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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

13 GROUPE CANAL+ S.A., CANAL+
TECHNOLOGIES, S.A., CANAL+
14 TECHNOLOGIES, INC.,

15 Plaintiff,

16 v.

17 NDS GROUP PLC, NDS AMERICAS, INC.,

18 Defendants.
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Case No. C-02-01178 VRW

**NDS GROUP PLC'S AND NDS
AMERICAS, INC.'S MOTION TO
DISMISS; MEMORANDUM IN
SUPPORT OF MOTION TO
DISMISS**

Date: May 30, 2001
Time: 2:00 p.m.
Place: Courtroom 6

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TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 30, 2002, at 2:00 p.m., or as soon thereafter as that matter may be heard in Courtroom E of the above-entitled Court, located at 450 Golden Gate Avenue, San Francisco, California 94102-3483, defendants NDS Group PLC (“NDS Group”) and NDS Americas, Inc. (“NDS Americas”) (collectively, “NDS”) will, and hereby do, move the Court pursuant to Federal Rule of Civil Procedure 12(b)(6) for dismissal of the Complaint filed by Groupe Canal+, S.A. (“Groupe Canal+), Canal+ Technologies, S.A. (“CANAL+ Technologies”), and Canal+ Technologies, Inc. (“Canal+ USA”) (collectively, “Canal+”) for failure to state a claim upon which relief may be granted. Alternatively, NDS also will, and hereby do, move the Court pursuant to Federal Rule of Civil Procedure 12(f) to strike the request for accounting and restitution in the first claim (Compl. ¶ 36) and the wire fraud allegations in the eighth claim (Compl. ¶¶ 80(iii) and 85, as well as at ¶ 86 on page 19:23-25). The motion is based upon this Notice of Motion, the Memorandum of Points and Authorities, the pleadings, and such other matters as the Court deems proper.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Canal+ designed its complaint to lay the blame for its financial woes publicly on
3 NDS. While examining the truth of those allegations and the dubious connection
4 between them and Canal+'s business ineptitude must await another day, the time is now
5 ripe to test the legal adequacy of Canal+'s claims. The eight-claim complaint in this case
6 is based on a single set of alleged facts; namely that NDS reverse engineered a "smart
7 card" designed by Canal+ Technologies and caused certain software contained on that
8 card (the "UserROM") to be published on the Internet. NDS denies any wrongdoing, but
9 accepting the well pleaded factual allegations of the complaint for purposes of this
10 motion, the entire complaint should be dismissed because each of the eight counts fails
11 to state a claim.

12 Canal+ makes four state-law claims (statutory unfair competition, common-law
13 unfair competition, tortious interference, and conspiracy). Each is preempted by the
14 Copyright Act on the facts alleged. Furthermore, each should be dismissed for
15 independent reasons. California's Unfair Competition Law ("UCL") statute does not
16 permit recovery for alleged lost business opportunities, and Canal+'s claim for
17 accounting and restitution (first claim) should therefore be stricken. The reverse
18 engineering and copying alleged in the complaint do not amount to common-law unfair
19 competition (second claim), which applies only to passing off. A claim for tortious
20 interference (sixth claim) must allege that defendants interfered with either a valid
21 contract with a third party or an existing economic relationship with a third party, but
22 Canal+ fails to identify any such business lost because of NDS's alleged acts. Finally,
23 the conspiracy claim (seventh claim) fails because there simply is no such civil claim for
24 relief.

25 Canal+'s attempt to allege federal causes of action also fails. Copyright
26 infringement and contributory copyright infringement each requires both proof of
27 ownership of the copyright and actual infringement. Groupe Canal+ and Canal+ USA do
28 not own the copyright at issue, and their claims for copyright infringement and

1 contributory copyright infringement must be dismissed. Independently, the entire
2 complaint alleges no conduct within the applicable three-year limitations period that is
3 actionable under the Copyright Act, and the claims for copyright infringement and
4 contributory copyright infringement should therefore be dismissed as to all plaintiffs.
5 Similarly, the complaint fails to state a violation of the Digital Millennium Copyright Act
6 (“DMCA”) because that statute is limited to technology used to circumvent a
7 technological protection measure, but the complaint alleges only that NDS disclosed part
8 of a technological protection measure, not circumvention technology. Finally, the
9 complaint fails to state a claim under the Racketeer Influenced and Corrupt
10 Organizations (“RICO”) Act because the complaint does not establish the type of injury
11 required for RICO standing and because the complaint fails to allege the required
12 enterprise. Additionally, the allegations of wire fraud as predicate acts for RICO should
13 be stricken because they are legally insufficient.

14 The end result of these many defects is simple: Canal+’s complaint should be
15 dismissed in its entirety.

16 THE COMPLAINT

17 Plaintiff CANAL+ Technologies is a French corporation that produces “conditional
18 access technology on cards that contain highly specialized microchips” to limit access to
19 digital pay television programs. Compl. ¶ 7. CANAL+ Technologies claims to be the
20 owner (or joint owner) of a copyright in certain software (UserROM) inscribed in these
21 “smart cards.” *Id.* ¶¶45-46. The other plaintiffs—Groupe Canal+ and Canal+ USA—do
22 not own the UserROM copyright; instead Groupe Canal+ produces pay television in
23 Europe, and Canal+ USA markets CANAL+ Technologies’ technology in the United
24 States. *Id.* ¶¶ 6, 8.

25 NDS Group is a British company that, among other things, provides conditional
26 access technology for digital programming. *Id.* ¶ 9. NDS Americas, based in Newport
27 Beach, California, is its American subsidiary. *Id.* ¶ 10. The complaint accuses NDS of
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1 creating a reverse-engineered copy in Israel of the UserROM from a Canal+ smart card
2 and sending it to employees of NDS Americas with instructions to transmit it to the
3 operator of an Internet website called DR7.com. Compl. ¶¶ 23-25. On March 26, 1999,
4 a file called SECAROM.ZIP was posted on DR7. *Id.* ¶ 25.

5 The enormous harm plaintiffs allege is not based on NDS's alleged conduct. It is
6 based exclusively on third parties using counterfeit digital television "smart cards" to
7 pirate satellite television signals in the European market. NDS did not manufacture, sell,
8 or market any counterfeit cards or pirate any satellite television signals. The complaint
9 asserts eight causes of action based exclusively on NDS allegedly transmitting a copy of
10 the UserROM to and from its subsidiary in southern California. Each of these eight
11 claims fails as a matter of law.

