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18 Attorneys for Plaintiff

19 UNITED STATES DISTRICT COURT
20 CENTRAL DISTRICT OF CALIFORNIA

21 TWENTIETH CENTURY FOX FILM)
CORPORATION,)

22 Plaintiff,)

23 vs.)

24 WARNER BROS.)
25 ENTERTAINMENT, INC.; WB)
STUDIO ENTERPRISES, INC.;)
26 WARNER BROS. PICTURES,)

27 Defendants.)
28

Case No. CV 08-0889 GAF (AJWx)

[Case assigned to Hon. Gary A. Feess]

STIPULATION RE FURTHER
PROCEEDINGS FOLLOWING
COURT'S DECEMBER 24, 2008
ORDER RE FOX MOTION FOR
PARTIAL SUMMARY JUDGMENT

Complaint Filed: February 8, 2008
Trial Date: January 20, 2009

1 Plaintiff Twentieth Century Fox Film Corporation (“Fox”) and defendants
2 Warner Bros. Entertainment, Inc., WB Studio Enterprises, Inc. and Warner Bros.
3 Pictures (collectively “Warner Bros.”), by and through their undersigned counsel,
4 hereby stipulate and agree and ask the Court to enter an Order hereon as follows:

5 WHEREAS, on December 24, 2008, the Court issued an interim Order in
6 connection with the parties cross-motions for summary judgment and summary
7 adjudication of issues expressing, *inter alia*, the Court's conclusion that Fox owns, at
8 the least, a distribution right with respect to the *Watchmen* motion picture produced
9 by Warner Bros. and the Court has indicated that a further order detailing the
10 Court’s ruling on the issues is forthcoming;

11 WHEREAS Fox’s claim for copyright infringement of the distribution right
12 with respect to any work based on or derived from the *Watchmen* graphic novel
13 and/or subsequent screenplays by Sam Hamm and Charles McKeown
14 (“*Watchmen*”), including without limitation the *Watchmen* motion picture produced
15 by Warner Bros., is hereafter referred to as Fox's “Distribution Claim,” and whereas
16 Warner Bros. disputes that Fox has any distribution rights in the *Watchmen* motion
17 picture produced by Warner Bros. or any other work based on or derived from the
18 *Watchmen* graphic novel and/or subsequent screenplays by Sam Hamm and Charles
19 McKeown. For purposes of this Stipulation, all of Fox’s remaining claims and
20 issues in this action are referred to as “the Remaining Claims;”

21 WHEREAS, a Status Conference was held on December 29, 2008, for the
22 purpose of determining how the case should proceed in light of the Court's
23 conclusions in the December 24th Order, and

24 WHEREAS, following the Status Conference the parties, through their
25 respective counsel of record, have engaged in further discussions aimed at defining
26 the nature and scope of future proceedings in this case, including, but not limited to
27

28

1 the nature and scope of any trial or hearing scheduled for Tuesday, January 20,
2 2009,

3 IT IS HEREBY STIPULATED AND AGREED as follows:
4

5 1. Fox hereby waives any and all rights to seek injunctive relief for
6 any claim or matter other than the Distribution Claim. For avoidance of doubt,
7 Warner Bros. agrees that, if the Court determines that an injunction is an appropriate
8 remedy, Fox is entitled on the Distribution Claim to enjoin release of the *Watchmen*
9 picture produced by Warner Bros., provided that nothing herein is intended as any
10 admission by Warner Bros. that Fox's Distribution Claim or any other claim has
11 merit, that Fox has suffered irreparable injury or that injunction is an appropriate
12 remedy for the alleged infringement of the distribution right.

13 2. The next proceeding in this case, currently scheduled for January 20,
14 2009, shall be limited to the question of whether Fox is entitled to a permanent
15 injunction on its Distribution Claim with respect to the *Watchmen* picture produced
16 by Warner Bros. (the "Permanent Injunction Hearing"). The Permanent Injunction
17 Hearing shall be a non-jury proceeding.
18

19 3. In the event the Court grants an injunction restraining release of the
20 *Watchmen* picture, Fox agrees to immediately dismiss, without prejudice, subject to
21 the terms and conditions set forth herein, any and all claims in this case except its
22 Distribution Claim. To effectuate the foregoing, upon the commencement of the
23 Preliminary Injunction Hearing, Fox shall deliver to counsel for Warner Bros. a
24 fully executed Stipulation of Dismissal providing for the dismissal, without
25 prejudice, of all claims in the case except the Distribution Claim. Said Stipulation
26 of Dismissal shall be of no force and effect, and may not be filed, unless and until
27 the Court grants an injunction restraining release of the *Watchmen* picture at the
28 conclusion of the Permanent Injunction Hearing

1 4. After the Permanent Injunction Hearing, any further trial court
2 proceedings in this case, if any, shall not occur until the conclusion of any appellate
3 proceedings initiated by Warner Bros. after the grant of permanent injunctive relief
4 or initiated by Fox after the denial of permanent injunctive relief.

5 5. Warner Bros. and Fox each agree that, following a determination by the
6 Court of the matters presented at the Permanent Injunction Proceeding, neither party
7 shall oppose any request by the other party to expedite any subsequent appellate
8 review of the Court's ruling on the injunction issue.

9 6. Upon the conclusion of any such appellate proceedings referenced in
10 paragraph 4, the parties agree that Fox shall be entitled to pursue all Remaining
11 Claims, including Remaining Claims dismissed without prejudice pursuant to
12 Paragraph 3 above, except that in the event an injunction restraining release of the
13 *Watchmen* picture is affirmed on appeal, and only in that event, Fox shall not pursue
14 any remaining copyright infringement claims, i.e., any and all copyright claims
15 other than the Distribution Claim.

16 7. Upon remand of the case to the district court following the conclusion
17 of all appellate proceedings contemplated here (the parties state their understanding
18 and agreement that remand would be necessary and appropriate whether an
19 injunction is affirmed on appeal or an order denying injunction is reversed on
20 appeal), Fox shall be entitled to further pursue all Remaining Claims dismissed
21 without prejudice, except as provided in Paragraph 6 above, by filing an amended
22 complaint setting forth the Remaining Claims in accordance with Paragraph 6
23 above, and the parties stipulate and agree that leave to file such an amended
24 complaint is appropriate and shall be granted. In the event Fox chooses, however, to
25 file a new action, the new action shall be considered a related claim to this action
26 under Local Rule 83-1.3.1 and Warner Bros. agrees that it shall be assigned to this
27 Court for all further proceedings. The parties stipulate and agree that upon refileing,
28 the Remaining Claims shall be treated as if they had never been dismissed without

1 prejudice (i.e., they shall be treated in the same procedural posture as if they had
2 not been dismissed following the Permanent Injunction Hearing). A trial date and
3 pre-trial schedule for any Remaining Claims and issues remaining in the action shall
4 be set by the Court at a status conference to be held promptly after the appellate
5 proceedings are concluded and remanded to this Court. With respect to such further
6 proceedings, the parties hereby jointly acknowledge that the calculation of damages,
7 if any, would be premature until the release and exploitation of the *Watchmen*
8 picture in at least most worldwide theatrical markets, so that trial shall be set for a
9 date no earlier than July 6, 2009, in order that discovery can be conducted on
10 damages issues following release of the *Watchmen* picture in March 2009 (should
11 release of the picture not be enjoined). Nothing herein is intended to preclude either
12 party from completing all discovery initiated prior to the time of this Order or
13 allowed by this Court in connection with the Permanent Injunction Hearing

14 8. Warner Bros. agrees that Fox's dismissal without prejudice of
15 Remaining Claims does not result in, nor will Warner Bros. ever argue that, as a
16 result of the dismissal or any actions taken to effectuate the dismissal, Fox's
17 Remaining Claims are barred by collateral estoppel, res judicata, waiver, release or
18 any other doctrines of claim preclusion at law or in equity. Warner Bros. agrees that
19 any statute of limitations, doctrines of repose or any similar doctrines at law or in
20 equity that might otherwise be applicable to bar Fox's further pursuit of the
21 Remaining Claims shall be tolled from the time Fox dismisses the claims until such
22 time as the claims are refiled or pursued by amended complaint as provided for
23 herein, and that Warner Bros. will never argue that, as a result of the dismissal or
24 any actions taken to effectuate the dismissal, any such doctrines preclude Fox from
25 further pursuing the Remaining Claims or give rise to additional defenses in favor of
26 Warner Bros. The parties agree to execute any further documentation necessary to
27 ensure that Fox's right to refile or pursue by amended complaint any claims
28

1 dismissed without prejudice pursuant to this stipulation is preserved to the extent
2 provided for herein.


3
4 9. Except as may be inconsistent with the exercise of appellate
5 jurisdiction, the parties stipulate to this Court's continuing jurisdiction over the
6 parties and all claims in the action, including Remaining Claims that are re-filed or
7 pursued by amended complaint, to enforce and give effect to the terms of this
8 Stipulation and Order. Each party waives the requirements of any rules, procedures
9 or statutory provisions that would be contrary to the accomplishment of the
10 objectives of this Stipulation and Order, and both parties agree not to assert any
11 defenses, arguments or positions inconsistent with the accomplishment of the
12 objectives of this Stipulation and Order. Nothing in this Stipulation and Order shall
13 be interpreted to result in the waiver of any claims or defenses in the action other
14 than as specifically set forth herein.

