making the performance in *Aveco* was the
5 consumer, and they won. *Id.* If there is a direct infringer in the Zediva system, it must be
6 the only individual who actually controls a performance: the consumer.¹⁰

7 That Zediva is not a direct infringer does not mean it could never face liability if it
8 set up an infringing system. The copyright law allows plaintiffs to sue those who induce,
9 contribute to, or are vicariously liable for acts of direct infringement by another. *See, e.g.*,
10 *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930-31, 125 S. Ct. 2764, 2776, 162 L.
11 Ed. 2d 781 (2005). But compared to direct infringement, those indirect infringement
12 doctrines are deliberately limited in their scope. They require evidence of knowledge or
13 intent to encourage infringement, and they require proof that there was a direct
14 infringement by another.

15 The Studios are no strangers to the law of indirect copyright infringement; they
16 have brought many of the cases that established that law in the United States Supreme
17 Court. But in this case, they made a deliberate choice not to allege indirect copyright
18 infringement against Zediva. Perhaps they did that because they feared that accusing a
19 consumer of making a “public performance” when he transmits a movie *to himself* would
20 look rather silly. Perhaps they (rightly) feared that even if that individual customer’s
21 performance was deemed public, the customer would be making a fair use under 17
22 U.S.C. § 107. Perhaps they feared that they couldn’t show that Zediva intended to
23 encourage infringement because it acted in the good-faith belief that its conduct was
24 lawful. But the reason doesn’t matter. Zediva is not a direct copyright infringer, and the

25
26 ¹⁰ Independently, this fact is a reason to deny any relief against named defendant
27 Venkatesh Srinivasan, the CEO of Zediva. There is no claim in the case that Srinivasan
28 himself engages in any act of performance, public or not. And since he is not charged
with indirect infringement, no remedy against him is appropriate.

1 Studios have chosen not to sue on the theory that it is a secondary copyright infringer.
 2 They are certainly not likely to succeed on the merits of a claim they haven't even
 3 brought.

4 **C. The Studios cannot demonstrate irreparable harm.**

5 Zediva rents out movies for \$1.99. Services like iTunes and Amazon make those
 6 same movies available on demand for \$3.99,¹¹ of which the Studios get 70%, or \$2.80.¹²
 7 Zediva, having purchased DVDs made and sold by the Studios, does not pay a per-rental
 8 fee. Similarly, video rental stores like Blockbuster or Netflix are free to purchase DVDs
 9 at retail and rent them with no further payment to the copyright owner. Gratz Decl. Ex. B
 10 at 66:11-67:15 (Deposition of Thomas Gewecke, President of Warner Brothers Digital
 11 Distribution ("Gewecke Dep.")). Thus, if the Court ultimately decides that Zediva must
 12 pay a per-rental fee, it is easy to calculate the maximum possible amount owed: \$2.80 per
 13 rental, minus the amount Zediva paid the Studios for its DVDs. There are certainly
 14 arguments, and good arguments, that Zediva would owe less; indeed, the Studios make
 15 less than \$1 from many DVD rentals. *See, e.g., Unkind Unwind*, THE ECONOMIST, March
 16 17, 2011 (Gratz Decl. Ex. D) (rentals from DVD kiosks "are worth just \$1 each to the
 17 studio, and would be worth even less if people were more punctual about returning their
 18 DVDs"). But for purposes of determining whether the Studios will suffer irreparable
 19 harm during the pendency of this case, the precise number is not important. The fact that
 20 the Studios are accepting \$2.80 per rental in exchange for a license to permit iTunes and
 21 Amazon to do more than that which Zediva does disposes of the irreparable-harm
 22 question. *See, e.g., Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989)

23 _____
 24 ¹¹ Declaration of Carolyn Luedtke ("Luedtke Decl.") Ex. A, ECF No. 28-1 (reflecting
 25 identical prices of \$3.99 for online rentals from Amazon, Best Buy, YouTube, and Vudu
 for films from different studios).

26 ¹² Scott Kirsner, *Indies Still Looking for Internet Equation*, VARIETY, Oct. 2, 2009
 27 (Declaration of Joseph C. Gratz ("Gratz Decl.") Ex. C) ("Apple offers a fairly
 28 straightforward 70/30 revenue split with most rights-holders (Apple keeps 30% of rentals
 and sales)[.]").