12 ARGUMENT

13 A court should dismiss a claim under Rule 12(b)(6) where "it appears beyond
14 doubt that the plaintiff can prove no set of facts . . . which would entitle [plaintiff] to relief,"
15 Conley v. Gibson, 355 U.S. 41, 45-46 (1957), *i.e.*, where there is either a "lack of
16 cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable
17 legal theory." Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990).
18 While the court must accept all well-pleaded facts as true, "conclusory allegations
19 without more are insufficient to defeat a motion to dismiss for failure to state a claim."
20 McGlinchy v. Shell Chem. Co., 845 F.2d 802, 810 (9th Cir. 1988). Moreover, the court
21 need not assume the truth of legal conclusions merely because they are in the form of
22 factual allegations. Wylar Summit P'ship. v. Turner Broad. Sys., Inc., 135 F.3d 658, 665
23 (9th Cir. 1998). Under these standards, all eight claims in Canal+'s complaint should be
24 dismissed.

25 Courts should also strike, pursuant to Rule 12(f), those allegations in the
26 complaint that "could have no possible bearing on the subject matter of the litigation."
27 LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992). In this
28

1 case, independent of NDS's motion to dismiss, the request for monetary recovery under
2 California's unfair competition statute should be stricken because such recovery is not
3 authorized under the statute, and the allegations of wire fraud in its RICO claim should
4 likewise be stricken because they do not properly allege a predicate act under that
5 statute.

6 The following discussion first explains how Canal+'s four state law claims are
7 preempted by Federal copyright law. It then addresses each of Canal+'s eight claims in
8 the order they are pled and identifies the independent reasons for dismissing each one.

9 **I. CANAL+'S STATE-LAW CLAIMS IN COUNTS 1, 2, 6, AND 7 ARE**
10 **PREEMPTED BY FEDERAL LAW.**

11 Counts 1, 2, 6, and 7 each attempt to make a claim under state law based on the
12 alleged copying or publication of the UserROM code. This is the subject matter of the
13 Copyright Act—subject matter which is actionable under the Copyright Act or not at all.
14 Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212 (9th Cir. 1998).

15 Section 106 of the Copyright Act states that the Copyright Act grants exclusive
16 rights in the reproduction, preparation of derivative works, importation, and distribution of
17 copies of the copyrighted work. Section 301(a) states that the Copyright Act exclusively
18 governs "all legal or equitable rights that are equivalent to any of the exclusive rights
19 within the general scope of copyright as specified by section 106" and bars any
20 "equivalent right in any such work under the common law or statutes of any State."¹ 17
21 U.S.C. § 301(a). "[S]ection 301 is intended to be stated in the clearest and most
22 unequivocal language possible, so as to foreclose any conceivable misinterpretation of
23 its unqualified intention that Congress shall act preemptively, and to avoid the
24 development of any vague borderline areas between State and Federal protection."
25 H.R. Rep. No. 94-1476, at 120 (1976), at 130 (1976), reprinted in 1976 U.S.C.C.A.N.

26 _____
27 ¹ In addition to the statutory basis for preemption under section 301(a), preemption
28 is constitutionally required by the Copyright Clause. U.S. CONST., Art. I § 8.

1 5659, 5746.

2 Preemption may occur even if a valid copyright infringement claim cannot be
3 stated. Kodadek, 152 F.3d at 1212 (affirming summary judgment against a UCL claim
4 even though copyright registration requirement was not satisfied); Idema v. Dreamworks,
5 Inc., 162 F. Supp. 2d 1129, 1189 (C.D. Cal. 2001) (“The shadow actually cast by the
6 Act’s preemption is notably broader than the wing of its protection.”). Likewise, attempts
7 to state a claim on behalf of persons that do not hold a copyright are preempted if those
8 allegations relate exclusively to the subject matter of the copyright. Perfect 10, Inc. v.
9 Cybernet Ventures, Inc., 167 F. Supp. 2d 1114, 1125 (C.D. Cal. 2001) (“The Court
10 dismisses so much of the unfair competition claims as they relate to copyrights, whether
11 [plaintiff’s] or third parties’, based on preemption.”).

12 To avoid preemption, a state-law cause of action based on copyrightable subject
13 matter must protect qualitatively different rights and have an extra element that changes
14 the nature of the action. Del Madera Prop. v. Rhodes Gardner, Inc., 820 F.2d 973, 977
15 (9th Cir. 1987) (UCL case); see also Symantec Corp. v. McAfee Assoc., Inc., No. C-97-
16 20367, 1998 WL 740798, *4-5 (N.D. Cal. June 9, 1998) (“The fact that the state-created
17 right is either broader or narrower than its federal counterpart will not save it from
18 preemption.”). To determine whether individual state-law claims are preempted, courts
19 “engage in a fact-specific inquiry into the actual allegations underlying the claims at issue
20 in the case, so as to determine whether the gravamen of the state law claim is the same
21 as the rights protected by the Copyright Act.” Idema, 162 F. Supp. 2d at 1190.

22 Canal+’s state-law claims are preempted because they assert nothing more than
23 business injury resulting either from the copying or distribution of the alleged copyrighted
24 work, Canal+’s UserROM code. Cf. Compl. ¶ 16 (“The MediaGuard conditional access
25 product is at the center of this controversy.”) In its UCL and common-law unfair
26 competition claims, Canal+ alleges that NDS copied the allegedly copyrighted UserROM
27 code and caused it to be disseminated to facilitate further copying. See, e.g., Compl. ¶¶
28