15
16 IT IS SO STIPULATED.

17 Dated: January 5, 2008

GLASER, WEIL, FINK, JACOBS &
SHAPIRO, LLP

18 IRELL & MANELLA LLP

19
20
21 By: 
22 Steven A. Marenberg
Attorneys for Defendants

23 Dated: January 5, 2008

ALSTON & BIRD LLP

24
25
26 By: 
27 Louis A. Karasik
Attorneys for Plaintiff

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CORPORATION,)

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23 vs.)

24 WARNER BROS.)
25 ENTERTAINMENT, INC.; WB)
STUDIO ENTERPRISES, INC.;)
26 WARNER BROS. PICTURES,)

27 Defendants.)
28

Case No. CV 08-0889 GAF (AJWx)

[Case assigned to Hon. Gary A. Feess]

**[PROPOSED] ORDER RE
FURTHER PROCEEDINGS
FOLLOWING COURT'S
DECEMBER 24, 2008 ORDER RE
FOX MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Complaint Filed: February 8, 2008
Trial Date: January 20, 2009

1 Plaintiff Twentieth Century Fox Film Corporation (“Fox”) and defendants
2 Warner Bros. Entertainment, Inc., WB Studio Enterprises, Inc. and Warner Bros.
3 Pictures (collectively “Warner Bros.”), by and through their undersigned counsel,
4 stipulated and agreed and asked the Court to enter an Order as follows:

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6 connection with the parties cross-motions for summary judgment and summary
7 adjudication of issues expressing, *inter alia*, the Court's conclusion that Fox owns, at
8 the least, a distribution right with respect to the *Watchmen* motion picture produced
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10 Court’s ruling on the issues is forthcoming;

11 WHEREAS Fox’s claim for copyright infringement of the distribution right
12 with respect to any work based on or derived from the *Watchmen* graphic novel
13 and/or subsequent screenplays by Sam Hamm and Charles McKeown
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22 purpose of determining how the case should proceed in light of the Court's
23 conclusions in the December 24th Order, and

24 WHEREAS, following the Status Conference the parties, through their
25 respective counsel of record, have engaged in further discussions aimed at defining
26 the nature and scope of future proceedings in this case, including, but not limited to
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28 2009,

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4 Warner Bros. agrees that, if the Court determines that an injunction is an appropriate
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14 Hearing shall be a non-jury proceeding.

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24 conclusion of the Permanent Injunction Hearing

25 4. After the Permanent Injunction Hearing, any further trial court
26 proceedings in this case, if any, shall not occur until the conclusion of any appellate
27 proceedings initiated by Warner Bros. after the grant of permanent injunctive relief
28 or initiated by Fox after the denial of permanent injunctive relief.

1 5. Warner Bros. and Fox each agree that, following a determination by the
2 Court of the matters presented at the Permanent Injunction Proceeding, neither party
3 shall oppose any request by the other party to expedite any subsequent appellate
4 review of the Court's ruling on the injunction issue.

5 6. Upon the conclusion of any such appellate proceedings referenced in
6 paragraph 4, the parties agree that Fox shall be entitled to pursue all Remaining
7 Claims, including Remaining Claims dismissed without prejudice pursuant to
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9 *Watchmen* picture is affirmed on appeal, and only in that event, Fox shall not pursue
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12 7. Upon remand of the case to the district court following the conclusion
13 of all appellate proceedings contemplated here (the parties state their understanding
14 and agreement that remand would be necessary and appropriate whether an
15 injunction is affirmed on appeal or an order denying injunction is reversed on
16 appeal), Fox shall be entitled to further pursue all Remaining Claims dismissed
17 without prejudice, except as provided in Paragraph 6 above, by filing an amended
18 complaint setting forth the Remaining Claims in accordance with Paragraph 6
19 above, and the parties stipulate and agree that leave to file such an amended
20 complaint is appropriate and shall be granted. In the event Fox chooses, however, to
21 file a new action, the new action shall be considered a related claim to this action
22 under Local Rule 83-1.3.1 and Warner Bros. agrees that it shall be assigned to this
23 Court for all further proceedings. The parties stipulate and agree that upon refileing,
24 the Remaining Claims shall be treated as if they had never been dismissed without
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26 not been dismissed following the Permanent Injunction Hearing). A trial date and
27 pre-trial schedule for any Remaining Claims and issues remaining in the action shall
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1 proceedings are concluded and remanded to this Court. With respect to such further
2 proceedings, the parties hereby jointly acknowledge that the calculation of damages,
3 if any, would be premature until the release and exploitation of the *Watchmen*
4 picture in at least most worldwide theatrical markets, so that trial shall be set for a
5 date no earlier than July 6, 2009, in order that discovery can be conducted on
6 damages issues following release of the *Watchmen* picture in March 2009 (should
7 release of the picture not be enjoined). Nothing herein is intended to preclude either
8 party from completing all discovery initiated prior to the time of this Order or
9 allowed by this Court in connection with the Permanent Injunction Hearing

10 8. Warner Bros. agrees that Fox's dismissal without prejudice of
11 Remaining Claims does not result in, nor will Warner Bros. ever argue that, as a
12 result of the dismissal or any actions taken to effectuate the dismissal, Fox's
13 Remaining Claims are barred by collateral estoppel, res judicata, waiver, release or
14 any other doctrines of claim preclusion at law or in equity. Warner Bros. agrees that
15 any statute of limitations, doctrines of repose or any similar doctrines at law or in
16 equity that might otherwise be applicable to bar Fox's further pursuit of the
17 Remaining Claims shall be tolled from the time Fox dismisses the claims until such
18 time as the claims are refiled or pursued by amended complaint as provided for
19 herein, and that Warner Bros. will never argue that, as a result of the dismissal or
20 any actions taken to effectuate the dismissal, any such doctrines preclude Fox from
21 further pursuing the Remaining Claims or give rise to additional defenses in favor of
22 Warner Bros. The parties agree to execute any further documentation necessary to
23 ensure that Fox's right to refile or pursue by amended complaint any claims
24 dismissed without prejudice pursuant to this stipulation is preserved to the extent
25 provided for herein.

26 9. Except as may be inconsistent with the exercise of appellate
27 jurisdiction, the parties stipulate to this Court's continuing jurisdiction over the
28 parties and all claims in the action, including Remaining Claims that are re-filed or

1 pursued by amended complaint, to enforce and give effect to the terms of this
2 Stipulation and Order. Each party waives the requirements of any rules, procedures
3 or statutory provisions that would be contrary to the accomplishment of the
4 objectives of this Stipulation and Order, and both parties agree not to assert any
5 defenses, arguments or positions inconsistent with the accomplishment of the
6 objectives of this Stipulation and Order. Nothing in this Stipulation and Order shall
7 be interpreted to result in the waiver of any claims or defenses in the action other
8 than as specifically set forth herein.
9

10 This Court, having read and considered Fox and Warner Bros.' Joint
11 Stipulation Re: Further Proceedings Following the Court's December 24, 2008,
12 Order Re: Fox's Motion for Partial Summary Judgment, and good cause appearing
13 therefor,

14 **IT IS SO ORDERED.**

15
16 Dated: _____, 2009

17 Hon. Gary A. Feess
18 United States District Court Judge
19 Central District of California
20
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28

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 TWENTIETH CENTURY FOX FILM CORPORATION

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

13 TWENTIETH CENTURY FOX FILM
 14 CORPORATION,
 Plaintiff,
 15 v.
 16 WARNER BROS. ENTERTAINMENT,
 17 INC.; WB STUDIO ENTERPRISES, INC.;
 18 WARNER BROS. PICTURES and DOES 1
 - 10,
 19 Warner Bros..

Case No. CV 08-0889 GAF (AJWx)
 [Honorable Gary A. Feess]

**PLAINTIFF’S APPLICATION FOR
 PERMANENT INJUNCTION AND
 REQUEST FOR BRIEFING
 SCHEDULE**

[Appendix of Authorities filed
 concurrently herewith]

Filing Date: February 8, 2008
 Trial Date: January 20, 2009
 Discovery Cut-off: December 8, 2008

1 **I. INTRODUCTION**

2 Plaintiff Twentieth Century Fox Film Corporation (“Fox”) and
3 defendants Warner Bros. Entertainment, Inc., WB Studio Enterprises, Inc. and Warner
4 Bros. Pictures (collectively, “Warner Bros.”) have submitted a Stipulation Re
5 Proceedings Following December 24, 2008 Order whereby the parties have agreed
6 that the next proceeding in this matter should be the Court’s determination of the
7 permanent injunction issue related to Fox’s claim for infringement of the distribution
8 right. To that end, Fox has agreed to waive injunctive claims for non-distribution
9 infringement and both parties have agreed that trial, if any, of any remaining damages
10 claims shall only proceed after any appeal of this Court’s injunction determination is
11 resolved.