1 (injuries compensable with money damages are not irreparable); *Dotster, Inc. v. ICANN*,
2 296 F. Supp. 2d 1159, 1163 (C.D. Cal. 2003) (loss of revenues is not irreparable harm).

3 So, the studios must answer the question, “Why is money not enough?” Their
4 attempts to answer fall flat.

5 *First*, the Studios argue that Zediva’s service interferes with their “right to
6 exclusive control over their copyrighted works.” Mot. at 19. This argument proves too
7 much: every alleged copyright infringement is regarded by the copyright holder as an
8 infringement upon the exclusive rights granted by the Copyright Act. Thus, if the Studios
9 were correct that there is irreparable harm any time there is a diminution of a copyright
10 holder’s “exclusive right to control how, when, to whom, and for what price (if any) it
11 will disseminate its copyrighted works,” *id.*, there would be a finding of irreparable harm
12 in every copyright case. This is a result foreclosed by the Supreme Court in *eBay*. And,
13 at any rate, such an abstract theory of harm does not meet the preliminary injunction
14 standard. The Studios claim that Zediva’s service “*risks* harming the relationships each
15 Studio has built with these third parties,” Mot. at 19 (emphasis added), but “[e]stablishing
16 a risk of irreparable harm is not enough. A plaintiff has the burden of proving a clear
17 showing of immediate irreparable injury.” *ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 226
18 (3d Cir. 1987) (internal quotation omitted). Indeed, Plaintiffs allege precisely the sort of
19 harm from competition that the Ninth Circuit found inadequate in *Professional Real*
20 *Estate Investors*: “While it might be true that Spectradyne’s system could be hurt by the
21 arrangements at La Mancha, Congress, not the courts, has the constitutional authority and
22 the institutional ability to accommodate this clash of economic interests.” *Prof’l Real*
23 *Estate Investors*, 866 F.2d at 282 n.7.¹³

24 *Second*, the Studios argue that the Zediva service may take customers away from
25

26
27 ¹³ In this case the Studios have already taken their case to Congress, seeking to be paid
28 when companies rent videos. See H.R. 5707, 97th Cong. (1st Sess. 1982). Congress said
no.

1 other services like iTunes or Amazon. The Studios assert that this harm “cannot be easily
2 quantified.” Mot. at 20. But, as explained above, this is an excellent example of
3 *reparable* harm, and is easy to quantify: for every rental made by Zediva instead of
4 iTunes, the Studios lose, at most, \$2.80. And this is not a case in which there is a risk of
5 uncontrolled, uncompensated, “viral” copying; Zediva uses reliable technological
6 measures to prevent the downloading or saving of movies. Gupta Decl. ¶ 13(f); Gewecke
7 Dep. 107:16-22 (no reason to believe Zediva is not secure).

8 *Third*, the Studios argue that they might be harmed because Zediva might change
9 consumers’ perceptions about the available means of lawfully watching movies. But the
10 very question at issue in this case is whether remote DVD rental is a means of lawfully
11 watching movies, and one litigant does not do irreparable harm to another litigant by
12 arguing that its legal position is the correct one. The Studios argue that “irreparable harm
13 [] can stem from [] customer confusion about whether payment is required for access to
14 copyrighted works,” Mot. at 21, but this is a *non sequitur*. Zediva charges \$1.99 to rent
15 out DVDs, and the Studios get some of that money when Zediva buys its hundreds of
16 DVDs for rental. Payment is required, both by customers to Zediva and by Zediva to the
17 Studios. The only question is price, and competition on price cannot support a finding of
18 irreparable harm. *Prof'l Real Estate Investors*, 866 F.2d at 282 n.7.

19 *Fourth*, the Studios argue that “the Zediva service threatens to provide a sub-
20 optimal customer experience, thereby tarnishing customers’ perception of VOD as an
21 attractive channel for viewing the Studios’ movies.” Mot. at 22. Setting aside the
22 question whether a mere “threat[]” of harm could ever meet the applicable standard,
23 which requires probability of harm, the Studios provide no support for their conjecture.
24 The Studios express concerns about two aspects of the Zediva customer experience:
25 picture quality and movie availability.

