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8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**

11 Groupe Canal+ S.A., et al.,  
12 Plaintiffs,  
13 v.  
14 NDS Group PLC, et al.,  
15 Defendants.

Case No. C02-01178 (VRW)

**DEFENDANTS NDS GROUP PLC'S &  
NDS AMERICAS, INC.'S REPLY  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS**

Judge: Hon. Vaughn R. Walker  
Date: May 30, 2001  
Time: 2:00 p.m.  
Place: Courtroom 6

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1 All eight of Canal+'s claims should be dismissed. Canal+'s opposition does not address  
2 much of the controlling law NDS cited in its motion to dismiss. Instead, Canal+ makes  
3 arguments unsupported by the law it cites and relies on allegations that either do not exist in the  
4 complaint or are made in an impermissibly conclusory fashion. After accounting for all of these  
5 failings, Canal+ provides no basis to conclude that it has stated a claim upon which relief can be  
6 granted.

7 **I. CANAL+'S STATE LAW CLAIMS ARE PREEMPTED BECAUSE THEY ARE**  
8 **REPACKAGED COPYRIGHT INFRINGEMENT CLAIMS.**

9 Canal+ acknowledges that the Copyright Act preempts state-law claims that are  
10 repackaged claims of copying and publication. Opp. at 1:23-24; see also 17 U.S.C. § 301.  
11 Canal+ then cites a number of cases for the well-established rule that state-law claims are not  
12 preempted if they contain an "extra element" beyond alleged unlawful copying and publication.  
13 Opp. at 2:1-19 & n.1; see also NDS Mot. at 6:12-15. None of these cases, however, helps Canal+  
14 because the complaint belies Canal+'s assertion that its state-law claims "include allegations  
15 going well beyond NDS's infringement." Opp. at 2:20-21. Each of Canal+'s state-law claims,  
16 unfair competition, tortious interference and conspiracy, really boils down to nothing more than  
17 NDS's alleged unauthorized copying and publication of the so-called MediaGuard UserROM,  
18 and they are therefore pre-empted.

19 Canal+ first asserts that it provides an "extra element" by alleging that NDS "highlighted"  
20 Canal+'s counterfeiting problem in an effort to disrupt Canal+'s customer relationships. Opp. at  
21 2:22-3:2. But "highlighting" a fact does not satisfy the extra element test for a tortious  
22 interference claim because it is not wrongful absent NDS's alleged copying and publication—*i.e.*,  
23 copyright infringement—that Canal+ claims caused its counterfeiting problem. See, e.g., Della  
24 Pena v. Toyota Motor Sales U.S.A., Inc., 11 Cal. 4th 376, 412 (1995) (tortious interference claim  
25 requires independently wrongful conduct); Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Vill.  
26 Square Venture Partners, 52 Cal. App. 4th 867, 880 (1997) ("one can interfere with a  
27 competitor's prospective contractual relationship with a third party as long as the interfering  
28 conduct is not independently wrongful"). Under the same reasoning, "highlighting" Canal+'s

1 counterfeit problem or, as Canal+ later argues, including the ostensible extra element of  
2 “anticompetitive diversion of Canal+’s existing customers,” Opp. at 3:12, cannot save Canal+’s  
3 unfair competition claims. Symantec Corp. v. McAfee Assoc., Inc., No. C-97-20367, 1998 WL  
4 740798 (N.D. Cal. June 9, 1998) (finding preemption of UCL claim of copying software to make  
5 competing product); see generally Kodadek v. MTV Networks, Inc., 152 F.3d 1209, 1212-13 (9th  
6 Cir. 1998) (affirming preemption of UCL claim).

7 Canal+ next notes that its tortious interference claim recites the elements for that cause of  
8 action. Opp. at 3:3-10. As a matter of law, however, such perfunctory recitation is inadequate to  
9 satisfy the extra element test. See Idema v. Dreamworks, Inc., 162 F. Supp. 2d 1129, 1190 (C.D.  
10 Cal 2001) (“[A] court should not rely merely on a ‘laundry list’ of the alleged ‘elements’ of the  
11 state law claims at issue, such that the mere *possibility* of an ‘extra element’ protects a claim from  
12 preemption.”). Because the only alleged independent wrong is the alleged copying and  
13 dissemination of the UserROM, the Copyright Act preempts Canal+’s tortious interference and  
14 other state-law claims.<sup>1</sup> Id. (articulating test as analyzing “gravamen” of the claim); See also  
15 Harper & Row Publishers, Inc. v. Nation Enter., 723 F.2d 195, 201 (2d Cir. 1983) (concluding  
16 that tortious interference claim was preempted because it did not establish any qualitatively  
17 different wrong than copying and publication), rev’d on other grounds., 471 U.S. 539 (1985).