12 By this Application, Fox requests that the Court grant a permanent
13 injunction restraining Warner Bros. from distributing the *Watchmen* picture, and any
14 other work based on *Watchmen* source material, as detailed more fully below. In
15 addition, because the parties have widely different views about how to proceed with
16 respect to the injunction hearing scheduled for January 20, 2009, Fox asks the Court
17 to provide guidance for an orderly briefing and hearing process. As detailed below,
18 Fox proposes that both parties be directed to brief the Court on the relevant legal
19 standard for deciding the injunction issue, that any disputed facts relevant to the
20 injunction issue be identified, and that the conduct of any evidentiary hearing
21 necessary to resolve the injunction question be determined by the Court once the
22 disputed facts, if any, are identified.

23 While this Application is not intended as a substitute for a full briefing of
24 the legal standards applicable to the permanent injunction issue, Fox provides a
25 summary of the key issues so that the Court can further evaluate Fox’s position that
26 there are no material disputed facts underlying Fox’s request for injunctive relief and
27 that the only remaining questions involve application of well settled legal standards
28 for issuance of permanent injunctive relief in cases of copyright infringement.

1 **II. APPLICATION FOR PERMANENT INJUNCTION**

2 Fox hereby applies for a permanent injunction restraining Warner Bros.,
3 together with its co-financiers, co-distributors, partners, affiliates, licensees and other
4 agents or parties claiming distribution rights from Warner Bros., from distributing and
5 releasing the *Watchmen* picture produced by Warner Bros., together with all other
6 works based on *Watchmen* source material, whether in DVD format, home video or
7 any other form of media, in movie theatres, the Internet, and all other venues.

8 **III. FOX'S REQUEST FOR ORDERLY BRIEFING**

9 Fox's position is that the Court should proceed as follows: (a) order the
10 parties to file briefs on the legal standard for deciding whether Fox is entitled to an
11 injunction; (b) require the parties to identify factual disputes, if any, that require
12 resolution by the Court before deciding the injunction issue; and (c) establish the
13 procedures for conducting the injunction hearing, including determination whether
14 any live witnesses are necessary. Fox proposes that the legal briefs be filed by
15 January 9, 2009; that the parties' joint submission of factual disputes, if any, be filed
16 by January 12; and that the Court conduct a pre-hearing conference on January 15 to
17 make final determinations on the conduct of the hearing on the 20th.

18 Further guidance from the Court on these matters is important to prevent
19 what might otherwise be a completely unnecessary and unstructured evidentiary
20 hearing where Warner Bros. seeks to introduce evidence on matters completely
21 irrelevant to the injunction issue or not in dispute, including issues already adjudicated
22 by this Court in the summary judgment order. As detailed below, Fox submits there
23 are no material facts in dispute which require an evidentiary hearing. Warner Bros.,
24 on the other hand, has proposed a 3-day evidentiary hearing that would involve scores
25 of witnesses who would testify about the meaning and effect of the Largo Agreement,
26 Warner Bros.' and Paramount's qualifications to distribute theatrical pictures in
27 domestic and foreign territories, respectively, and the expenses incurred by Warner
28

1 Bros. to produce the *Watchmen* picture.¹ Such matters are irrelevant to the Court's
2 resolution of the injunction question, and Fox is prepared to stipulate to the terms of
3 the Largo Agreement, to Warner Bros. and Paramount's qualifications to distribute
4 and to the expenses either or both incurred in connection with the production of the
5 picture.

6 The parties' diverging views over what further proceedings are required
7 to resolve the injunction issue stem, no doubt, from competing views about the
8 relevant legal standard for injunctions in copyright cases. Fox briefly states its
9 position on that issue with an eye toward identifying whether any factual disputes
10 remain that are material to the injunction question.

11 **IV. THE STANDARD FOR DECIDING PERMANENT INJUNCTIONS IN**
12 **COPYRIGHT CASES AFTER EBAY**

13 Warner Bros. has represented to this Court that irreparable injury is no
14 longer presumed in copyright cases after the Supreme Court's decision in *eBay Inc. v.*
15 *MercExchange, L.L.C.*, 547 U.S. 388 (2006), and that *eBay* dramatically changes the
16 principles under which the Court must decide the injunction issue.² Warner Bros. is
17 wrong, and its position in this case is contrary to the position Warner Bros has taken,
18 and other Courts have adopted, in copyright infringement cases post-*eBay*. Under the
19 traditional four-part test described in *eBay*, irreparable injury continues to be
20 presumed in copyright infringement cases like this one, and in any event, the
21 undisputed facts of this case reveal clear irreparable injury if Warner Bros. were
22 permitted to distribute the *Watchmen* picture and other works based on *Watchmen*

24 ¹ For example, Warner Bros. wants to call 1990's era witnesses such as Lyman Gronemeyer (Fox
25 counsel) and Stuart Rosenthal (who assertedly negotiated the Largo Agreement for Largo) to testify
26 about the Largo Agreement, even though the terms of that agreement are not in dispute and no such
27 testimony is needed from either of these gentlemen for the Court to decide the irreparable injury
question.

28 ² This was Warner Bros' position at the hearing on Fox's motion to bifurcate liability and damages.
As the issue was not yet before the Court, Fox did not address the standard under *e-Bay* at that time,
and the Court did not decide the issue.

1 source material.

2 A. **Irreparable Injury is Presumed in this Case**

3 Contrary to Warner Bros.’ representations to this Court, *eBay* has no
4 language suggesting that the presumption of irreparable injury in copyright cases has
5 been abrogated. Rather, *eBay* determined that the Federal Circuit’s adoption of “a
6 ‘general rule,’ unique to patent disputes, ‘that a permanent injunction will issue once
7 infringement and validity have been adjudged’” overstated the traditional four-part
8 test. *eBay Inc.*, 547 U.S. at 393-394 (citations omitted). The Court also criticized the
9 District Court’s conclusion that a plaintiff’s willingness to license the patented
10 technology for a fee, i.e., the availability of money damages for use of the technology,
11 defeated a showing of irreparable injury. *Id.* at 393. The problem with both the
12 District Court and Federal Circuit’s approach was that they did not consider the
13 traditional four factor test, which includes the question of irreparable injury. *Id.*³ The
14 Supreme Court nowhere states that irreparable injury is not presumed in patent or
15 copyright cases.

16 The concurring opinions in *eBay* emphasize that application of the four-
17 part test is not intended to write a “clean slate” for District Court’s exercising their
18 discretion to grant injunctive relief in infringement cases. Chief Justice Robert’s
19 concurring opinion (joined by Justices Scalia and Ginsburg) makes this clear:

20 “From at least the early 19th century, courts have granted injunctive
21 relief upon a finding of infringement in the vast majority of patent cases. This
22 ‘long tradition of equity practice’ is not surprising, given the difficulty of
23 protecting a right to *exclude* through monetary remedies that allow an infringer
24 to *use* an invention against the patentee’s wishes—a difficulty that often

25
26 ³The four-part test under *eBay* is this “A plaintiff must demonstrate: (1) that it has suffered an
27 irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to
28 compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and
defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by
a permanent injunction.” *eBay Inc.*, 547 U.S. at 391.

1 implicates the first two factors of the traditional four-factor test. This historical
2 practice, as the Court holds, does not *entitle* a patentee to a permanent
3 injunction or justify a *general rule* that such injunctions should issue. . . . At the
4 same time, there is a difference between exercising equitable discretion
5 pursuant to the established four-factor test and writing on an entirely clean slate.
6 ‘Discretion is not whim, and limiting discretion according to legal standards
7 helps promote the basic principle of justice that like cases should be decided
8 alike.’ [citations omitted]. When it comes to discerning and applying those
9 standards, in this area as others, ‘a page of history is worth a volume of
10 logic.’ [citations omitted].”

11 *Id.* at 395.

12 Similar sentiments are expressed in the concurring opinion by Justice
13 Kennedy (joined by Justices Stevens, Souter and Breyer):

14 “To the extent earlier cases establish a pattern of granting an injunction
15 against patent infringers almost as a matter of course, this pattern simply
16 illustrates the result of the four-factor test in the contexts then prevalent. The
17 lesson of the historical practice, therefore, is most helpful and instructive when
18 the circumstances of a case bear substantial parallels to litigation the courts
19 have confronted before.”

20 *Id.* at 396.

21 With no less than *seven* Justices expressing the view that historical
22 practice for granting injunctive relief continues to hold sway in applying the four-part
23 test, it is not surprising that, following *eBay*, the Courts continue to find that
24 irreparable injury is presumed in copyright cases, as it has been for decades, where the
25 question is whether a party holding copyright interests is injured by the defendant’s
26 unauthorized release or distribution of a work. Indeed, when Warner Bros. is the
27 plaintiff seeking to enforce its copyrights interests, Warner Bros. itself has taken
28 exactly this position.