26 The Studios argue that they are concerned about “the quality of the transmission
27 and the overall movie-watching experience.” Mot. at 22. Zediva offers an excellent level
28

1 of picture quality, which is comparable to the quality of the DVDs the Studios sell and
2 meets or exceeds the quality of licensed video-on-demand services like iTunes and
3 Amazon. Gupta Decl. ¶ 13(c). There is no evidence to the contrary. The Studios cite a
4 portion of the deposition transcript of Zediva's Chief Technical Officer for the proposition
5 that "Zediva admits that it has received complaints about the quality of its product," Mot.
6 at 22, but the complaints about quality were the result of skipping DVDs sold by the
7 Studios or slow home internet connections, not any defect in the service provided by
8 Zediva. Luedtke Decl. Ex. O (Gupta Dep.) 150:6-151:21 (bad disks), 154:11-25 (home
9 internet connections), ECF No. 28-15. Indeed, the Studios' own declarant admitted that
10 he had no basis to believe Zediva's service was of lower quality than existing movie
11 services. Gewecke Dep. 126:11-24 (Gratz Decl. Ex. B).

12 Finally, the Studios complain that "Defendants limit the number of consumers who
13 can actually view a movie 'on demand,'" so "customers who expect to see a particular
14 movie 'on demand' may be told that the movie they want is out-of-stock." Mot. at 22.
15 This may be the first time in history that a copyright owner claims that an alleged
16 infringer has irreparably harmed it by not engaging in *enough* acts of supposed
17 infringement.

18 Availability is a limitation inherent in any service which rents out physical DVDs,
19 as Zediva does. Movies are sometimes unavailable at the local video store; movies are
20 sometimes unavailable to rent by mail; movies are sometimes unavailable for remote
21 DVD rental via Zediva. (Even theaters sell out.) Zediva tries to solve this problem by
22 buying many copies of popular DVDs, but, like any other DVD rental business, can't
23 always keep up. That does not mean that Blockbuster, Netflix, and Zediva have somehow
24 injured the Plaintiffs when their popular movies are out of stock.

25 One solution to this problem would be for Zediva to copy the DVDs to hard disks
26 and stream them to multiple users at once, as iTunes and Amazon do. But the Studios
27 would no doubt allege that making those copies would be copyright infringement.

1 Amazon pays the Studios so that it may make as many copies as it wishes, to ensure that
2 no movie is ever unavailable. Zediva does not make those copies, so movies are
3 sometimes unavailable. The Studios will not be irreparably harmed if a Zediva customer
4 occasionally has to wait a little while in order to watch *Vampires Suck*. Indeed, if
5 anything, we would expect Plaintiffs to be happy about that limitation, since their other
6 arguments are all premised on the opposite idea: that Zediva is *too good* a competitor.

7 In addition, the Studios' delay in bringing suit demonstrates that irreparable harm is
8 unlikely. "Preliminary injunctions are generally granted under the theory that there is an
9 urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking
10 enforcement of those rights, however, tends to indicate at least a reduced need for such
11 drastic, speedy action." *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985). In
12 *Citibank*, the fact that the plaintiff waited nine weeks before filing suit "undercuts the
13 sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests
14 that there is, in fact, no irreparable injury." *Id.* at 277 (internal citation omitted). See
15 *Givempower Corp. v. Pace Compumetrics, Inc.*, No. 07cv157-WQH-RBB, 2007 WL
16 951350, at *7 (S.D. Cal. Mar. 23, 2007) (plaintiff's two-month delay "undercuts its
17 current argument of immediate, irreparable harm"); *Kerr Corp. v. N. Am. Dental*
18 *Wholesalers, Inc.*, No. SACV 11-0313 DOC CWx, 2011 WL 2269991, at *3 (C.D. Cal.
19 June 9, 2011) ("Kerr cannot plausibly assert that it faces irreparable injury because of
20 NAD when it demonstrated little urgency in its seeking a preliminary injunction.");
21 *Oakland Tribune, Inc. v. Chronicle Publ'g Co., Inc.*, 762 F.2d 1374, 1377 (9th Cir. 1985)
22 ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency
23 and irreparable harm.").