18 The cases Canal+ cites in its opposition illustrate the distinct nature of allegations—not  
19 present in this case—required to supply an extra element sufficient to avoid preemption. For  
20 example, in Gemel Precision Tool Co.. v. Pharma. Tool Corp., 35 U.S.P.Q. 2d 1019, 1025 (E.D.  
21 Pa. 1995), the court found that unfair competition claims based on unauthorized use of  
22 copyrighted works were preempted but permitted claims premised on using an uncopyrightable  
23 work and misrepresenting plaintiff’s work as defendant’s own. See also Rasmussen & Assoc.,  
24 Inc. v. Kalitta Flying Serv., Inc., 958 F.2d 896, 901 (9th Cir.1992). Another case cited by Canal+

25 \_\_\_\_\_  
26 <sup>1</sup> Canal+ also suggests that NDS’s alleged bad intent can serve as the “extra element” sufficient to  
27 state a claim for tortious interference. Opp. at 3:6-9. This suggestion is inconsistent with the case  
28 law, which routinely dismisses on preemption grounds tortious interference claims under  
California law despite such claims necessarily involving alleged bad intent. See, e.g., Idema, 162  
F. Supp. 2d at 1193; Motown Record Corp. v. George A. Hormel & Co., 657 F. Supp. 1236, 1240  
(C.D. Cal. 1987).



1 involved violation of a distinct property right. eBay, Inc. v. Bidder’s Edge, Inc., 100 F. Supp. 2d  
2 1058, 1072 (N.D. Cal. 2000) (noting that trespass claim involved the right to exclude others from  
3 using physical personal property). Although Canal+’s complaint contains allegations about the  
4 effect of the copyright infringement structured as “elements” of state-law claims, it contains no  
5 factual allegations that establish a wrong independent of the alleged copyright infringement.  
6 Accordingly, all four state-law causes of action should be dismissed because they are preempted  
7 by the Copyright Act.

8 **II. THE TORTIOUS INTERFERENCE CLAIM FAILS TO ALLEGE A SPECIFIC**  
9 **CONTRACT OR ECONOMIC RELATIONSHIP THAT WAS DISRUPTED.**

10 In addition to the preemption grounds discussed above, Canal+’s tortious interference  
11 claim should be dismissed because it is fatally vague. In a vain attempt to defend this claim,  
12 Canal+ completely ignores the controlling case law cited in NDS’s opening memorandum and  
13 relies exclusively on the generic proposition that Federal Rule of Civil Procedure 8 permits notice  
14 pleading. Opp. at 6:8-10 (citing Leatherman v. Tarrant Cty. Narcotics Intellig. & Coord. Unit,  
15 507 U.S. 163 (1993)). But to state a claim for tortious interference, Canal+ must allege either a  
16 valid contract or an existing economic relationship;<sup>2</sup> vague allegations about unnamed potential  
17 customers or contracts are inadequate. See, e.g., NDS Mot. at 15:1-16:23; Silicon Knights, Inc. v.  
18 Crystal Dynamics, Inc., 983 F. Supp. 1303, 1312 (N.D. Cal. 1997) (mere conclusory allegations  
19 are insufficient to state an existing economic relationship); Knott v. McDonald’s Corp., 147 F.3d  
20 1065, 1068 (9th Cir. 1998) (affirming summary judgment where no valid, enforceable contract  
21 existed); Kasparian v. Los Angeles, 38 Cal. App. 4th 242, 271 (1995) (holding that interference  
22 with prospective economic advantage requires that it was “reasonably probable that the lost  
23 economic advantage would have been realized but for the defendant’s interference”). Canal+  
24 simply does not satisfy this standard.

25 With respect to tortious interference with contract, Canal+ alleges only that it was a party

26 \_\_\_\_\_  
27 <sup>2</sup> Canal+ contends that NDS “blurs the distinction” between tortious interference with  
28 contract and with economic relations. Opp. at 5:13-15. But Canal+ causes the blurring by  
improperly alleging two causes of action in a single claim.

1 to contracts, Compl. ¶¶ 31, 67, 70, but does not allege that NDS interfered with any specific  
2 contract or even that any specific contract was breached or terminated. Similarly, with respect  
3 tortious interference with prospective economic advantage, Canal+ merely alleges the existence  
4 of some, unspecified economic relations. Compl. ¶ 68 (“Plaintiffs have beneficial economic  
5 relationships with existing customers”); *id.* ¶ 30. But Canal+’s does not allege that NDS  
6 disrupted any specific actual economic relationship. These vague allegations are inadequate as a  
7 matter of law. See also, e.g., *Leader v. Health Indus. of Am., Inc.* 89 Cal. App. 4th 603, 608  
8 (2001) (noting that the trial court sustained demurrer in part because the complaint “was devoid  
9 of factual allegations that establish the prospective business relationships”). Canal+’s tortious  
10 interference claim should be dismissed.