1 35-36 (UCL), 40-41 (common-law unfair competition). Similarly, Canal+'s tortious
2 interference claim alleges that NDS disrupted alleged advantageous relationships as "a
3 direct result of Defendants' acts alleged herein"—the copying and dissemination the
4 UserROM code. Compl. ¶¶ 67, 69. The conspiracy claim merely alleges that the
5 copying and dissemination of the UserROM was pursuant to a "conspiracy." Compl. ¶
6 74. Because the complaint confirms what is obvious, that the software (UserROM code)
7 is within the subject matter of the copyright law, Compl. ¶ 46, any claim based on alleged
8 copying or distribution of that code must be founded on the Copyright Act. Accordingly,
9 the state-law claims alleged in counts 1, 2, 6, and 7 do not state claims upon which relief
10 can be granted. See, e.g., Kodadek, 152 F.3d at 1212-13 (affirming summary judgment
11 because UCL claim was preempted, where the claim was based on alleged copying and
12 dissemination of the work); Idema, 162 F. Supp. 2d at 1193 (C.D. Cal. 2001) (finding
13 preemption of claim for intentional interference with prospective economic advantage
14 and other claims); Xerox v. Apple Computer, Inc., 734 F. Supp. 1542, 1550-51 (N.D. Cal.
15 1990) (dismissing UCL claim); Bull Publ. v. Sandoz Nutrition Co., No. C87-4723, 1989
16 WL 201080, at *6-7 (N.D. Cal., July 7, 1989); Motown Record Corp. v. George A. Hormel
17 & Co., 657 F. Supp. 1236, 1240 (C.D. Cal. 1987) (finding that plaintiff's claim for
18 intentional interference with prospective business advantage was preempted under the
19 Copyright Act).

20 The decision in Symantec is illustrative. 1998 WL 740798 *4-5. The court found
21 that a UCL claim was preempted because reverse engineering software for the purpose
22 of copying its code to make competing software did not include an extra element of
23 conduct beyond the subject matter covered by the Copyright Act. It distinguished, as
24 examples of claims that contain extra qualitative elements, those claims that allege
25 breach of confidence, reverse palming off, or fraud. See also Computer Assoc. Int'l v.
26 Altai, Inc., 982 F.2d 693 (2d Cir. 1992) (finding trade secret misappropriation claim not
27 preempted because of the extra element of breach of confidentiality in that case);
28

1 Firoozye v. Earthlink, 153 F. Supp. 2d 1115, 1125, 1130 (N.D. Cal. 2001) (dismissing
2 certain state-law claims as preempted because they did not contain any additional
3 substantive elements); Anderson v. Stallone, No. 87-0592, 1989 WL 206431 (C.D. Cal.
4 April 25, 1989) (holding that plaintiff’s unfair competition and unjust enrichment claims
5 were preempted because there was “no extra element” such as fraud or palming off to
6 save the claims). Because no such elements are or can be alleged here, the claims
7 should be dismissed.

8 Apart from copying and distribution of copyrightable subject matter, Canal+
9 merely alleges that NDS’s engineers reverse engineered the Canal+ smart cards. But
10 this does not state a claim either. The complaint expressly alleges that the reverse
11 engineering did not occur in the United States, and, in any event, reverse engineering is
12 a common, lawful and competitively significant practice. See Kewanee Oil Co. v. Bicon
13 Corp., 416 U.S. 470 (1974) (holding that reverse engineering, by itself, is not prohibited
14 by law); Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d
15 1211, 1227 (9th Cir. 1997) (“[I]t is important to note that ‘reverse-engineering’ is perfectly
16 legal in a product not protected by a patent.”); cert. denied 523 U.S. 1021 (1998);
17 Chicago Lock Co. v. Fanberg, 676 F.2d 400 (9th Cir. 1982); Cal. Civ. Code § 3426.1(a)
18 (California trade secret law: “Reverse engineering or independent derivation shall not be
19 considered improper means”).

20 Canal+’s first, second, sixth, and seventh claims are all based on conduct that is
21 the exclusive province of federal copyright law. Such claims are squarely preempted
22 under section 302(a) of the Copyright Act and should be dismissed.

23 **II. CANAL+ CANNOT CLAIM RELIEF UNDER CALIFORNIA’S UNFAIR**
24 **COMPETITION STATUTE.**

25 In addition to being preempted, Canal+’s claim for accounting and restitution
26 under the UCL, Compl. ¶ 36, is subject to a motion to strike pursuant to Rule 12(f)
27 because Canal+ does not seek reimbursement of any money obtained by NDS from
28

1 Canal+. Kraus v. Trinity Mgmt. Svcs. Inc., 23 Cal. 4th 116, 128 (2000) (holding that
2 restitutionary remedies under the UCL are limited to “orders compelling a UCL defendant
3 to **return** money obtained through an unfair business practice **to those persons in**
4 **interest from whom the property was taken, that is, to persons who had an**
5 **ownership interest in the property** or those claiming through that person”) (emphasis
6 added); Cortez v. Purolator Air Filtration Prods. Co., 23 Cal. 4th 163, 172 (2000) (same,
7 allowing restitution only to “persons from whom the money or property has been unfairly
8 or unlawfully obtained.”). The California Supreme Court expressly declined to allow
9 “restitution” of money that a plaintiff never possessed because it would turn the UCL into
10 a “hunting license.” Cortez, 23 Cal. 4th at 176 n.9 (2000).

11 Although Canal+ attempts to allege “unjust enrichment” of NDS “at plaintiffs’
12 expense,” Compl. ¶ 36, this conclusory allegation is based on the theory that Canal+ lost
13 sales opportunities to its competitors, including NDS. Compl. ¶¶ 27, 30. This is a simple
14 claim for lost profits, which are not available under the UCL. In MAI Sys. Corp. v. UIPS,
15 856 F. Supp. 538, 541-42 (N.D. Cal. 1994), the court explained that “[c]ompensation for
16 a lost business opportunity is a measure of damages and not restitution to the alleged
17 victims. . . . [The claim is] accordingly barred by the rule limiting recovery under section
18 17203 to restitution and injunctive relief.” 856 F. Supp. at 542 (citing Meta-Film Assoc.,
19 Inc. v. MCA, Inc., 586 F. Supp. 1346, 1363 (C.D. Cal. 1984)); see also Cel-Tech
20 Communications, Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 179 (1999)
21 (holding that damages are not available under the UCL; citing cases). Accordingly,
22 Canal+’s claim in paragraph 36 of the complaint for accounting and restitution under the
23 UCL should be stricken.