24 Here, the Studios had actual notice of the nature of Zediva's service as early as
25 November 22, 2010, and waited more than 18 weeks before filing suit on April 4, 2011.
26 Zediva's server logs indicate that starting on November 22, 2010, the zediva.com website
27 was browsed by a computer with IP address 216.205.243.145. Gupta Decl. ¶ 20. That IP
28

1 address belongs to Plaintiff Twentieth Century Fox. *Id.* ¶ 22. Similarly, Zediva's logs
2 indicate that Disney browsed its site starting on November 26, 2010; that Universal
3 browsed its site starting on November 29, 2010; that Paramount browsed its site starting
4 on December 8, 2010; and that Plaintiffs' counsel Munger Tolles & Olson browsed its site
5 starting on December 9, 2010. *Id.* ¶¶ 23-30. There can be no question but that the Studios
6 knew how the service worked; an IP address belonging to Disney watched a movie using
7 the Zediva service on November 30, 2010. *Id.* ¶¶ 31-32. Nor is this a case in which the
8 employees with knowledge were low-level functionaries. On December 7, 2010, an
9 account was created on Zediva by a user with email address LJacobs@newscorp.com. *Id.*
10 ¶ 33. That is the email address of Lawrence Jacobs, General Counsel of News
11 Corporation, the parent company of Twentieth Century Fox.¹⁴

12 The Studios did not promptly seek preliminary relief. Indeed, they did not tell
13 Zediva they objected to its service at all. The first contact they made with Zediva was the
14 service of their complaint on April 4, 2011. When companies face urgent problems
15 necessitating immediate relief to avoid irreparable harm, they do not sit silent for months
16 before even broaching the issue. The Studios' delay confirms that their claim does not
17 justify drastic, preliminary relief, but instead can be adjudicated in an orderly fashion, and
18 any remedies determined following a final determination regarding liability.

19 **D. Granting the motion would put Zediva out of business, so the balance of**
20 **hardships tilts against the Studios.**

21 A grant of preliminary injunction in this case would put Defendants out of business.
22 Defendants have invested millions of dollars of resources in their business, and have
23 garnered favorable national media coverage from the New York Times,¹⁵ the Washington
24

25 _____
26 ¹⁴ Mr. Jacobs was General Counsel of News Corporation from 2004 until June 8, 2011.
27 *See* Jeremy W. Peters, *General Counsel of News Corp. Resigns in Wake of Settlement*,
28 N.Y. TIMES, June 8, 2011, at B4.

¹⁵ David Pogue, *DVD Movies From Afar*, N.Y. TIMES, Mar. 17, 2011, at B1.

1 Post,¹⁶ and the Wall Street Journal.¹⁷ Tens of thousands of movie lovers have signed up
2 for the service, and tens of thousands more are on the waiting list. Zediva is a business
3 with real value which brings enjoyment to a wide range of consumers.

4 If an injunction is granted, all of that value will be destroyed. DVD rental is
5 Zediva's only business, and remote DVD rental makes up the lion's share of that business.
6 If enjoined, all of the attention and goodwill that Zediva has garnered since it began
7 operations in 2010 will be lost. Its customers will be disappointed, and will turn to
8 competitors' services. Even if an injunction were later dissolved, the damage would be
9 done: Zediva has put millions of dollars of resources into winning customers, and if they
10 switch to one of the Studios' approved services, they are unlikely to come back.

11 The Studios, on the other hand, face no such risk. This Court will ultimately
12 determine whether remote DVD rental is lawful or whether it is an infringement of
13 copyright. When that determination is made, either Zediva will be able to continue
14 buying hundreds of DVDs and renting them out to its customers, or it will be put out of
15 business. If it is put out of business, Zediva's customers are likely to switch to one of the
16 Studios' approved services. There is no chance of harmful "lock-in": either Zediva's
17 service is lawful, and Zediva is permitted to continue serving its customers, or Zediva's
18 service is not lawful, and the Studios will get those customers. The converse is not true.
19 If Zediva must shut down *pendente lite*, it will lose its entire customer base, and will have
20 little hope of ever getting it back. *See, e.g., Random House, Inc. v. Rosetta Books LLC*,
21 283 F.3d 490, 492 (2d Cir. 2002) (finding balance of hardships favored denial of
22 injunction where "while Random House expresses fears about harm to its goodwill if
23 Rosetta is allowed to proceed with its sale of ebooks, Rosetta, whose entire business is
24

25 ¹⁶ Hayley Tsukayama, *Zediva Offers New Approach to Online Movies*, WASH. POST, Mar.
26 16, 2011, at [http://www.washingtonpost.com/blogs/faster-forward/post/zediva-offers-
new-approach-to-online-movies/2011/03/16/AB3sX6e_blog.html](http://www.washingtonpost.com/blogs/faster-forward/post/zediva-offers-new-approach-to-online-movies/2011/03/16/AB3sX6e_blog.html).