11 **III. CANAL+’S ARGUMENT FOR MONETARY RELIEF UNDER THE UCL**  
12 **MISSTATES ITS COMPLAINT.**

13 Not only is the UCL claim preempted, but its claim for monetary relief is improper. As  
14 explained in NDS’s opening memorandum, California law bars any claim for restitution under the  
15 UCL for money or property that Canal+ never possessed. *Kraus v. Trinity Mgmt. Serv., Inc.*, 23  
16 Cal. 4th 116, 128 (2000); *Cortez v. Purolator Air Filtration Prods. Co.*, 23 Cal. 4th 163, 172  
17 (2000); see also *E.W. French & Sons, Inc. v. General Portland, Inc.*, 885 F.2d 1392, 1401-02 (9th  
18 Cir. 1989). By its silence on the issue, Canal+’s opposition concedes that the Court should strike  
19 its UCL claim to the extent it seeks monetary relief for lost profits or harm to its business  
20 reputation. Canal+’s opposition instead makes the new claim that it seeks restitution for NDS  
21 wrongfully obtaining Canal+’s property—specifically its smartcards.<sup>3</sup> *Opp.* at 4:4-6. But this  
22 effort to rewrite Canal+’s complaint fails.

23 First, Canal+’s complaint sought restitution for “the detriment of Canal+’s business and  
24 its reputation among its customers and in the industry,” Compl. ¶ 35, not as it now claims,  
25 restitution for Canal+ smartcards that NDS acquired. See also Compl. ¶¶ 27, 30, 36. Second,

26 <sup>3</sup> In a footnote, Canal+ also claims that the UCL allows for a separate accounting remedy,  
27 but it tellingly cites no authority for its position. Cf. *Opp.* at 4 n.2. “In the case of all private  
28 plaintiffs, the statute plainly authorizes only injunctive relief and restitution.” *E.W. French & Sons*, 885 F.2d at 1402.

1 Canal+ does not allege that NDS wrongfully acquired Canal+'s smartcards. In its opposition,  
2 Canal+ cites to paragraph 35 of the Complaint for this proposition, but that paragraph contains  
3 only the conclusory allegation that the acquisition of the smartcards was a step in NDS's  
4 allegedly wrongful scheme. It does not allege any fact to establish wrongful acquisition. Rather,  
5 where facts are alleged, Canal+ does not even suggest NDS improperly acquired the smartcards.  
6 Compl. ¶ 23.

7 **IV. THE COMMON-LAW UNFAIR COMPETITION CLAIM FAILS BECAUSE THE**  
8 **ALLEGATIONS ARE UNRELATED TO ACTS OF PASSING OFF.**

9 The California Supreme Court and the Ninth Circuit have held that the common law  
10 doctrine of unfair competition is limited to acts "generally thought to be synonymous with the act  
11 of 'passing off' one's goods as those of another." Bank of the West v. Superior Court, 2 Cal. 4th  
12 1254, 1263 (1992); Southland Sod Farms v. Stover Seed Co., 108 F.3d 1134, 1147 (9th Cir.  
13 1997) ("Because Plaintiffs' allegations do not amount to 'passing off' or its equivalent,  
14 Defendants are correct that Plaintiffs' claim for unfair competition was properly dismissed.").  
15 Canal+ entirely ignores this controlling authority. Indeed, Canal+ misleadingly asserts that  
16 "[a]ccording to California's Supreme Court, unfair competition covers 'all cases where fraud is  
17 practiced by one in securing the trade of a rival dealer . . .'" Opp. at 4:13-14 (citing Cel-Tech  
18 Communic., Inc. v. Los Angeles Cellular Tel. Co., 20 Cal. 4th 163, 193 (1999)). This is  
19 disingenuous. The foregoing statement is not, as it appears to be, a part of the California  
20 Supreme Court's opinion in the 1999 Cel-Tech case, which addressed a separate issue entirely.  
21 Instead, it is a quote in dictum from the concurring and dissenting opinion of a single justice in  
22 the case. This lone justice was quoting a 1935 decision, American Philatelic Soc'y v. Claibourne,  
23 3 Cal. 2d 689 (1935), that clearly cannot trump Bank of the West.<sup>4</sup> In short, under California law,  
24 to state a claim for common-law unfair competition, it is necessary to allege passing off. Because

25 <sup>4</sup> The other two cases Canal+ cites are irrelevant. Cf. Opp. at 4:22-5:2. In United States  
26 Golf Assoc. v. Arroyo Software Corp., 69 Cal. App. 4th 607, 618 (1999), it is not clear whether  
27 the statement quoted by Canal+ referred to the general concept of "unfair competition" or to a  
28 specific common-law or statutory claim (also discussing patent, copyright, and other laws as part  
of the protection against "unfair competition"). The decision in Gemel, 35 U.S.P.Q.2d 1019, did  
not involve California law.