1 Thus, in *Warner Bros. Entertainment, Inc. vs. RDR Books*, 575 F.Supp.2d
2 513 (S.D.N.Y. 2008) Warner Bros. (the same company who is a defendant here)
3 sought to protect Warner Bros.’ valuable copyright interests in the “Harry Potter”
4 works by suing to enjoin defendant from marketing or selling its planned book "The
5 Harry Potter Lexicon." In a brief filed by Warner Bros. two years after *e-Bay* was
6 decided, Warner Bros.’ argued that “Courts *routinely hold* that . . . copyright
7 infringement gives rise to a *presumption of irreparable injury*. See, e.g., *ABKCO*
8 *Music*, 96 F.3d at 66 (a prima facie case of copyright infringement supports a
9 presumption of irreparable harm) . . . As Plaintiffs have clearly demonstrated a
10 likelihood of success on the merits of their copyright . . . infringement claims,
11 *irreparable injury may be presumed*. (Warner Bros. Memorandum of Points and
12 Authorities in Support of Motion for Preliminary Injunction, p. 22, *emphasis added*.)

13 Warner Bros.’ argument was adopted by the District Court when it
14 granted the injunction requested by Warner Bros. in an opinion concluding that this
15 result was appropriate after *eBay*. The Court held:

16 “Because Plaintiffs have demonstrated a case of copyright infringement,
17 and because Defendant has failed to establish its affirmative defense to
18 copyright infringement, *irreparable injury may be presumed in this case*. In
19 view of *eBay*, which applied the traditional four-part test for injunctive relief in
20 the context of a patent claim, there is some question of whether the presumption
21 of irreparable harm still applies. *District courts, however, have continued to*
22 *apply the presumption post- eBay*. See, e.g., *Warner Bros. Entm't, Inc. v.*
23 *Carsagno*, No. 06 Civ. 2676, 2007 WL 1655666 at *6 (E.D.N.Y. June 4, 2007)
24 (finding irreparable harm where plaintiff had demonstrated that without an
25 injunction, its copyrighted work would be subject to continued copyright
26 infringement); *UMG Recordings, Inc. v. Blake*, No. 06 Civ. 00120, 2007 WL
27 1853956, *3 (E.D.N.C. June 26, 2007) (stating that irreparable injury is
28 presumed when plaintiff succeeds on the merits).

1 *Warner Bros Entm't v. RDR Books*, 575 F.Supp.2d at 552 (emphasis
2 added).⁴

3 The *Carsagno* case, identified by the Court in the Harry Potter case, is a
4 second example of Warner Bros. relying upon and benefiting from the presumption of
5 irreparable injury in another copyright case post-*eBay*. In that case, Warner Bros
6 sought to enjoin the defendant from distributing (on the Internet and otherwise)
7 “Million Dollar Baby,” a work in which Warner Bros held copyright interests. After
8 reviewing the decision in *eBay* and the four-part test identified therein, the Court
9 found no trouble concluding that irreparable injury was presumed:

10 “Plaintiff has demonstrated irreparable harm in that without an
11 injunction, its copyrighted film remains subject to continued, repeated
12 infringement. *See Video Trip Corp. v. Lightning Video, Inc.*, 866 F.2d 50, 51-
13 52 (2d Cir.1989) (“*In a copyright action the existence of irreparable injury is*
14 *presumed upon a showing of a prima facie case of copyright infringement.*”);
15 *Island Software II*, 2006 WL 1025915, at *2 (“[W]hen a copyright plaintiff has
16 established liability and a threat of continuing infringement, he is entitled to an
17 injunction.”)

18 *Warner Bros. Entm't v. Carsagno*, 2007 WL 1655666 at *6 (emphasis
19 added).

20 When Warner Bros. is protecting its own copyrights interests, the
21 presumption of irreparable injury in copyright cases to restrain infringement of the
22 right to distribute post-*eBay* is “routine” and has been applied at least twice to enjoin
23 the release of works in which Warner Bros. has a copyright interest. But in this case,
24 Warner Bros. argues that a 3-day mini-trial is necessary to determine if Warner Bros.
25 should be enjoined from releasing *Watchmen*.

26 The presumption of irreparable injury found appropriate in these Warner
27

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⁴ The opinion goes on to point out that even if not presumed, irreparable injury was established, a holding equally applicable here. *Id.* at 552.

1 Bros. cases has also been recently applied in May 2008 by a District Court in the 9th
2 Circuit. In *Idearc Media Corp. v. Opinion and Order Northwest Directories, Inc.*,
3 Civil No. 07-796-HA, 2008 WL 2185334 (D. Or. May 23, 2008), plaintiff sued to
4 enjoin the defendant from publishing display ads in which the plaintiff held a
5 copyright interest. The Court applied *eBay* and concluded that, under the four-part
6 test, irreparable injury was presumed:

7 “[T]he court is mindful of the Supreme Court's recent admonishment that
8 ‘according to well-established principles of equity, a plaintiff seeking a
9 permanent injunction must satisfy a four-factor test before a court may grant
10 such relief.’ . . .

11 Here, the court presumes that there is irreparable harm, because
12 [defendant] is infringing the display ads and using them to compete with
13 [plaintiff] in the Yamhill County directory market.”

14 *Id.* at *9.

15 The decision in *Idearc* only reinforces that even if irreparable injury were
16 not presumed, it is plainly established here because Fox and Warner Bros. are direct
17 competitors. There is no reasonable dispute that release of the *Watchmen* picture by
18 Warner Bros., after nine months of intense worldwide advertising and promotion by
19 theatrical trailers in movie theatres across the country, the Internet and other media,
20 impacts the parties’ respective market share for distribution of theatrical pictures.
21 Indeed, Warner Bros. seeks to transfer to Warner Bros. the market share that would
22 otherwise be held by Fox upon distribution of the picture. The cases are settled that a
23 distribution activity that impacts market share is an irreparable injury. *Metro-*
24 *Goldwyn-Mayer Studios, Inc. v. Grokster*, 518 F.Supp.2d 1197, 1215 (C.D. Cal.
25 2007); *see also Lubrizol Corp. v. Exxon Corp.*, 696 F.Supp. 302, 323 (N.D. Ohio
26 1988).

27 Where there is irreparable injury, there is no adequate remedy at law.
28 *Cadence Design Systems, Inc. v. Avant! Corp.*, 125 F.3d 824, 827 (9th Cir. 1997). Nor

1 is there any question that the public interest is served, not disserved, by enforcing
2 Fox's copyright interests. For over 100 years, the Copyright Act has never
3 countenanced an "infringe now, pay later" mentality that permits infringers to avoid
4 injunction by offering to pay the plaintiff damages. *See e.g., Triad Systems Corp. v.*
5 *Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995). Nor can Warner Bros.
6 claim outweighing hardships if the picture is enjoined – it is not disputed that Warner
7 Bros. chose to pursue development of the *Watchmen* picture with full knowledge in
8 May 2006 of the 1991 Quitclaim, even though Warner Bros. was aware of distribution
9 rights stated in the Quitclaim, and only after deciding not to contact Fox to inquire
10 about the distribution rights. Moreover, the vast majority of costs incurred by Warner
11 Bros. to produce and advertise the *Watchmen* picture occurred after July 2007, when
12 Fox had fully asserted its rights and advised Warner Bros. it proceeded at its own peril
13 to produce and later seek distribution of a *Watchmen* picture.

14 If the Court concludes that irreparable injury is presumed under the
15 authorities, or that Warner Bros. is estopped to argue otherwise, or that the obvious
16 injury Fox suffers in market share establishes irreparable injury, this may obviate the
17 need for any hearing on January 20th.⁵ At a minimum, Fox believes the Court would
18 benefit from briefing on the controlling standard for the Court to decide the injunction
19 question so that the parties and the Court can determine if there are any remaining
20 disputed facts necessary to adjudicate in order for the Court to decide the injunction
21 issue.

22
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24
25 ⁵ It is equally beyond reasonable dispute that Fox suffers irreparable injury in the loss of screens to
26 exhibit Fox pictures in the relevant time period, conflicts posed by the release of *Watchmen* to the
27 release date for Fox pictures, loss of critical trailer advertising attached to the *Watchmen* picture and
28 other forms of harm that are not readily, if at all, compensable by money damages. If Warner Bros.
seeks to dispute that evidence, they may certainly do so, but to date, no such factual disputes have
been identified. Fox proposes that the parties be directed to identify the factual disputes, if any, for
which a hearing is necessary on January 20th.

1 **B. The Parties Should Identify the Facts, if Any, Which are in Dispute**
 2 **on the Irreparable Injury Issue**

3 It is unclear to Fox that there are any factual disputes related to the
 4 irreparable injury issue. Warner Bros. to date has identified none. Warner Bros.
 5 apparently seeks to call witnesses to testify that Paramount and Warner Bros. will
 6 suffer monetary damages if the Court enjoins the movie (damages caused by
 7 Paramount and Warner Bros.' decision to go forward with the picture in the face of
 8 Fox's assertion of rights in July 2007). If this is the purpose of these witnesses, Fox
 9 would entertain a stipulation that an injunction will result in substantial expenses
 10 incurred by these parties that cannot be recovered (at least not through distribution
 11 activities)⁶ if release of the picture is enjoined. Whether this defeats Fox's showing of
 12 irreparable harm is a question for this Court to decide.