24 **III. CANAL+ FAILS TO STATE A CLAIM FOR COMMON-LAW UNFAIR**
25 **COMPETITION.**

26 The crux of a common-law unfair competition claim is an allegation that the
27 defendant profited because it actually confused (and intended to confuse) consumers
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1 into thinking that they were buying plaintiff's products. Thus, the common law doctrine of
2 unfair competition prohibits acts "generally thought to be synonymous with the act of
3 'passing off' one's goods as those of another . . . by which a person exploits a
4 competitor's reputation in the market." Bank of the West v. Superior Court, 2 Cal. 4th
5 1254, 1263 (1992); see also Aloha Pac., Inc. v. California Ins. Guarantee Ass'n, 79 Cal.
6 App. 4th 297, 318 (2000). Canal+ has not alleged that NDS "passed off" Canal+'s goods
7 as its own, instead basing its claim on the same reverse engineering and copying
8 allegations made throughout the complaint. Compl. ¶¶ 38-42. Accordingly, count two of
9 the complaint fails to state a claim for common-law unfair competition. Southland Sod
10 Farms v. Stover Seed Co., 108 F.3d 1134, 1147 (9th Cir. 1997) (applying Bank of the
11 West, 2 Cal. 4th at 1263).²

12 **IV. EACH OF THE PLAINTIFFS FAIL TO STATE A CLAIM FOR COPYRIGHT** 13 **INFRINGEMENT.**

14 It is indisputable that neither Groupe Canal+ nor Canal+ USA can assert a claim
15 for copyright infringement in the complaint for the simple reason that they do not own the
16 copyright for the MediaGuard UserROM software code. Compl. ¶¶ 45-46 (alleging
17 ownership only for CANAL+ Technologies). Copyright ownership is, of course, a
18 prerequisite to an action for infringement. Three Boys Music Corp. v. Bolton, 212 F.3d
19 477, 481 (9th Cir. 2000) ("A copyright plaintiff must prove (1) ownership of the copyright
20 and (2) infringement."); accord A & M Records, Inc. v. Napster, Inc., 239 F.3d 1004,
21 1019 (9th Cir. 2001). Any copyright infringement claim asserted by either of those two
22 plaintiffs should therefore be dismissed.

23 Additionally, none of the plaintiffs can maintain a copyright claim because the
24 complaint makes no allegation that any conduct within the scope of the Copyright Act
25 occurred within the three-year limitations period. 17 U.S.C. § 507(b); see also Roley v.

26 _____
27 ² Moreover, the common-law unfair competition claim is preempted by the
28 Copyright Act, as explained above.

1 New World Pictures, Ltd., 19 F.3d 479 (9th Cir. 1994) (rejecting continuing tort theory).
2 The complaint was filed on March 11, 2002. The only conduct specifically alleged to
3 have occurred within the three-year limitations period is the alleged posting of UserROM
4 code on the DR7.com website—conduct not alleged to have been performed by either
5 defendant or to have occurred within the United States. This conduct may not form the
6 basis for liability under the Copyright Act because the Act does not create liability for
7 otherwise infringing acts that occur outside the United States, even if defendants in the
8 United States expressly authorized such acts. Subafilms, Ltd. v. MDM-Pathe
9 Communications, 24 F.3d 1088, 1090, 1094 (9th Cir. 1994), cert. denied 513 U.S. 1001
10 (rejecting claim based on foreign distribution of the home video of “Yellow Submarine”
11 even though the initial authorization for the infringing distribution occurred in the U.S.).
12 The alleged conduct that occurred in the United States is the transmission of the
13 UserROM code to NDS Americas in southern California and the subsequent
14 transmission of the code by NDS Americas from southern California to the operator of
15 the DR7 site. Compl. ¶¶ 25, 49. The complaint alleges no facts to show that this
16 supposedly infringing activity took place within the three year statute of limitations.
17 Accordingly, the facts alleged in the complaint do not state a claim upon which relief can
18 be granted under the Copyright Act, and that claim should be dismissed.

19 **V. EACH OF THE PLAINTIFFS FAIL TO STATE A CLAIM FOR CONTRIBUTORY**
20 **COPYRIGHT INFRINGEMENT.**

21 Canal+'s fourth claim alleges NDS committed contributory copyright infringement.
22 Contributory infringement occurs when one who, with knowledge of the infringing activity,
23 induces, causes, or materially contributes to the infringing conduct of another. Napster,
24 239 F.3d at 1019 (citing Fonovisa, Inc. v. Cherry Auction, Inc., 76 F.3d 259, 264 (9th Cir.
25 1996)). As with the copyright infringement claim, Groupe Canal+ and Canal+ USA
26 cannot assert a claim for contributory copyright infringement because they do not own
27 the copyright at issue. See also, e.g., Sony v. Universal City Studios, Inc., 464 U.S. 417,
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1 434 (1984) (holding that the standing requirement that applied to direct infringement also
2 applied to contributory infringement, stating that “To prevail, [plaintiffs] have the burden
3 of proving that users of the Betamax have infringed their copyrights and that Sony
4 should be held responsible for that infringement.”).

5 A direct infringement of a copyright is, of course, required for any contributory
6 infringement claim. Napster, 239 F.3d at 1013 n.2. The direct infringement alleged to be
7 the basis for the contributory infringement claim is the alleged incorporation of the
8 CANAL+ Technologies UserROM into counterfeit smart cards. Compl. ¶¶ 54-55. But
9 the complaint does not allege that the counterfeit cards were created or sold in the
10 United States, and the only country identified with respect to the counterfeit cards is Italy.
11 Compl. ¶ 26. This alleged direct infringement outside the United States is not actionable
12 under U.S. law, and therefore the alleged contributory infringement is beyond the
13 purview of the Copyright Act. See Subafilms, 24 F.3d at 1094. Canal+’s claim for
14 contributory copyright infringement should therefore be dismissed.

15 **VI. CANAL+’S ALLEGATIONS FAIL TO STATE A CLAIM UNDER THE DMCA.**

16 Canal+’s allegation that NDS’s copying and disseminating the UserROM code
17 violates the DMCA fails because the section of DMCA at issue in this case applies only
18 to trafficking in circumvention technology. 17 U.S.C. § 1201(a)(2). In contrast,
19 according to the facts alleged in the complaint, the UserROM is part of a technological
20 protection measure, not a circumvention technology. Accordingly, the DMCA simply
21 does not apply to the allegations in the complaint.