1 Canal+ does not allege that NDS engaged in passing off or anything like it, the claim for  
2 common-law unfair competition should be dismissed for this reason, in addition to the  
3 preemption grounds discussed above.

4 **V. CONSPIRACY IS NOT AN INDEPENDENT TORT.**

5 Canal+ concedes that conspiracy is not an independent tort. Opp. at 6:17-18. As the  
6 California Supreme Court stated, “Conspiracy is not a cause of action, but a legal doctrine that  
7 imposes liability on persons who . . . share with the immediate tortfeasors a common plan or  
8 design in its perpetration.” Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal. 4th 503, 510-  
9 11 (1994). Canal+ argues that the conspiracy claim is based on the underlying torts of unfair  
10 competition and tortious interference, Opp. at 7:3-4, but those claims provide no basis for a claim  
11 against NDS under the conspiracy doctrine because the complaint alleged that NDS itself  
12 committed those wrongful acts. Compl. ¶¶ 34-42, 66-71; see Barney v. Aetna Cas. & Sur. Co.,  
13 185 Cal. App. 3d 966, 983 (1986) (“The pleading of civil conspiracy is merely a procedural  
14 method of joining defendants”). Canal+’s conspiracy claim should be dismissed for this  
15 additional reason.

16 **VI. NO COPYRIGHT INFRINGEMENT CLAIM EXISTS FOR ANY OF THE THREE**  
17 **PLAINTIFFS.**

18 Canal + concedes that under 17 U.S.C. § 501 the ownership of an exclusive interest in a  
19 copyrighted work is a prerequisite to a claim for copyright infringement. See Opp. at 7:14-16.  
20 The complaint does not allege that Groupe Canal+ and Canal+ USA own the copyright, and  
21 Canal+ makes no argument in its opposition that they do.

22 In its opposition, Canal+ argues that the Court should deny the motion to dismiss the  
23 copyright claims because at least one plaintiff (C+ Technologies) has alleged an ownership  
24 interest. Opp. at 7:27-28. But the two cases Canal+ cites merely conclude that if at least one  
25 party to a lawsuit has standing based upon alleged injury, the lawsuit should not be dismissed in  
26 its entirety. See CBS, Inc. v. Primetime 24 Joint Venture, 76 F. Supp. 2d 1333, 1337 (S.D. Fla.  
27 1998); Watt v. Energy Action Educ., 454 U.S. 151, 160 (1981). They do not hold that parties  
28 with no ownership interest are entitled to join the claim of the true owner, and Canal+’s attempt

1 to transform these authorities into such a nonsensical rule falls of its own weight. Cf. Opp. at  
2 7:20-21. Because neither Groupe Canal+ nor Canal+ USA allegedly own the copyright, neither  
3 has standing under the Copyright Act and their claims should be dismissed. 17 U.S.C. § 501(b);  
4 see also, e.g., Three Boys Music Corp. v. Bolton, 212 F.3d 477, 481 (9th Cir. 2000).

5 With respect to C+ Technologies, NDS established in its opening memorandum that the  
6 complaint made no allegation that any conduct within the scope of the Copyright Act occurred  
7 within the three-year limitations period set forth in 17 U.S.C. § 507(b). See NDS Mot. at 10:23-  
8 11:18. C+ Technologies’s effort to defend its claim raises troubling questions about its candor  
9 with the Court. C+ Technologies’s primary response is that its complaint should be construed to  
10 allege certain facts when it knows them to be untrue. Specifically, in discussing the posting of the  
11 code on the DR7.com website—the act C+ Technologies identifies as undisputedly occurring  
12 within the statute of limitations period—it argues that “[w]hile NDS states that the alleged  
13 infringement on March 26, 1999 took place outside of the United States, the complaint does not.”  
14 Opp. at 9:16-17; see also id. 9:6-8 (“where the facts pled allow for the possibility that the act of  
15 infringement occurred within the United States, the allegations are sufficient to withstand a  
16 motion to dismiss.”).

17 But this coy statement is seriously misleading. In a declaration recently submitted to this  
18 Court, the CEO of C+ Technologies, Francois Carayol, testified that “a website *based in Canada*  
19 called ‘DR7.com’ published a copy of the software code for Canal+’s smartcard.” 3/18/02  
20 Carayol Decl. ¶ 6. C+ Technologies’s argument is thus directly contrary to the sworn testimony  
21 its CEO submitted in this case under penalty of perjury. While as a general rule a court should  
22 liberally construe a complaint that is silent on a subject to permit a construction favorable to a  
23 claim, see, e.g., Aalmuhammed v. Lee, 202 F.3d 1227, 1238 (9th Cir. 2000), a plaintiff cannot  
24 reasonably argue that the Court should draw an inference that the plaintiff and the Court know to  
25 be false because it is contrary to the plaintiff’s own prior sworn statement. The copyright  
26 infringement claim of C+ Technologies should thus be dismissed as well.