13 **C. This Court Should Determine What Form of Hearing, if Any, is**
 14 **Necessary to Determine the Irreparable Injury Issue**

15 Depending on the Court's determination of the legal standard, and the
 16 existence and extent of factual disputes, if any, on irreparable injury, the Court may
 17 determine that there is no need or only a limited need for presentation of any evidence,
 18 and no need, or any limited need, for the presentation of any live witnesses, and the
 19 Court may decide to focus the parties' attention on issues the Court considers most
 20 important for resolving the injunction issue. Fox submits that the Court should
 21 provide that guidance to the parties in advance of the January 20 hearing so that any
 22 presentations are directed to the factual or legal issues, if any, for which the Court
 23 seeks evidence or argument.

24 **V. CONCLUSION**

25 Fox proposes an orderly briefing and hearing procedure to resolve the

26 _____
 27 ⁶ In February 2008, within weeks of Fox's filing of this lawsuit, Warner Bros. gave notice to Gordon
 28 that Warner Bros. would hold Gordon responsible for all damages Warner Bros. suffers as a result of
 Fox's claims. Having made a decision to take its chances with Fox on the infringement claim with
 the understanding that Warner Bros. would later pursue its damages from Gordon, Warner Bros. is in
 no position to now argue that the expenses incurred to make the picture are a "hardship."

1 remaining injunction issue. Warner Bros. has not identified any factual issues
2 reasonably in dispute, and this Court should determine what evidence, if any, is
3 necessary and helpful to the Court to decide whether to enjoin the *Watchmen* picture
4 under the prevailing legal standard.

5
6 DATED: January 5, 2009

LOUIS A. KARASIK
SAMUEL C. TAYLOR
CASONDRA K. RUGA
ALSTON & BIRD LLP

7
8
9 /s/ Louis A. Karasik
10 Louis A. Karasik
11 Attorneys for Plaintiff
12 TWENTIETH CENTURY FOX FILM
13 CORPORATION
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on January 5, 2009, I caused a copy of **PLAINTIFF’S**
3 **APPLICATION FOR PERMANENT INJUNCTION AND REQUEST FOR**
4 **BRIEFING SCHEDULE** to be served upon the following counsel in the manner
5 described below:

6 Via the Court’s CM/ECF system:

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28 **TWENTIETH CENTURY FOX FILM CORPORATION**

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13 CENTRAL DISTRICT OF CALIFORNIA
14

15 TWENTIETH CENTURY FOX FILM)
CORPORATION,)

16 Plaintiff,)

17 vs.)

18 WARNER BROS.)
19 ENTERTAINMENT, INC.; WB)
STUDIO ENTERPRISES, INC.;)
20 WARNER BROS. PICTURES,)

21 Defendants.)
22

Case No. CV 08-0889 GAF (AJWx)

**WARNER BROS.' RESPONSE TO
FOX'S APPLICATION FOR
PERMANENT INJUNCTION**

Judge: Hon. Gary A. Feess
Courtroom: 740
Complaint Filed: February 8, 2008
Trial Date: January 20, 2009

1 Fox's so-called "Application for Permanent Injunction and Request for
2 Briefing Schedule" is both procedurally improper and, perhaps more importantly,
3 invites legal error because it misstates controlling Ninth Circuit law governing the
4 requirements for permanent injunctive relief following the Supreme Court's decision
5 in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). As explained in this
6 short response, Warner Bros. submits that an evidentiary hearing on Fox's request
7 for a permanent injunction should begin as soon as possible to address the four-part
8 test required by the Supreme Court in *eBay* and subsequent Ninth Circuit precedent.

9 To facilitate a quick hearing, Warner Bros. agrees with Fox's proposal that the
10 parties submit briefing on the legal standard for a permanent injunction by Friday,
11 January 9. Because the release date for *Watchmen* is less than two months away and
12 Warner Bros. must imminently commit to spending tens of millions of dollars on its
13 marketing and promotional campaign for the picture, time is of the essence, and
14 every day counts. Thus, Warner Bros. further proposes that the permanent
15 injunction hearing be advanced, if possible, to January 12 or as soon thereafter as
16 the Court's schedule permits, and that the hearing be completed as soon as possible
17 (Warner Bros. estimates two to three days should be sufficient), with the Court to
18 issue its decision as quickly as practicable thereafter.

19 We will be prepared to discuss all these issues at the status conference on
20 Wednesday, January 7, 2009.

21 **A. Fox Filed Its Improper Ex Parte Application Without Notice**

22 Fox's Application should be stricken as procedurally improper.
23 Notwithstanding the name on the document, there is no cause for filing an
24 "Application" for injunctive relief, especially when a hearing on that matter is
25 already scheduled. In any event, under this Court's rules, no "Application" could
26 properly be filed by Fox without either meeting and conferring with Warner Bros. or
27 giving notice of the "Application." Local Rules 7-3, 7-19.1. Fox did neither.
28

1 Instead, shortly before 9:30 p.m. on Monday night, January 5, 2009, just after
2 the parties had just concluded four days of intensive discussions to arrive at a Joint
3 Stipulation concerning the future proceedings in this case (filed by the parties on
4 January 5), Fox filed this document. *Not once* during those discussions did Fox
5 state that it would be filing this Application.¹ The "Application" is simply an all-
6 too-clever ex parte procedural maneuver without any attempt to satisfy the
7 requirements for such relief. *Mission Power Eng'g Co. v. Continental Casualty Co.*,
8 883 F. Supp. 488, 490 (C.D. Cal. 1995).

9 **B. Fox Is Inviting The Court To Commit Clear Error By Ignoring Supreme**
10 **Court And Ninth Circuit Precedent**

11 While Fox states that its "Application is not intended as a substitute for a full
12 briefing on the legal standards applicable to the permanent injunction issue (App.
13 2:23-24), it then proceeds to spend seven pages briefing the matter. In its argument,
14 Fox contends that after the Supreme Court's decision in *eBay Inc. v. MercExchange*,
15 *L.L.C.*, 547 U.S. 388 (2006), "irreparable injury continues to be presumed in
16 copyright infringement cases like this one." App. at 4:19-20. By ignoring Ninth
17 Circuit law adopting *eBay's* rule that a plaintiff seeking a permanent injunction has
18 the burden of proving a four-part test, including proving (not presuming) that it has
19 suffered irreparable harm, and inviting this Court to ignore the controlling
20 precedent, Fox is asking the Court to commit clear error.

21 In *Reno Air Racing Assoc., Inc. v. McCord*, 452 F.3d 1126 (9th Cir. 2006), a
22 case ignored by Fox, the Ninth Circuit adopted the *eBay* four-part test, stating that
23 "[t]he Supreme Court recently reiterated that district courts should apply 'traditional
24 equitable principles' in deciding whether to grant permanent injunctive relief," and
25

26 ¹ Another example of Fox's sandbagging is its statement in the Application
27 that it will stipulate to various facts such as "Warner Bros. and Paramount's
28 qualifications to distribute." App. at 4:3. During the parties Rule 16 meeting and
discussions about the Pretrial Order, Fox stated that it did not believe that there were
any facts to which the parties could stipulate.

1 cited *eBay*. *Id.* at 1137. The Ninth Circuit then re-stated the *eBay* four-part test,
2 including that "a plaintiff seeking a permanent injunction must demonstrate: (1) that
3 it has suffered an irreparable injury." *Id.* at 1137 n.11. In *Geertson Seed Farms v.*
4 *Johanns*, 541 F.3d 938 (9th Cir. 2008), an environmental case discussing the impact
5 of *eBay* on injunction decisions generally and also ignored by Fox, the Ninth Circuit
6 recognized that after *eBay*, no irreparable harm can be presumed. *Id.* at 944. In that
7 case, the Ninth Circuit held that the district court did not abuse its discretion in
8 granting an injunction because "the record demonstrates that the district court
9 applied the traditional four-factor test . . . before issuing its injunction," and "did not
10 presume that irreparable harm was likely to occur only on the basis of the NEPA
11 violation." *Id.* at 944-45.

12 Specifically citing to and following *eBay* and *Reno Air*, a Central District
13 court recently rejected the argument that a permanent injunction should generally
14 issue with the finding of copyright infringement and instead held that "the four *eBay*
15 factors are the only relevant considerations for purposes of Plaintiffs' instant motion
16 under the Copyright Act." *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*,
17 518 F. Supp. 2d 1197, 1209 (C.D. Cal. 2007). Then, in applying the four *eBay*
18 factors, the court held that irreparable harm "cannot be presumed," neither from
19 "past infringement" nor from the possibility of "future infringement." *Id.* at 1214-
20 15. Instead, the court explained, "the onus is on [the plaintiff] to explain why future
21 infringement . . . would cause *irreparable* harm." *Id.* at 1215 (emphasis in
22 original).²

23 Rather than focusing on these cases from this circuit and district, Fox
24 rehashes two Second Circuit cases in which Warner Bros. sought an injunction.
25 Those cases and the Second Circuit case law on which Warner Bros. relied are
26 irrelevant here because this Court is in the Ninth Circuit. The Second Circuit at the

27 _____
28 ² Warner Bros. will submit more complete briefing on the legal standard for a
permanent injunction in the briefing discussed in Part C. below.