22 Section 1202(a)(2) of the DMCA specifies that “no person shall manufacture,
23 import, offer to the public, provide, or otherwise traffic in any technology, product,
24 service, device, component, or part thereof, that [] is primarily designed or produced for
25 the purpose of circumventing a technological measure that effectively controls access to
26 a work protected under this title.” The complaint does not allege that NDS designed,
27 manufactured, or provided to the public any device that is part of a mechanism designed
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1 or produced to circumvent a “technological measure that effectively controls access” to a
2 protected work. Rather, it alleges that NDS caused the publication of a copy of code
3 that was designed as part of a method to protect a protected work. This is simply not the
4 conduct at which section 1202 is aimed. See, e.g., Universal City Studios, Inc. v. Corley,
5 273 F.3d 429 (2d Cir. 2001) (finding a violation of the DMCA by DeCSS technology that
6 defeated the protection of CSS encryption technology, and affirming the injunction in
7 Corley, 111 F. Supp. 2d 294 (S.D.N.Y. 2000)); Sony Computer Entm’t. Am., Inc. v.
8 Gamemasters, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999) (holding that defendant’s
9 “Game Enhancer” that “circumvents the mechanism on the Playstation console that
10 ensures the console operates only when encrypted data is read from an authorized CD-
11 ROM” violated the DMCA); CSC Holding, Inc. v. Greenleaf Elec., Inc., No. 99C 7249,
12 2000 WL 715601 (N.D. Ill. Jun. 2, 2000) (finding that the sale of a decoder for cable TV
13 descrambler violated DMCA section 1202(a)(2)); Realnetworks, Inc. v. Streambox, Inc.,
14 No. 99CV 02070, 2000 WL 127311 (W.D. Wash. Jan. 18, 2000) (finding a DMCA
15 violation by products designed to permit users to make unauthorized modifications to
16 RealNetworks software program). NDS is unaware of any court allowing a DMCA claim
17 based on publication of a portion of “the technological measure that effectively controls
18 access to a [copyrighted] work” itself. 17 U.S.C. 1202(c).

19 The design of the DMCA as a whole further confirms that it addresses
20 circumvention of copyright protection systems, rather than copyright infringement itself.
21 See United States v. Fiorillo, 186 F.3d 1136, 1146 (9th Cir. 1999) (stating that in addition
22 to statutory language, courts generally look to “design of statute as a whole” to
23 determine meaning). Thus, for example, the DMCA’s limited fair use provision
24 authorizes circumvention of technological protection measures to reverse engineer the
25 protected work for interoperability. 17 U.S.C. § 1201(f). The provision says nothing,
26 however, about copying the protected work, which remains protected by the Copyright
27 Act’s other provisions. See M. Nimmer & D. Nimmer, Nimmer on Copyright,

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1 § 12A.03[D][1] (“the gravamen here [with the DMCA] is not copyright infringement.”).

2 The legislative history additionally supports this conclusion. The official reports of
3 both the House Judiciary Committee and Senate Judiciary Committee explain that
4 Section 1201(a)(2) “is drafted carefully to target ‘black boxes,’” not actual copyright
5 infringement. H.R. Rep. No. 105-551, pt. 1, at 18 (1998); S. Rep. No. 105-190, at 29
6 (1998). See also H.R. Rep. No. 105-551, pt. 2, at 38 (1998) (“Section [1201](a)(2) is
7 aimed fundamentally at outlawing so called ‘black boxes’ that are expressly intended to
8 facilitate circumvention of technological protection measures for purposes of gaining
9 access to a work.”).

10 Applied against this proper understanding of the DMCA, the complaint fails to
11 state a claim under the DMCA. A reverse-engineered copy of the ostensibly copyrighted
12 UserROM is a copy of code designed as part of a technological protection measure, not
13 a circumvention technology. UserROM is not a product “primarily designed” to
14 circumvent protection technology or a product “having limited commercial purpose or use
15 other than to circumvent protection technology.” Cf. 17 U.S.C. § 1202(a)(2)(A)-(B); see
16 also Corley, 273 F.3d at 441 (“the focus of subsection 1201(a)(2) is [trafficking in]
17 circumvention of technologies designed to permit access to a work”). It *is* a part of the
18 protection technology. See also Compl. ¶¶ 24, 60 (describing MediaGuard smart cards).
19 As the Corley court explained, the essential question of liability under subsection
20 1202(a)(2)(A) is “whether DeCSS was designed primarily to circumvent CSS”—the
21 “technological measure at issue in that case.” Corley, 111 F. Supp. 2d at 318. Applying
22 that question to Canal+’s theory in this case creates an absurdity: whether UserROM
23 was designed primarily to circumvent UserROM. Clearly, the answer is no; UserROM
24 was primarily designed as part of a system to protect satellite television broadcasts,
25 regardless of what use a counterfeiter may later have made of it. Because the complaint
26 does not allege that NDS trafficked in any circumvention technology, Canal+’s fifth claim
27 should be dismissed.

1 **VII. CANAL+ FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE.**

2 Canal+'s sixth claim is for tortious interference with economic relations, combining
3 both allegations of interference with contractual relations and interference with
4 prospective economic advantage. In addition to being preempted by the Copyright Act,
5 these claims should be dismissed because Canal+ does not properly identify a contract
6 or economic relationship with which NDS allegedly interfered.

7 To state a claim for tortious interference, a plaintiff must allege either a valid
8 contract or an existing economic relationship with a third party. Kasparian v. Los
9 Angeles, 38 Cal. App. 4th 242, 260 (1995) (claim for interference with prospective
10 economic advantage); Knott v. McDonald's Corp., 147 F.3d 1065, 1068 (9th Cir. 1998)
11 (claim for interference with contract); BAJI Nos. 7.80, 7.81. A plaintiff must also assert
12 that it was "reasonably probable that the lost economic advantage would have been
13 realized but for the defendant's interference." Kasparian, 38 Cal. App. 4th at 271; see
14 also Roth v. Rhodes, 25 Cal. App. 4th 530, 545 (1994).

15 The complaint fails to meet these standards because the allegations identify
16 neither a valid contract that was lost nor an existing economic relationship that failed to
17 materialize due to the alleged interference. Instead, it generally alleges that Canal+
18 Technologies has unspecified contracts in Europe and Malaysia and that it has unnamed
19 "potential customers" in the United States. Compl. ¶ 67; see also id. ¶ 70 (claiming that
20 "customers" are "deterred" from purchasing CANAL+ Technologies' cards). Pleading
21 this type of generalized harm is not sufficient to state a claim for tortious interference.
22 Silicon Knights, Inc. v. Crystal Dynamics, Inc., 983 F. Supp. 1303, 1312 (N.D. Cal. 1997)
23 (holding that merely conclusory allegations were insufficient to state an existing
24 economic relationship); Roth, 25 Cal. App. 4th at 564 (rejecting a physician's claim that
25 expectation of future patients satisfies the existing-economic-relationship requirement of
26 a claim for interference with prospective economic advantage); see also Knott, 147 F.3d
27 at 1068 (affirming summary judgment where no valid, enforceable contract existed).