1 **VII. NO CONTRIBUTORY COPYRIGHT INFRINGEMENT CLAIM EXISTS FOR**  
2 **ANY OF THE THREE PLAINTIFFS.**

3 Groupe Canal+ and Canal+ USA cannot state a contributory copyright infringement claim  
4 for the same fundamental reason that they have no copyright infringement claim—they do not  
5 own the copyright. Canal+ does not even contest this point in its opposition, and this concession  
6 mandates dismissal of their claims.

7 As with the direct infringement claim, Lee, 202 F.3d at 1238, is not dispositive of whether  
8 C+ Technologies has properly pled a contributory infringement claim. In Lee, the court made  
9 clear that plaintiff's complaint was silent on the issue of where co-defendant's allegedly infringing  
10 conduct transpired. 202 F.3d at 1238. In contrast, Canal+'s complaint specifically identifies  
11 Europe, not the United States, as the location where the counterfeit cards emerged. See Compl.  
12 ¶¶ 24-26. And, as explained in the preceding section, the alleged publication of the copyrighted  
13 code occurred in Canada, not the United States. 3/18/02 Carayol Decl. ¶ 6. Under these  
14 circumstances, the Court should not infer that the copying occurred in the United States. The  
15 Court should dismiss C+ Technologies's claim for contributory infringement.

16 **VIII. THE DMCA CLAIM FAILS BECAUSE THE DMCA DOES NOT APPLY TO THE**  
17 **ALLEGED CONDUCT.**

18 NDS explained in its opening memorandum that the DMCA was inapplicable to the facts  
19 alleged in the complaint because NDS is accused of copying and publishing Canal+'s UserROM,  
20 which is a technological protection measure, not a circumvention device prohibited by the statute.  
21 17 U.S.C. § 1201(a)(2). Recognizing that the DMCA bars trafficking only in circumvention  
22 technology—and not in copies of protection technology—Canal+ argues that it has properly  
23 alleged that the file containing its code was in fact a circumvention technology.<sup>5</sup> Opp. at 10:23-  
24 27; Compl. ¶¶ 61-62. This argument, however, is inconsistent with the Complaint, which alleges

25 <sup>5</sup> Canal+ also argues that NDS's contentions about the nature of the SECAROM file are  
26 beyond the scope of the pleadings. Opp. at 11:3-7. Not so. The complaint makes clear that NDS  
27 is accused of making the SECAROM file to publish the UserROM. Compl. ¶¶ 24-25; see also id.  
28 at ¶¶ 43-52 (in copyright claim, alleging that NDS copied the UserROM that C+ Technologies  
had copyrighted). Moreover, Canal+ admits that the code in the file is also found in its  
smartcards—that is, in the technological protection measure. Opp. at 11:8-9.

1 that NDS published the very Canal+ code that is part of Canal+'s conditional access system.  
2 Compl. ¶ 24-25, 59-60. And, as Canal+ concedes, “[u]ndoubtedly, the smart cards Canal+  
3 created [containing the UserROM] were a technological protection measure.” Opp. at 11:11-12.

4 Canal+ also argues that because the same UserROM was copied by NDS for a different  
5 purpose (allegedly to publish it to the computer hacking community), the code transforms from a  
6 technological protection measure into a circumvention technology. Opp. at 11:12-16, 11:25-27.  
7 This proposition is contrary to the plain language of the statute, which unambiguously  
8 differentiates between “technological protection measures” and “circumvention technology.” See  
9 id. §§ 1201(a)(2), (3) (discussing separate concepts of the “technological measure that effectively  
10 controls access to a work” and the technology designed to “circumvent a technological protection  
11 measure”). Under the DMCA, the same technology cannot be both, and NDS is not aware of any  
12 court ever holding to the contrary.

13 This distinction between “technological protection measures” and “circumvention  
14 technology” was evident in each of the decisions upon which Canal+ relies. Each of these cases  
15 involved a circumvention technology that was a different product than the technological  
16 protection measure. See, e.g., Universal City Studios, Inc. v. Corley, 273 F.3d 429, 436-37 (2d  
17 Cir. 2001) (addressing whether the DeCSS software utility program was circumvention  
18 technology with respect to the separate technological protection measure CSS, which is an  
19 encryption-based access control system); Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.  
20 2d 294, 308, 311 (S.D.N.Y. 2000) (same); Sony Computer Entertain. Am., Inc. v. Gamemasters,  
21 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999) (finding probability that sales of defendant’s Game  
22 Enhancer product violated DMCA by circumventing protection measures in plaintiff’s  
23 PlayStation by sending false validation codes); Realnetworks, Inc. v. Streambox, Inc., No. 99CV  
24 02070, 2000 WL 127311 \*\* 2, 4, 7 (W.D. Wash. Jan. 18, 2000) (finding probability of DMCA  
25 violation by defendant’s Streambox VCR, which mimicked or “bypassed” the authentication  
26 procedure used by plaintiff’s RealServer/RealPlayer technological protection system and  
27 circumvented the system’s Copy Switch by ignoring it). None of these cases involved the mere  
28 publication of details of the technological protection measure. Similarly, while the circumvention