1 time of those two Warner Bros. cases had not yet adopted the *eBay* four-part test nor
2 had the district courts in the Second Circuit adopted the result from *eBay* that the
3 plaintiff must *prove* irreparable harm, not merely rely on a presumption of harm.
4 Here, the Ninth Circuit has adopted the *eBay* test and has held that after *eBay* an
5 injunction cannot issue based on presumed irreparable harm, and a court of this
6 district has held that no such presumption of irreparable harm applies in the wake of
7 *eBay*.³

8 Based on this precedent, as well as on other cases that Warner Bros. will brief
9 in more detail at the appropriate time, this court cannot accept Fox's invitation to
10 apply the rejected rule that irreparable harm automatically and presumably flows
11 from a finding of copyright infringement. Fox has the burden of affirmatively
12 proving irreparable harm, which it cannot do based merely on its distribution right in
13 the *Watchmen* picture.

14 **C. Time Is Critical, So Warner Bros. Requests An Early Trial And Decision**

15 Fox asks the Court to set an immediate briefing schedule on the permanent
16 injunction legal standard, determine if there are any factual disputes, and determine
17 if a trial with live witnesses is necessary, contending that "Warner Bros. seeks to
18 introduce evidence on matters completely irrelevant to the injunction issue or not in
19 dispute," and plans to call "scores of witnesses" at the permanent injunction trial.⁴
20 App. at 3:20-21, 3:24-25. This is a distortion of Warner Bros.' trial plans.

21 As Warner Bros. has told Fox many times, Warner Bros. seeks a resolution of
22 the permanent injunction issue as soon and as quickly as possible, and anticipates a
23

24 ³ Fox also cites *Idearc Media Corp. v. Opinion and Order Northwest*
25 *Directories, Inc.*, 2008 WL 2185334 (D. Or. May 23, 2008), for the proposition that
26 irreparable harm can be presumed. App. at 9:2-6. However, in that unpublished
27 case, the court *did* apply the *eBay* four-part test and concluded that the plaintiff had
28 suffered harm to its good will and that it "is unclear that monetary compensation
will suffice to remedy that harm." *Id.* at *9.

⁴ Warner Bros. did not identify "scores of witnesses" on its witness list and
has no intention of calling more than a few witnesses at trial.

1 2-day, at most 3-day, trial focused solely on the issue of a permanent injunction. To
2 achieve this, Warner Bros. is amenable to Fox's proposal for an expedited briefing
3 schedule on the legal standard for a permanent injunction, with both parties
4 submitting briefs by January 9, 2009. Warner Bros. proposes that the permanent
5 injunction trial be advanced to January 12, 2009 or as soon thereafter as the Court's
6 schedule permits.

7 Finally, Warner Bros. emphatically rejects Fox's attempt to deprive it of its
8 right to present its case against the issuance of a permanent injunction by live
9 witnesses. During discovery, Warner Bros. refrained from cross-examining Fox
10 witnesses during depositions because the Court had stated that the issue of an
11 injunction would be decided at trial. For example, Fox witnesses have stated that
12 Fox will be harmed because its market share will decline and its other pictures will
13 be injured if an injunction does not issue and *Watchmen* is released. Warner Bros.
14 disputes these contentions. Warner Bros. is entitled to examine the Fox witnesses
15 on these and other disputed matters at trial.

16 Dated: January 6, 2009

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SHAPIRO, LLP

IRELL & MANELLA LLP

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13 CENTRAL DISTRICT OF CALIFORNIA

14 TWENTIETH CENTURY FOX FILM)
15 CORPORATION,)

16 Plaintiff,)

17 v.)

18 WARNER BROS. ENTERTAINMENT,)
19 INC.; WB STUDIO ENTERPRISES,)
20 INC.; WARNER BROS. PICTURES,)

21 Defendants.)

Case No. CV 08-0889 GAF (AJWx)

**DEFENDANTS' MEMORANDUM
OF CONTENTIONS OF FACT AND
LAW RE INJUNCTION HEARING**

[Appendix of Authorities concurrently
filed herewith]

[Honorable Gary A. Feess]
[Complaint filed: 2/8/08]

Trial Date: January 20, 2009
Time: 8:30 AM
Courtroom: 740

Discovery Cutoff: December 8, 2008

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1 TO THE HONORABLE COURT:

2 Pursuant to Local Rule 16-4 and the Court's Orders, Defendants Warner Bros.
3 Entertainment, Inc. and WB Studio Enterprises, Inc. (on behalf of itself and its
4 division, Warner Bros. Pictures) (collectively, "Warner Bros.") respectfully submit the
5 following Memorandum of Contentions of Fact and Law, addressing the contentions
6 of the parties as regards the Hearing re Preliminary Injunction on Fox's right to
7 distribute the *Watchmen* motion picture.

8 **I. INTRODUCTION**

9 In its December 24, 2008 Order Re Cross-Motions for Summary Judgment, the
10 Court determined that Fox, "at the very least, has distribution rights" in the *Watchmen*
11 motion picture.¹ Pursuant to the parties' Joint Stipulation Re Further Proceedings
12 Following Court's December 24, 2008 Order Re Fox Motion For Partial Summary
13 Judgment, the parties have agreed that only Fox's claim to injunctive relief on its
14 distribution rights will be tried to the Court on January 20, 2009.

15 Based on the Court's prior bifurcation and summary judgment orders, and
16 based on the parties' stipulation regarding the scope of this proceeding, Warner Bros.
17 believes that the current non-jury trial will resolve the following basic remaining
18 issues on Fox's distribution rights claim and its requested equitable remedy and on
19 Warner Bros.' remaining applicable defenses to that claim:

- 20 • Whether Fox would suffer irreparable injury if Warner Bros. were not
- 21 enjoined from distributing *Watchmen*.
- 22 • Whether the hardship to Warner Bros. in losing its approximately more than
- 23 \$150 million investment exceeds the hardship to Fox of being deprived of
- 24 distributing a picture it abandoned.

25
26
27 ¹ The Court also advised the parties of its intent to issue a detailed order addressing the arguments
28 in the parties' cross-motions. Warner Bros. has sought herein to take into account the Court's Order,
but reserves the right to modify its contentions as set forth herein to take into account the Court's
final Order, once issued.

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- Whether Fox's injury is compensable in damages, measured by either its Buy-Out Price or its contractual distribution fee pursuant to the formula in the Largo Agreements.
- Whether the public interest would be served by an injunction prohibiting the release and public exhibition of *Watchmen*, given the efforts made to create the work and the economic activity associated with its distribution.
- Whether equitable relief is barred as a matter of laches, unclean hands, estoppel or other equitable doctrines, because, among other reasons:
 - Fox indicated in writing that it owned no copyright interests relating to *Watchmen*, which Warner Bros. relied on when it decided to develop and proceed with the production of the movie.
 - Before raising its claim of rights, Fox contractually agreed with Warner Bros. that Warner Bros. could use the title *Watchmen* for the *Watchmen* movie.
 - Fox was aware that the *Watchmen* project was in development at Warner Bros., and before that at two other major motion picture studios, Universal and Paramount, and said nothing until those other studios had spent tens of millions of dollars on the project and until Warner Bros. was about to begin filming.
 - Fox was given the opportunity in writing to produce *Watchmen* in 2005, at the same time that Warner Bros. was given that opportunity; but Fox executives rejected the script and declined to make the movie.
 - After Fox first asserted its claims to *Watchmen* in July 2007, Fox waited eight months before filing this lawsuit, and then never sought a preliminary injunction.

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II. CLAIMS AND DEFENSES

This is a civil action concerning claimed copyrights and contract rights relating to the major motion picture *Watchmen*, which was developed and produced by Warner Bros. over the last three years and is scheduled for worldwide release in March 2009. Jurisdiction is asserted under 28 U.S.C. §§ 1331 and 1338 based on copyright claims, and pursuant to 28 U.S.C. § 1367 based on pendent state law contract and tort claims.

A. PLAINTIFF'S CLAIMS

1. Summary of Claims

The Complaint herein alleges five purported claims for relief. For simplicity, each of these, with its core allegations, is set forth in tabular form:

Claim	Title	Core Allegations
First	Copyright Infringement	Fox alleges that the 1991 Quitclaim should be construed as granting it a distribution right in <i>Watchmen</i> , that the Changed Elements provision of the 1994 Turnaround Notice should be construed as granting it a production right in <i>Watchmen</i> , that these are both copyright interests, and that Warner Bros. has infringed these alleged copyright interests. (Partly adjudicated.)
Second	Interference with Contract	Fox alleges that Warner Bros.' act of assuming the 1991 Quitclaim constituted interference with its alleged rights under the 1991 Quitclaim. (Not at issue in this phase of the proceedings.)
Third	Breach of Contract	Fox alleges that it is a third party beneficiary of the 2006 Option/Quitclaim between Golar/LEI and Warner Bros., and that in the 2006 Option/Quitclaim Warner Bros. allegedly promised to deliver <i>Watchmen</i> to Fox for distribution. (Not at issue in this phase of the proceedings.)
Fourth	Accounting	Fox seeks an accounting of "incomes, profits and revenues associated with" the development and distribution of <i>Watchmen</i> . (Bifurcated – not at issue in this phase of the proceedings.)