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1 The complaint also fails to allege that CANAL+ Technologies lost profit it would
2 otherwise have had because of a “reasonable probability” it would have realized the
3 economic advantage but for NDS’s acts. Although the complaint alleges certain losses,
4 they are apparently losses by CANAL+ Technologies’ customers, not plaintiffs
5 themselves. See, e.g., Compl. ¶ 67 (“These operators have lost revenues”); id. at 70
6 (“Plaintiffs’ customers do not receive payment” if counterfeit cards are used). While the
7 complaint alleges that CANAL+ Technologies “faces claims” from its customers, Compl.
8 ¶ 67, and that NDS “attempt[ed] to disrupt Canal+’s relationships with existing
9 customers,” Compl. ¶ 30, these vague allegations are insufficient. See Kasparian, 38
10 Cal. App. 4th at 271 (holding that tortious interference requires actual disruption of the
11 economic relationship). Moreover, although the complaint also makes the conclusory
12 allegation that CANAL+ Technologies lost “sales opportunities” and customers for its
13 smart card products, it does not allege any specific customers that would have done
14 business with any of the plaintiffs but for NDS’s alleged acts. Compare Compl. ¶¶ 30, 70
15 with Silicon Knights, 983 F. Supp. at 1312 (dismissing claim for interference with
16 prospective economic advantage premised on conclusory allegations of lost sales,
17 explaining that “[t]here are no allegations in the complaint from which the court or
18 defendants could infer the probable disruption of an actual economic relationship”).
19 Finally, the complaint does not allege any facts establishing that either Groupe Canal+ or
20 Canal+ USA lost specific business they otherwise would have had absent NDS’s alleged
21 acts.

22 For each of these multiple reasons, and because it is pre-empted, plaintiffs’ sixth
23 claim should be dismissed.

24 **VIII. CANAL+ CANNOT STATE A CLAIM FOR CONSPIRACY BECAUSE NO SUCH**
25 **CAUSE OF ACTION EXISTS.**

26 Canal+’s “conspiracy” count fails to state a claim because no independent tort of
27 “conspiracy” exists under California or federal law. Applied Equip. Corp. v. Litton Saudi

1 Arabia Ltd., 7 Cal. 4th 503 (1994) (“Conspiracy is not an independent tort; it cannot
2 create a duty or abrogate an immunity.”); Kidron v. Movie Acquisition Corp., 40 Cal. App.
3 4th 1571, 1581 (1995) (affirming nonsuit); Stansfield v. Starkey, 220 Cal. App. 3d 59, 75-
4 76 (1990) (dismissing conspiracy claim because fraud claim was insufficient and
5 because conspiracy is not a separate tort); Entertainment Research Group, Inc. v.
6 Genesis Creative Group, Inc., 122 F.3d 1211, 1228 (9th Cir. 1997) (addressing
7 California law); LaFountain v. Kerckaert, 95 F.3d 1152, 1996 WL 479131 at *3 (6th Cir.
8 1996) (“We also note that there is no federal cause of action for conspiracy under
9 common law.”); Riddel v. Riddel Washington Corp., 866 F.2d 1480, 1493 (D.C. Cir.
10 1989). Accordingly, the complaint’s seventh count should be dismissed.³

11 **IX. CANAL+ FAILS TO STATE A CLAIM UNDER RICO, 18 U.S.C. SECTIONS**
12 **1962 (A), (C) AND (D).**

13 Most of Canal+’s extensive public relations campaign has focused on its
14 allegations of racketeering and the accompanying specter of treble damages. Courts
15 are well familiar with the promiscuous use of RICO allegations and the mischief this
16 causes to judicial administration. As so frequently seen in other cases, the attempt to
17 turn this into a RICO case is wholly lacking in merit.

18 Canal+ alleges that in copying and distributing the SECAROM.ZIP file containing
19 the UserROM, NDS was conducting an “enterprise” engaged in a pattern of racketeering
20 activity in violation of 18 U.S.C. § 1962(c), investing the proceeds of the racketeering
21 activity in violation of § 1962(a), and conspiring to violate 18 U.S.C. § 1962(a) or
22 § 1962(c) in violation of § 1962(d). See Compl. ¶¶ 80-90. As a matter of law, however,
23 Canal+’s allegations are legally insufficient to state a RICO claim.

24 **A. Canal+ Alleges No Injury Creating Standing Under RICO.**

25 Canal+ bears the burden of establishing RICO standing. Hal Roach Studios, Inc.
26 v. Richard Feiner and Co., 896 F.2d 1542, 1544 n.18 (9th Cir. 1989). Only certain types

27 ³ Moreover, the conspiracy claim is preempted by the Copyright Act, as explained
28 above.

1 of injuries constitute “injury” for this purpose. Specifically, the loss must be concrete and
2 proximately caused “by reason of” the defendant’s violation of RICO and, for purposes of
3 a section 1962(a) claim, it must flow from the reinvestment of the alleged proceeds of
4 predicate criminal acts. 18 U.S.C. §§ 1962(a), 1964(c); Sedima, S.P.R.L. v. Imrex Co.,
5 473 U.S. 479, 496 (1985). The Ninth Circuit has emphasized the importance of the
6 RICO standing requirement in assuring that RICO is not expanded to provide a federal
7 cause of action and treble damages to every tort plaintiff. Steele v. Hospital Corp. of
8 Am., 36 F.3d 69, 70 (9th Cir. 1994). Canal+ fails to allege any facts giving rise to RICO
9 standing.