1 devices in those cases may have been able to replicate certain parts or functions of the  
2 technological protection devices, none of the cases hold that if a defendant publishes details about  
3 the technological protection measure, it becomes a circumvention device. Canal+ cites no case,  
4 and NDS is aware of none, that makes the statutory leaps Canal+ now suggests.

5 Canal+'s block quotation from Reimerdes illustrates Canal+'s confusion of the  
6 technological protection measure with the circumvention technology. While Canal+ claims that  
7 "publishing the details of a technological protection measure" is circumvention-based activity,  
8 Opp. at 12:10-12, the Reimerdes discussion quoted by Canal+ relates to the publication of a  
9 circumvention device, DeCSS, not the technological protection measure, CSS. See Opp. at 12:13  
10 (quoting and editing statement from Reimerdes). Canal+'s attempt to state a DMCA claim based  
11 on alleged publication of a technological protection measure is baseless and unprecedented. The  
12 claim should be dismissed.

### 13 **IX. CANAL+'S RICO CLAIM FAILS FOR SEVERAL REASONS.**

14 Canal+'s RICO claim under 18 U.S.C. §§ 1962(a), (c) & (d) suffers from  
15 numerous flaws and should be dismissed in its entirety. First, Canal+ has no standing because it  
16 alleges neither the concrete injury to business or property required by RICO or, for the § 1962(a)  
17 claim, a distinct injury arising from the reinvestment of proceeds from the alleged racketeering  
18 acts. Second, Canal+'s § 1962(c) claim also fails because the alleged association-in-fact  
19 enterprise lacks the required structure independent of the alleged pattern of racketeering acts.  
20 Third, the allegation of wire fraud predicate acts must be stricken because it is a repackaged  
21 copyright infringement claim lacking any factual allegations of any intent to obtain money or  
22 property from Canal+ and any detrimental reliance by Canal+. Finally, Canal+ admits that its  
23 RICO conspiracy claim under § 1962(d) cannot survive without a proper claim under subsection  
24 (a) or (c).

#### 25 **A. There Is No RICO Injury.**

26 Canal+ does not dispute that the Ninth Circuit "limits injuries compensable under RICO. .  
27 . . A showing of 'injury' requires proof of concrete financial loss." Imagineering, Inc. v. Kiewit  
28 Pac. Co., 976 F.2d 1303, 1310 (9th Cir. 1992) (citation omitted). A concrete financial loss cannot



1 be “mere injury to a valuable intangible property interest,” nor can it be “speculative.” Steele v.  
2 Hosp. Corp. of Am., 36 F.3d 69, 70, 71 (9th Cir. 1994). Injuries such as lost profits or to one’s  
3 ability to compete are deemed speculative by the Ninth Circuit for RICO purposes because  
4 neither is a tangible property interest. See Imagineering, 975 F.2d at 1311; Steele, 36 F.3d at 71.

5 Canal+ claims it alleged concrete loss to business property from NDS’s alleged  
6 racketeering activities because it will have to spend “substantial time and money” creating anti-  
7 piracy countermeasures for its new smartcard designs. See Opp. at 13:5-11 (citing Compl. ¶ 28).  
8 But this alleged loss is not the claimed injury upon which Canal+ based its RICO claim. To the  
9 contrary, the only specific damage to its property Canal+ identified with respect to its RICO  
10 claim is damage to its “ability to compete by reason of the unfair advantage Defendants gained by  
11 their racketeering activity . . .” Compl. ¶ 90. While this alleged injury may suit Canal+’s desire  
12 to publicize a multi-billion dollar damage theory in the press, it does not meet the standard of  
13 tangible, concrete loss required by the Ninth Circuit for RICO standing. Imagineering, 975 F.2d  
14 at 1310 (affirming dismissal of plaintiffs’ claim when alleged injury was not having received  
15 subcontracts to which they believed they were entitled); Steele, 36 F.3d at 71 (finding speculative  
16 plaintiffs’ injury claim that the defendant’s alleged excessive charges to their health insurance  
17 depleted the availability of benefits which plaintiffs might have used). Although Canal+ cites  
18 several cases, they either do not analyze the concrete loss requirement or are inconsistent with  
19 this binding Ninth Circuit authority.