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Fifth	Declaratory Relief	Fox seeks a declaration that (1) it has Changed Elements rights under the 1994 Turnaround Notice; and (2) it has distribution rights under the 1991 Quitclaim. (Partly adjudicated – not at issue in this phase of the proceedings.)
-------	--------------------	--

Although the Complaint alleges five claims for relief, only a portion of the first claim for copyright infringement is relevant to the permanent injunction hearing. Pursuant to the Joint Stipulation, the January 20 permanent injunction hearing will only address Fox's equitable claim for injunctive relief on its distribution rights. Accordingly, the discussion of the elements of Fox's claims will be limited to the injunctive relief standards that Fox must meet.

2. Elements

a. *The eBay Decision*

An injunction does not follow as a matter of course from a finding of copyright infringement. *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Rather, as the Supreme Court unanimously held, "[a]ccording to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate the following elements: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *Id.* at 391.

Although the Copyright Act "provides that courts 'may' grant injunctive relief 'on such terms as it may deem reasonable to prevent or restrain infringement of a copyright,'" the Supreme Court "has consistently rejected invitations to replace traditional equitable considerations with a rule that an injunction automatically follows a determination that a copyright has been infringed." *Id.* at 392, 393 (quoting

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1 17 U.S.C. § 502(a)). Indeed, the Ninth Circuit has long recognized that "an injunction
 2 is a 'harsh and drastic' discretionary remedy, never an absolute right." *Abend v. MCA,*
 3 *Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988); *see also Christopher Phelps & Assocs. v.*
 4 *Galloway*, 492 F.3d 532, 543-46 (4th Cir. 2007); *Reno Air Racing Ass'n., Inc. v.*
 5 *McCord*, 452 F. 3d 1126, 137-38 (9th Cir. 2006) (trademark infringement); *Designer*
 6 *Skin, LLC v. S & L Vitamins, Inc.*, 2008 WL 4174882 (D. Ariz. Sept. 8, 2008)
 7 (prevailing plaintiff seeking a permanent injunction has burden of proving that harm
 8 from defendant's copyright infringement "cannot otherwise be remedied except
 9 through injunctive relief"); *Propet USA, Inc. v. Shugart*, 2007 WL 4376204 (W.D.
 10 Wash. Dec. 13, 2007) ("in order to justify a permanent injunction, [plaintiff] must
 11 satisfy *eBay's* four-factor test").

12 Thus, after *eBay* and the cases following it, no court may issue a permanent
 13 injunction for copyright infringement unless the plaintiff proves the four factors,
 14 including irreparable injury and the balance of hardships weighing in its favor.

15 **b. Irreparable injury**

16 Because there is no presumption of irreparable harm even where a plaintiff has
 17 establish a copyright infringement, the plaintiff seeking an injunction has the burden
 18 of establishing the existence of irreparable harm. *eBay, Inc.*, 547 U.S. at 391-393;
 19 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d at 1210-1211.

20 "By definition, 'irreparable injury' is that for which compensatory damages are
 21 unsuitable." *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 24 (5th Cir. 1992).
 22 *See also Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("Only harm
 23 that the district court cannot remedy following a final determination on the merits
 24 may constitute irreparable harm."(*Prairie Band of Potawatomi Indians v. Pierce*, 253
 25 F.3d 1234 (10th Cir. 2001)("irreparable harm is often suffered when the injury
 26 can[not] be adequately atoned for in money, or when the district court cannot remedy
 27 [the injury] following a final determination on the merits") (internal quotation marks
 28 and citations omitted). In *Abend*, the Ninth Circuit held that the district court was

1 "capable of calculating damages" from the distribution of a movie, and so the plaintiff
2 could be adequately compensated. *Abend*, 863 F.2d at 1479.

3 **c. Adequacy of Legal Remedies**

4 "[T]he requisite analysis for the second factor of the four-factor test inevitably
5 overlaps with that of the first" *MercExchange*, 500 F. Supp. 2d at 582; *see also*
6 *800 Adept, Inc. v. Murex Securities, Ltd.*, 505 F. Supp. 2d 1327, 2007 U.S. Dist.
7 LEXIS 27051, 2007 WL 1101238, at *6 (M.D. Fla. 2007) (quoting *Lewis v. S.S.*
8 *Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976) ("[o]ften times the concepts of
9 'irreparable injury' and 'no adequate remedy at law' are indistinguishable' in the
10 context of a permanent injunction"). Accordingly, as stated above, if monetary
11 damages are sufficient compensation, no injunction can issue.

12 **d. Balance of hardships.**

13 As to the third factor, the Court must consider the hardships that might afflict
14 the parties by the grant or denial of Fox's request for a permanent injunction. *Metro-*
15 *Goldwyn-Mayer*, 518 F. Supp. 2d at 1220. In balancing these hardships, a court
16 should consider whether an injunction would effectively foreclose a defendant from
17 enjoying legitimate profits derived from its exploitation of a film that was created
18 largely on elements unrelated to the underlying rights of the plaintiff. For example, in
19 *Abend*, where the plaintiff who owned the copyright to the story upon which a movie
20 was based sought to prevent the distribution of that movie, the court held that the
21 balance of hardships weighed in favor of the infringing party, because the infringing
22 motion picture resulted from the collaborative efforts of many talented individuals
23 other than the author of the underlying story. 863 F.2d at 1467-68, 1479.
24 Specifically, the court determined that "[i]t would cause a great injustice for the
25 owners of the film if the court enjoined them from further exhibition of the movie.
26 An injunction would also effectively foreclose defendants from enjoying legitimate
27 profits derived from exploitation of the 'new matter' comprising the derivative work."
28 *Id.*, *see Campbell v. Acuff-Rose Music*, 510 U.S. 569, 578 (finding there may be a

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1 strong public interest in the publication of a derivative work and the copyright
 2 owner's interest may be adequately protected by an award of damages for whatever
 3 infringement is found) (citing *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir.
 4 1988)).

5 **e. The public interest**

6 In deciding whether the public interest would be served by a permanent
 7 injunction, the Court must consider the injury to the public from lost economic
 8 activity and by denying the public the opportunity to view the movie. *See Abend v.*
 9 *MCA, Inc.*, 863 F.2d 1465, 1479 (9th Cir. 1988) (holding that an injunction should not
 10 be issued because an injunction could cause public injury by denying the public the
 11 opportunity to view a classic film for many years to come).

12 **B. DEFENDANT'S DEFENSES**

13 **1. Summary of Defenses Pleaded**

14	15	16	17	18	19	20	21	22	23	24	25	26	27	28
	Defense			Title										
	First			Failure to State a Claim										
	Second			Laches										
	Third			Waiver										
	Fourth			Modification										
	Fifth			Merger										
	Sixth			Unclean Hands										
	Seventh			Estoppel										
	Eighth			Failure to Mitigate										

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Ninth	Mistake
Tenth	Failure of Consideration
Eleventh	Release, Novation, Accord and Satisfaction
Twelfth	Implied License
Thirteenth	Offset
Fourteenth	Harm Caused By Plaintiff

2. Elements

Pursuant to the Stipulation of the Parties, this phase of the proceeding will only address Fox's equitable claim for injunctive relief on the portion of its copyright claim based on the distribution right the Court has found to exist. Accordingly, the discussion of the elements of Warner Bros.' defenses will be limited to those equitable defenses that Warner Bros. believes, based on its understanding of the Court's December 24, 2008 Order and the relief sought by Fox, will be pertinent to this phase of the proceeding.

a. *Laches*

Laches bars equitable relief where there is unreasonable delay that causes prejudice to the defendant resulting from the delay: "It must be obvious to everyone familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large amounts of money in its exploitation." 3 Nimmer & Nimmer, *Nimmer on Copyright*, §12.06[A] (2008)(quoting *Haas v. Leo Feist*, 234 F. 105, 108 (S.D.N.Y. 1916)); See *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 950-951 (9th Cir. 2001) ("Laches is an equitable defense that prevents a plaintiff, who "with full

1 knowledge of the facts, acquiesces in a transaction and sleeps upon his rights.")
 2 (quoting *S. Pac. Co. v. Bogert*, 250 U.S. 483, 500 (1919); see also *Universal Pictures*
 3 *v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947) (accord).