10 To have standing, a plaintiff must have suffered a concrete financial loss;
11 intangible injuries to business or property are not actionable under RICO. See, e.g.,
12 Steele, 36 F.3d at 70 (affirming summary judgment of a RICO claim because “a showing
13 of injury requires proof of a concrete financial loss and not mere injury to a valuable
14 intangible property interest”); Imagineering, Inc. v. Kiewit Pac. Co., 976 F.2d 1303 (9th
15 Cir. 1992) cert. denied 507 U.S. 1004 (1993) (affirming dismissal based on lack of RICO
16 standing given an inability to show concrete financial loss as a result of defendant’s
17 racketeering activity); Oscar v. University Students Coop. Ass’n, 965 F.2d 783, 785 (9th
18 Cir. 1992), cert. denied 506 U.S. 1020 (affirming dismissal of a RICO claim and citing
19 with approval a Sixth Circuit decision holding that recovery is limited to money plaintiffs
20 paid out as a result of the racketeering activity).

21 Canal+’s has not alleged either payment or loss of money by reason of NDS’s
22 alleged conduct. Canal+ alleges merely that its business and property were damaged
23 “by reason of the unfair advantage Defendants gained by their racketeering activity.”
24 Compl. ¶ 90. Elsewhere, Canal+ further alleges its intangible losses from an alleged
25 loss of customers, sales opportunities, and harm to business reputation. Compl. ¶¶ 29-
26 31. Under Steele, Imagineering, and Oscar, these injuries are insufficient to establish
27 standing under RICO. In Imagineering, for example, the court rejected a claim that
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1 because of defendant's acts, the plaintiffs did not receive certain subcontracts. The
2 court rejected this kind of "lost opportunity" injury because the facts alleged "did not
3 establish 'proof of concrete financial loss,' let alone show that money was paid out as a
4 result of [defendant's] alleged racketeering activity." 976 F.2d at 1310. See also
5 Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 406 (9th Cir. 1991)
6 ("Market share is neither tangible or intangible property; its loss is far to amorphous a
7 blow to support a claim for mail fraud [as a predicate act for RICO]"); In re Taxable Mun.
8 Sec. Bond Litig., 51 F.3d 519 (5th Cir. 1995). Because the complaint fails to allege a
9 proper RICO injury, the RICO claim should be dismissed in its entirety.

10 Separately, Canal+'s claim under § 1962(a) fails because Canal+ does not allege
11 that the alleged "injury flowed from the defendant's 'use or investment' of racketeering
12 income," as opposed to "injuries flowing from the predicate acts of racketeering." Nugget
13 Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992) cert.
14 denied 508 U.S. 908 (1993) ("[I]t is not sufficient to allege injuries flowing from the
15 predicate acts of racketeering") (citing with approval Ouaknine v. McFarlane, 897 F.2d
16 75, 82-83 (2d Cir. 1990)). This "use or investment" injury must be distinct from the
17 injuries resulting from the predicate acts themselves. See Blue Cross & Blue Shield of
18 N.J. v. Phillip Morris, Inc., 113 F. Supp. 2d 345, 383-84 (E.D.N.Y. 2000) (holding that
19 where the plaintiff alleges the reinvestment of proceeds back into the same racketeering
20 enterprise, the "injuries stem proximately not from the investment, but from the predicate
21 acts"). The Blue Cross decision is illustrative. In that case, the court rejected plaintiff's
22 theory that § 1962(a) was satisfied because defendants reinvested the proceeds into the
23 company for marketing and advertising and to increase the use of its products. Id. at
24 384 ("[I]nvestment of the proceeds from the pattern of alleged racketeering activity for
25 general operations is too attenuated a causal connection to satisfy § 1962(a) and
26 1962(c)").

27 Canal+'s allegations bear striking resemblance to those rejected as a matter of
28

1 law in Blue Cross. Canal+ does not allege injury from NDS's use or investment of
2 proceeds from the alleged racketeering activity. Rather, Canal+ alleges merely that part
3 of the income NDS obtained was from perfectly lawful sales that were the alleged
4 consequential effects of the publication of UserROM, and that this income was then used
5 in NDS's operations. Compl. ¶ 87. This type of generalized allegation of unfair
6 competitive advantage is insufficient to allege a § 1962(a) injury. See also Lightning
7 Lube, Inc. v. Witco Corp., 4 F.3d 1153, 1187-89 (3d Cir. 1993) (finding that a claim failed
8 because no separate injury existed based on investment).

9 **B. Canal+ Fails to Allege a Racketeering "Enterprise" Separate from**
10 **NDS.**

11 Independent of the RICO standing requirement, Canal+ does not allege an
12 actionable RICO racketeering "enterprise" as required under § 1962(c). Forsyth v.
13 Humana, Inc., 114 F.3d 1467, 1481 (9th Cir. 1997), aff'd. 527 U.S. 299 (1998). An
14 enterprise is "proved by evidence of an ongoing organization, formal or informal, and by
15 evidence that the various associates function as a continuing unit." United States v.
16 Turkette, 452 U.S. 576, 583 (1981). As a matter of law, neither of Canal+'s enterprise
17 theories is viable.

18 Canal+ first alleges that NDS itself is the claimed "enterprise," Compl. ¶ 87, but
19 NDS cannot be the "enterprise" because of the well-established rule that the RICO
20 "person" must be a separate and distinct entity from the alleged "enterprise" in an action
21 under § 1962(c). Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401
22 (9th Cir. 1986). Thus, a defendant corporation cannot also be the claimed enterprise.
23 Id.; Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1534 (9th Cir. 1992) (finding "a corporate
24 defendant cannot be both the RICO person and the RICO enterprise under section
25 1962(c)").

26 Canal+ next suggests that defendants have formed an "association-in-fact"
27 enterprise. Compl. ¶ 88. But Canal+ fails to allege facts showing that the "enterprise"
28 has an ascertainable structure "separate and apart from the [pattern] of racketeering

1 activity in which it engages,” as the law requires Chang v. Chen, 80 F.3d 1293, 1298
2 (9th Cir. 1996); accord Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083 (9th
3 Cir. 2000) (affirming dismissal of a RICO claim for failure to allege an enterprise distinct
4 from the racketeering activity); see also Turkette, 452 U.S. at 583 (“[T]he ‘enterprise’ is
5 not the ‘pattern of racketeering activity’; it is an entity separate and apart from the pattern
6 of activity in which it engages.”). The enterprise must also, at a minimum, have “some
7 sort of structure for the making of decisions and some mechanisms for controlling and
8 directing the affairs of the group on an on-going, rather than an ad hoc basis.” Simon,
9 208 F.3d at 1083. Canal+ merely alleges that NDS “organized, supervised, and
10 directed” the enterprise, Compl. ¶ 88, failing to allege any decision-making structure or
11 mechanisms for on-going control and direction of the affairs of the alleged association-in-
12 fact. Canal+’s allegations should be dismissed because they suggest, at most, an ad
13 hoc association that is indistinguishable from the alleged pattern racketeering activity
14 itself. Simon, 208 F.3d at 1083; Rotec Indus., Inc. v. Mitsubishi Corp., 163 F. Supp. 2d
15 1268, 1279-80 (D. Or. 2001) (granting summary judgment against RICO plaintiff
16 because enterprise element cannot be established merely by list of actions taken by
17 members of the alleged enterprise).