20 Separately, Canal+ fails to state a claim under 18 U.S.C. § 1962(a) because it has alleged  
21 no injury flowing from NDS’s alleged investment of racketeering income. Under well-settled  
22 Ninth Circuit law, “a plaintiff seeking civil damages for a violation of section 1962(a) must allege  
23 facts tending to show that he or she was injured by the use or investment of racketeering income.”  
24 Nugget Hydroelectric, L.P. v. Pac. Gas & Elec. Co., 981 F.2d 429, 437 (9th Cir. 1992). Canal+  
25 has not done so.

26 Canal+ protests that its distinct investment injury allegation “is not merely directed to a  
27 general competitive advantage NDS gained from its initial offenses.” Opp. at 15:3-4. But the  
28 Complaint proves otherwise. The Complaint claims that NDS gained an unfair competitive

1 advantage from the alleged racketeering, which enabled NDS to gain additional income from  
2 additional sales, and that NDS used “part of such income in the operation of an enterprise.”  
3 Compl. ¶ 87;<sup>6</sup> see also id. ¶ 90. The complaint nowhere alleges that Canal+ thereafter suffered a  
4 distinct injury by any use of the resulting income for the operations of an alleged RICO  
5 enterprise. The claimed injury of NDS’s additional sales is at most an injury arising from the  
6 predicate acts themselves. Of course, that type of alleged damages is insufficient to support a  
7 claim under § 1962(a). See Perfect 10, 167 F. Supp. 2d at 1128 (“Without some indication of  
8 precisely *how* [plaintiff’s] damage is derived from something more than the predicate acts . . .  
9 [plaintiff] has failed to adequately allege a violation of 18 U.S.C. § 1962(a).”).<sup>7</sup> The lack of a  
10 RICO injury alone justifies dismissal of the RICO claim.

11 **B. The Complaint Identifies No RICO Enterprise.**

12 Separately, NDS’s opening memorandum established that the § 1962(c) claim should be  
13 dismissed because Canal+ failed to satisfy RICO’s enterprise requirement of having “[a]t a  
14 minimum... ‘some sort of structure...for the making of decisions’ and ‘some mechanisms for  
15 controlling and directing the affairs of the group on an on-going, rather than an ad hoc basis.’”  
16 Simon v. Value Behavioral Health, Inc., 208 F.3d 1073, 1083-84 (9th Cir. 2000). Canal+ does  
17 not dispute that the enterprise must “have an existence and structure separate from the pattern of  
18 racketeering activity.” Opp. at 16:15-16. Instead, Canal+ asserts that a corporation’s  
19 involvement in a RICO enterprise automatically satisfies the requirement that the enterprise have  
20 an existence and structure separate from the pattern of racketeering activity. Current Ninth  
21 Circuit law, however, follows no such rule. In Simon, the Ninth Circuit rejected a RICO claim  
22 because the enterprise requirement was not met even though plaintiff alleged that numerous

23 <sup>6</sup> An additional insurmountable problem for plaintiffs is that the alleged “enterprise”  
24 Canal+ refers to in paragraph 87 is NDS itself. Ninth Circuit authority makes clear that the RICO  
25 defendant cannot also be the RICO “enterprise.” See, e.g., Sever v. Alaska Pulp Co., 978 F.2d  
1529, 1534 (9th Cir. 1992).

26 <sup>7</sup> Thus, although Canal+ alleges that “NDS played upon the benefit it gained from its initial  
27 racketeering acts by making misstatements to potential customers in a further attempt to disrupt  
28 Canal+’s business,” Opp. at 16, “making misstatements” is not the same as making a  
reinvestment into the enterprise of the pecuniary proceeds from NDS’s alleged predicate acts and  
having that reinvestment cause a distinct injury.

1 participating defendant corporations formed an enterprise. 208 F.3d at 1083-84. This conclusion  
2 is fundamentally incompatible with finding the enterprise requirement automatically satisfied by  
3 including a corporation as a RICO defendant. See also Acro-Tech, Inc. v. Robert Jackson Family  
4 Trust, No. 01-447-KI, 2002 WL 275411, at \*3 (D. Or. Jan. 2, 2002) (reviewing Ninth Circuit case  
5 law and concluding that the inclusion of two corporations was not sufficient to meet the enterprise  
6 requirement); Rotec Indus., Inc. v. Mitsubishi Corp., 163 F. Supp. 2d 1268, 1279-80 (D. Or.  
7 2001) (same).