4 Laches is established by a showing of (1) unreasonable delay (2) resulting in
 5 prejudice to the defendant. See *Danjaq*, 263 F.3d at 950-956. In determining the
 6 unreasonableness of the delay, the relevant delay is the period from when the plaintiff
 7 knew (or should have known) of the allegedly infringing conduct to the initiation of
 8 the lawsuit. *Id.* at 952. For determining the issue of prejudice, "Courts have
 9 recognized two chief forms of prejudice in the laches context -- evidentiary and
 10 expectations-based. (citations omitted). Evidentiary prejudice includes such things as
 11 lost, stale, or degraded evidence, or witnesses whose memories have faded or who
 12 have died. (citations omitted). A defendant may also demonstrate prejudice by
 13 showing that it took actions or suffered consequences that it would not have, had the
 14 plaintiff brought suit promptly." *Id.* at 955.

15 **b. Unclean Hands**

16 "Equitable relief typically will not be granted to an individual who has acted in
 17 bad faith with respect to the transaction that has come before the court." 11A Wright
 18 & Miller, *Federal Practice and Procedure*, § 2946 (1995). Whether phrased as the
 19 Unclean Hands Doctrine, or under other rubrics such as the maxim of equity that "He
 20 who seeks equity must do equity," a court of equity will not award relief to one who
 21 has acted inequitably. See 5 *Patry on Copyright*, § 17:127. The Supreme Court has
 22 explained that the doctrine of unclean hands "closes the doors of a court of equity to
 23 one tainted with inequity or bad faith relative to the matter in which he seeks
 24 relief, however improper may have been the behavior of the defendant." *Precision*
 25 *Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 814 (1945); see also
 26 *Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 880 (1st Cir.
 27 1995) ("It is old hat that a court called upon to do equity should always consider
 28 whether the petitioning party has acted in bad faith or with unclean hands.").

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1 *Inc. v. Stokely-Van Camp, Inc.*, 522 F.2d 369, 378-379 (2d Cir. 1975) (Plaintiff's
 2 failure to voice a complaint or make a competing claim to the rights of a comic strip
 3 character, in the face of numerous opportunities to do so over a period of many years,
 4 gave Defendant the right to rely on Plaintiff's silence). It is, instead, a duty of good
 5 faith: "When one party in a relationship with another has an opportunity to speak in
 6 order to avoid harm or injury to the other party and fails to do so to the ultimate
 7 prejudice of the other party, he will be estopped from relying thereafter on that
 8 relationship." *Id.* "It is immaterial to a claim of estoppel that there was no actual
 9 attempt to defraud or mislead." *Id.*

10 C. KEY EVIDENCE ON CLAIMS AND DEFENSES

11 The evidence will show that monetary damages are an adequate remedy for any
 12 alleged breach or disruption of Fox's distribution rights with respect to the *Watchmen*
 13 picture. First, under the 1994 Turnaround Agreement, Fox set the Buy-Out as the
 14 value of its rights, setting a monetary price on the value its rights and obtaining a
 15 security interest to secure payment of that monetary price. Alternatively, and in any
 16 event, even under the Largo Agreement, damages for breach or disruption of Fox's
 17 distribution rights (if any) are capable of being computed with reasonable certainty
 18 pursuant to the provisions of the Largo Agreement. Witnesses will testify that
 19 Warner Bros. and Paramount are at least as competent as Fox to distribute the film,
 20 and any argument that the picture would do better at the box office and in other media
 21 were Fox distributing it is unwarranted speculation.

22 The evidence will also show that Fox's rights are purely economic and that Fox
 23 has no meaningful nonmonetary benefits attendant to the distribution right the Court
 24 has found. In contrast to producing a picture, which involves creative activity,
 25 Distribution is a business proposition, a monetary activity. Fox's distribution rights
 26 under the Largo Agreements do not give it any creative controls over the motion
 27 picture, and it still must consult on many of its permitted distribution decisions. Fox's
 28 expectations in distributing pursuant to the Largo Agreements are purely economic.

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1 As a result, there can be no irreparable harm that would result from the denial of an
2 injunction.

3 The evidence will also show that an injunction prohibiting distribution of the
4 picture would not be in the public interest. The evidence will show that the
5 *Watchmen* picture is a superior and significant creative work, embodying years of
6 intensive labor by hundreds of talented individuals and eagerly awaited by legions of
7 fans around the world. Enjoining its public exhibition will deprive a significant
8 segment of the public of the pleasure of seeing the movie, will harm many third
9 parties involved in the distribution, marketing and promotion of the picture by
10 depriving them of economic benefits, and will deprive the nation of both access to an
11 important, creative work and the economic benefits associated with the distribution of
12 a major motion picture. For example, theater owners around the world have planned
13 to show this picture in March and the following months and are expecting the major
14 economic benefit that results from a major motion picture release. Many other third
15 parties have been planning promotional and merchandising campaigns to lead up to
16 and coincide with the release of *Watchmen*. The millions of dollars already spent on
17 these campaigns and the millions more that these third parties expect to earn will be
18 lost.

19 The balance of hardship also weighs heavily in Warner Bros.' favor. Not only
20 has it spent approximately \$130 million making the movie, it is in the process of
21 spending millions more dollars in a carefully choreographed marketing and
22 promotional plan that started months ago and is ongoing. The plan is designed to
23 maximize consumer interest in the picture just before the picture's release date.
24 Disruption of the marketing plan will irreparably harm Warner Bros. In addition,
25 enjoining movie will adversely affect Warner Bros., and those creative personnel
26 associated with it, from enjoying legitimate profits derived from their contributions to
27 the *Watchmen* picture, such as the actor's performances, special effects, music,
28 cinematography, editing and many other elements to which Fox has no rights.

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1 The evidence will further show that Fox did not act in a way consistent with its
 2 present contention that it will be of valuable non-monetary rights in the absence of an
 3 injunction. The 1994 Turnaround Agreement provided that if Gordon "introduce[d]
 4 any new or alter[ed] any existing elements (e.g., a director or principal cast, change in
 5 the storyline or reduction of the budget)" then Gordon was to "submit to Fox in
 6 writing such Changed Elements." Fox was aware of elements being changed over the
 7 years, was aware that the project was set up at other studios, without presentation to
 8 Fox, and yet Fox never complained. The evidence will also show that in 2005 the
 9 *Watchmen* project was submitted to Fox, which passed on the picture with
 10 disparaging remarks by Fox's top creative executives. Gordon then brought the
 11 picture to Warner Bros., which decided to pick up *Watchmen* based on the very same
 12 submission made to and rejected by Fox.

13 The evidence will also show that Fox had made no timely claim of rights in the
 14 picture, after it learned of Warner Bros.' involvement in the project. Indeed, Fox
 15 delayed for years before asserting its rights.

16 In short, the evidence will show that Warner Bros. acted reasonably and
 17 equitably in believing it had rights, that Fox did not act reasonably or equitably in
 18 connection with its claimed rights, that any rights of Fox would be adequately
 19 protected by its remedies at law, and that no injunction should issue.

20 **III. EVIDENTIARY ISSUES**

21 The parties have not identified any significant disputed evidentiary issues in
 22 connection with this phase of the trial.

23 **IV. LEGAL ISSUES**

24 Other than as identified in their respective summary judgment motions, the
 25 parties have not identified any significant legal issues in connection with this phase of
 26 the trial.

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1 **V. BIFURCATION**

2 The Court has previously bifurcated the issue of damages, as set forth in its
3 October 8, 2008 Order. The Hearing re Preliminary Injunction will not involve
4 presentation of damages evidence, except to the extent necessary to illustrate the
5 availability of such damages.

6 **VI. JURY TRIAL**

7 The parties have each demanded a trial by Jury of all issues so triable. The
8 parties agree that current phase of the trial will be tried to the Court and understand
9 that the Court will only be deciding equitable issues that will not bind any future jury.
10 Warner Bros. reserves its right to a trial by jury in all respects.

11 **VII. ATTORNEYS' FEES**

12 Fox has demanded attorneys' fees. The Hearing re Preliminary Injunction will
13 not involve presentation of evidence on attorneys' fees.

14 **VIII. ABANDONED ISSUES**

15 The Parties have stipulated that Fox will not seek injunctive relief as to any
16 claim other than its claim for distribution rights.

18 Dated: January 6, 2009

Respectfully submitted,

19 Patricia L. Glaser
20 Kevin J. Leichter
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PROOF OF SERVICE

STATE OF CALIFORNIA
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I am employed in the County of Los Angeles, State of California; I am over the age of 18 and not a party to the within action; my business address is 10250 Constellation Boulevard, Nineteenth Floor, Los Angeles, California 90067.

On January 6, 2009, I served the foregoing document(s) described as: DEFENDANTS' MEMORANDUM OF CONTENTIONS OF FACT AND LAW RE INJUNCTION HEARING on the interested parties to this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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(BY MAIL) I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. This correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business at our Firm's office address in Los Angeles, California. Service made pursuant to this paragraph, upon motion of a party served, shall be presumed invalid if the postal cancellation date of postage meter date on the envelope is more than one day after the date of deposit for mailing contained in this affidavit.

(BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the above named addressee(s).

(BY E-MAIL) I caused such documents to be delivered via electronic transmission to the offices of the addressee(s) at the e-mail addresses listed.

Executed this on January 6, 2009, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

/s/ Scott E. Gizer
Scott E. Gizer

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