27 ¹⁷ Martin Peers, *New Headache for Hollywood*, WALL ST. J., Mar. 16, 2011, at
28 <http://online.wsj.com/article/SB10001424052748704662604576202994155182626.html>.

1 based on the sale of ebooks, raises a reasonable concern that the proposed preliminary
2 injunction will put it out of business or at least eliminate its business as to all authors who
3 have executed similar contracts.”).

4 The Studios argue that pre-*eBay* case law suggests that where there is a likelihood
5 of success on the merits, this factor can be presumed in favor of the movant. But *eBay*
6 makes clear that the Court must consider the balance of hardships in every case, and may
7 not rely upon presumptions. *eBay*, 547 U.S. at 391. Indeed, Plaintiff Warner Brothers
8 recently defeated a motion for preliminary injunction in a copyright case on this very
9 ground. See Warner Brothers Entertainment Inc.’s Opposition to Motion for Preliminary
10 Injunction, ECF No. 29, in *Whitmill v. Warner Bros. Entertainment Inc.*, No. 4:11-cv-
11 00752-CDP (E.D. Mo. filed May 20, 2011) at 37 (Gratz Decl. Ex. A) (arguing that threat
12 of serious harm to the accused infringer “justifies the denial of preliminary injunctive
13 relief” and must be analyzed independently of likelihood of success on the merits).

14 And it is notable that this is not a case in which the outcome is clear. At a bare
15 minimum, this is a question of first impression in which Plaintiffs hope to establish law in
16 the Ninth Circuit that is contrary to the rule in the Second Circuit. Accordingly, the
17 traditional rule that it is no hardship to be stopped from infringing, *Cadence Design*
18 *Systems, Inc. v. Avant! Corp.*, 125 F.3d 824, 830 (9th Cir. 1997), should not apply here.
19 Zediva did not build its business on infringement; like Blockbuster, Netflix, TiVo, Sling
20 Media, and a host of other now-established companies, it identified a new market
21 opportunity, one the Plaintiffs would now like to block.

22 The harm to Plaintiffs if the motion is denied is, at most, \$2.80 per rental. The
23 harm to Defendants if the motion is granted is total destruction of their business. The
24 balance of hardships tilts sharply in favor of Defendants.

25 **E. The public interest is in equipoise, and does not favor the Studios.**

26 For a preliminary injunction to be granted, the movant must show “that an
27 injunction is in the public interest.” *Winter*, 129 S. Ct. at 374. But here, where the
28

1 question is one of greater availability of copyrighted works to the public with adequate
2 remuneration to the copyright holder, the public interest does not favor an injunction.
3 “The sole interest of the United States and the primary object in conferring the [copyright]
4 monopoly lie in the general benefits derived by the public from the labors of authors.”
5 *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S. Ct. 546, 547, 76 L. Ed. 1010 (1932).
6 Here, those public benefits are best achieved by the wide availability of the Studios’
7 movies, through all lawful channels, whether or not they are the channels that achieve the
8 most profits for the Studios. The public interest does not benefit from the availability of
9 copyrighted works only at a high price, or only from pre-approved sources, so long as the
10 copyright holder receives full value, through the purchase of DVDs, for those copyrighted
11 works.

12 Zediva also benefits the public interest by the very act of setting out the limits of
13 the copyright monopoly:

14 [T]he policies served by the Copyright Act are more complex,
15 more measured, than simply maximizing the number of
16 meritorious suits for copyright infringement. . . . Because
17 copyright law ultimately serves the purpose of enriching the
18 general public through access to creative works, it is peculiarly
19 important that the boundaries of copyright law be demarcated as
20 clearly as possible. To that end, defendants who seek to
advance a variety of meritorious copyright defenses should be
encouraged to litigate them to the same extent that plaintiffs are
encouraged to litigate meritorious claims of infringement.