18 **C. Canal+’s Allegation of Wire Fraud Should Be Stricken.**

19 One of the predicate statutory violations for RICO alleged in the complaint is wire
20 fraud under 18 U.S.C. § 1343. Canal+’s allegation of wire fraud should be stricken
21 because Canal+ fails to allege fraud on the part of NDS or detrimental reliance on the
22 part of Canal+. The complaint merely restates the alleged copyright violation. Compl.
23 ¶¶ 70, 85.⁴ This is impermissible and should result in dismissal. See, e.g., Smith v
24 Jackson, 84 F.3d 1213, 1217-18 (9th Cir. 1996) (dismissing RICO claim that attempted to
25 recharacterize copyright violation as wire and mail fraud); Damiano v. Sony Music

26 ⁴ At the very least, plaintiffs do not allege the wire fraud with particularity, as
27 required by Rule 9(b). Alan Neuman Prod., Inc. v. Albright, 862 F.2d 1388, 1392 (9th
28 Cir. 1988), cert. denied 493 U.S. 858 (1989).

1 Entm't., Inc., 975 F. Supp. 623, 632 (D.N.J. 1996).

2 The complaint does not allege any representations—let alone
3 misrepresentations—by NDS to Canal+. Nor does it allege that NDS received any
4 money from Canal+ at all. The complaint also fails to allege that NDS made fraudulent
5 misrepresentations specifically to obtain money or property from plaintiff. Schreiber
6 Distrib. Co. 806 F.2d at 1393, 1399-1401 (see also Monterey Plaza Hotel Ltd. P'ship. v.
7 Local 483 Hotel Employees Union, 215 F.3d 923, 926 (9th Cir. 2000); United States v.
8 Lew, 875 F.2d 219, 221 (9th Cir. 1989) (holding that RICO protected customers who
9 suffered direct injury, but not competitors who suffered indirect injury caused by mail
10 fraud).⁵ These deficiencies are fatal to the wire fraud allegations.

11 Moreover, the wire fraud allegations fail because Canal+ does not allege that it
12 relied to its detriment on any misrepresentations by NDS. Forsyth v. Humana, Inc., 114
13 F.3d 1467 (9th Cir. 1997) (stating that for wire fraud under RICO, a plaintiff must show
14 reliance that caused concrete financial loss). The reliance requirement is important
15 because it creates the necessary connection between the alleged conduct and the
16 claimed damages:

17 Imposing a burden on a civil RICO plaintiff to prove justifiable reliance as a
18 necessary means of demonstrating causation is entirely consistent with the
19 Supreme Court's recognition in Basic Inc. v. Levinson, [485 U.S. 224, 243
(1988)] that '[r]eliance provides the requisite causal connection between a
defendant's misrepresentation and a plaintiff's injury' in a securities case.

20 David B. Smith & Terrance G. Reed, Civil RICO ¶ 9.05 (2001); see also Aizuss v.
21 Commonwealth Equity Trust, 847 F. Supp. 1482, 1490-91 (E.D. Cal. 1993) ("There must
22 be some causal link between the alleged mail fraud and wire fraud and the harm
23 suffered by plaintiffs."). The complaint fails to identify any reliance by Canal+ on any
24 representations by NDS. The only reliance alleged by Canal+ is on signals from
25 counterfeit smart cards, Compl. ¶ 85,—which Canal+ itself admits were created by third-

26 ⁵ Mail and wire fraud are interpreted equivalently for most RICO purposes. See,
27 e.g., United States v. Richards, 204 F.3d 177, 208 n. 13 (5th Cir. 2000), cert. denied 531
28 U.S. 826.

1 parties and not NDS, see, e.g., Compl. ¶ 25.

2 For all of these independent reasons, the wire fraud predicate acts alleged in
3 paragraph 80(iii), 85, and 86 are legally insufficient, immaterial to the complaint, and
4 therefore should be stricken pursuant to Rule 12(f).

5 **D. Because Canal+ Has No Claim Under § 1962(a) or (c), Its Claim Under**
6 **§ 1962(d) Must Be Dismissed.**

7 Section 1962(d) makes it unlawful “for any person to conspire to violate any of the
8 provisions of subsection (a), (b), or (c).” Failure to adequately plead a substantive
9 violation of RICO also justifies dismissal of a corresponding conspiracy claim under
10 § 1962(d). Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000), cert.
11 denied 531 U.S. 828 (affirming dismissal under Rule 12(b)(6) and stating that “the district
12 court held that the failure to adequately plead a substantive violation of RICO precludes
13 a claim for conspiracy [under section 1962(d)]. We agree.”); Neibel v. Trans World
14 Assur. Co., 108 F.3d 1123, 1127 (9th Cir. 1997) (“if the section 1962(c) claim does not
15 state an action upon which relief could ever be granted . . . then the section 1962(d)
16 claim cannot be entertained.”); Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367
17 n.8 (9th Cir. 1992) (“Because we find that [the plaintiff] has failed to allege the requisite
18 substantive elements of RICO, the conspiracy cause of action cannot stand.”). In this
19 case, because Canal+ failed to adequately plead a substantive violation of either
20 subsection (a) or (c), its § 1962(d) conspiracy claim fails as a matter of law and should
21 be dismissed.

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CONCLUSION

For the reasons stated above, NDS respectfully requests that the Court dismiss with prejudice all eight counts of the complaint with respect to each plaintiff.

Alternatively, NDS requests that the Court strike as immaterial Canal+'s complaint ¶¶ 36, 80(iii), 85, as well as at ¶ 86 on page 19:23-25.

Dated: April 22, 2002

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