21 *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526, 114 S. Ct. 1023, 1029, 127 L. Ed. 2d 455
22 (1994).

23 ///

24 ///

25 ///

26 ///

27 ///

1 **IV. CONCLUSION**

2 As they have so many times before, the Studios seek here to put a new and
3 innovative competitor out of business before a final determination on the merits is
4 reached. They should not be permitted to do so. Zediva does not make “public
5 performances” of the Studios’ movies, and certainly does not do irreparable harm.

6 Dated: June 17, 2011

DURIE TANGRI LLP

/s/ Joseph C. Gratz

7
8 By: _____
9 JOSEPH C. GRATZ

10 Attorneys for Defendants and
11 Counterclaimants
12 WTV SYSTEMS, INC. f/k/a WTV
13 SYSTEMS, LLC and VENKATESH
14 SRINIVASAN
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I certify that all counsel of record are being served on June 17, 2011, with a copy of this document via the Court's CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on June 17, 2011, at San Francisco, California.

/s/ Joseph C. Gratz
Joseph C. Gratz

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

Responses, Replies and Other Motion Related Documents

[2:11-cv-02817-JFW -E Warner Bros. Entertainment Inc. et al v WTV Systems, Inc.](#)

(Ex), [AO121](#), DISCOVERY, MANADR

UNITED STATES DISTRICT COURT, CENTRAL DISTRICT OF CALIFORNIA

Notice of Electronic Filing

The following transaction was entered by Gratz, Joseph on 6/17/2011 at 1:17 PM PDT and filed on 6/17/2011

Case Name: Warner Bros. Entertainment Inc. et al v WTV Systems, Inc.

Case Number: [2:11-cv-02817-JFW -E](#)

Filer: WTV Systems, Inc.
WTV Systems, LLC
Venkatesh Srinivasan

Document Number: [32](#)

Docket Text:

[MEMORANDUM in Opposition to MOTION for Preliminary Injunction Notice of Motion and Motion of Motion Picture Studio Plaintiffs for Preliminary Injunction; Memorandum of Points and Authorities in Support Thereof\[25\] filed by Defendants Venkatesh Srinivasan, WTV Systems, Inc., WTV Systems, LLC, Counter Claimants Venkatesh Srinivasan, WTV Systems, Inc.. \(Attachments: # \(1\) Proposed Order\)\(Gratz, Joseph\)](#)

2:11-cv-02817-JFW -E Notice has been electronically mailed to:

Benjamin Sidney Sheffner ben_sheffner@mpaa.org

Carolyn H Luedtke carolyn.luedtke@mto.com, erika.eberline@mto.com

Daniel E Robbins dan_robbins@mpaa.org

Glenn D Pomerantz glenn.pomerantz@mto.com

Jonathan H Blavin jonathan.blavin@mto.com

Joseph Charles Gratz jgratz@durietangri.com, records@durietangri.com

Kelly M Klaus kelly.klaus@mto.com, shari.lorand@mto.com

Mark A Lemley mlemley@durietangri.com

Michael H Page mpage@durietangri.com, records@durietangri.com

Rohit K Singla rohit.singla@mto.com, steven.uhrig@mto.com

2:11-cv-02817-JFW -E Notice has been delivered by First Class U. S. Mail or by fax to :

The following document(s) are associated with this transaction:

Document description:Main Document

Original filename:C:\Users\Sandi Meyer\Documents\WTV PI OPP FILING\2011.06.17 FINAL Opp to Studio PI.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=6/17/2011] [FileNumber=11807192-0]
][aa89d4f8b700df7ce7581cca44ac7a6f198171b1a74f7500d9834738c9762eeda10
d3e16c49762e792df759070e24db7d42321a0f2e96f32a32439d2113fee2f]]

Document description:Proposed Order

Original filename:C:\Users\Sandi Meyer\Documents\WTV PI OPP FILING\2011 06 17 FINAL proposed order.pdf

Electronic document Stamp:

[STAMP cacdStamp_ID=1020290914 [Date=6/17/2011] [FileNumber=11807192-1]
][50d7267eb8c37a13f0e6a8cc831508814e948d9a7208518e62cec932e87f1d026d9
ece997aa5e1fa53760e839fe9796005632b1fd66acb76871b7adce9af5c4c]]