8 A court must examine the allegations of the complaint in each case to determine whether  
9 the requirement is satisfied. “A group whose members collectively engage in an illegal act, in-  
10 and-of-itself, does not constitute an ‘enterprise’ for the purposes of RICO.” Simon, 208 F.3d at  
11 1083. Canal+’s conclusory allegation that NDS “organized, supervised, and directed” an  
12 enterprise, Compl. ¶ 88, is inadequate to established the structure required under RICO. Canal+  
13 fails to make any factual allegations about the decision-making structure or mechanisms for on-  
14 going control and direction of the affairs of the alleged association-in-fact. At most, it alleges an  
15 ad hoc association that is completely indistinguishable from the alleged pattern of racketeering  
16 activity itself. An enterprise cannot exist based solely on the agreement of its participants—  
17 whether corporate or not—to commit an illegal act. Like the plaintiff in Simon, Canal+ has  
18 included corporations in the alleged enterprise, but has failed to allege sufficient structure to  
19 satisfy the RICO enterprise requirement. Simon, 208 F.3d at 1084.<sup>8</sup> Thus, Canal+ has failed to  
20 state a claim under § 1962(c).

21 \_\_\_\_\_  
22 <sup>8</sup> The various Ninth Circuit decisions Canal+ cites, Opp. at 16:16-22 & 17 n.6, all pre-date  
23 Simon. Moreover, on their facts, they provide no support for Canal+’s contention that the two  
24 corporate defendants in this case provide the requisite structure for a RICO enterprise. The  
25 individual members of the alleged enterprises in three of the cited cases had formal roles in the  
26 defendant corporations that ostensibly provided the structure for the enterprise. Webster v.  
27 Omnitron Int’l, Inc., 79 F.3d 776, 780 (9th Cir. 1996); United States v. Feldman, 853 F.2d 648,  
28 656 (9th Cir. 1988); United States v. Kirk, 844 F.2d 660, 661 (9th Cir. 1988). In contrast, Canal+  
alleges that the enterprise includes Al Menard, Compl. ¶ 88, but it does not allege that he had any  
formal role in the defendant corporations. Further, United States v. Blinder, 10 F.3d 1468, 1475  
(9th Cir. 1993), is inapposite because the enterprise there consisted of several corporations and no  
individuals, and the court found sufficient structure in the fact that all of the entities were formed  
and taken public through one of the entities. Finally, Chang v. Chen, 80 F.3d 1293, 1301 (9th  
Cir. 1996), did not find that the enterprise requirement was satisfied in that case.

1           **C. The Wire Fraud Allegations Should Be Stricken.**

2           As NDS explained in its opening memorandum, NDS Mot. at 21:19-23:4, the wire fraud  
3 predicate act allegations should be stricken under F.R.C.P. 12(f) because they are merely  
4 repackaged copyright infringement claims that allege neither a specific intent to obtain money or  
5 property from Canal+ or detrimental reliance by Canal+. As a preliminary matter, Canal+ claims  
6 that the wire fraud allegations are permissible predicate acts because criminal copyright  
7 infringement under 18 U.S.C. § 2319 is now itself a predicate act for RICO purposes. Cf. Opp. at  
8 18:7-14. But this is irrelevant to whether simple copyright infringement may be repackaged as  
9 wire fraud.

10           Canal+ fails to make the required allegation that NDS defrauded Canal+ specifically to  
11 obtain money or something valuable from it. Canal+ erroneously argues that a wire fraud  
12 predicate act does not require that “misrepresentations be intended to obtain money or property  
13 directly from the plaintiff.” Opp. at 18:22-24. There is no doubt, however, that to commit wire  
14 or mail fraud, one must obtain or intend to obtain money, property, or service from the party  
15 defrauded. See McNally v. United States, 483 U.S. 350, 359-60 (1987); United States v. Lew,  
16 875 F.2d 219, 221-22 (9th Cir. 1989) (reversing mail fraud conviction on grounds that  
17 government had not proved that the money received as part of the scheme was from the deceived  
18 party); United States v. Utz, 886 F.2d 1148, 1151 (9th Cir. 1989) (affirming conviction using  
19 similar test). Canal+ makes no such allegation. Furthermore, unlike the defendants in United  
20 States v. Coyle and United States v. Norris, upon which Canal+ relies, Canal+ does not allege that  
21 NDS received any money or property directly from its alleged fraudulent acts. See Coyle, 943  
22 F.2d 424, 425 (4th Cir. 1991) (defendant received money from customers who purchased his  
23 cable television signal descramblers); Norris, 833 F. Supp. 1392, 1396 (N.D. Ind. 1993) (same).  
24 Instead, Canal+ claims damages in the form of lost profits and market share. Compl. ¶ 90. But  
25 the Ninth Circuit has held that such allegations are “far too amorphous” to support such a claim.  
26 Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist., 940 F.2d 397, 406 (9th Cir. 1991).

27           Moreover, a party must allege proximate cause for a RICO claim—which for the wire  
28 fraud predicate act means detrimental reliance. Forsyth v. Humana, Inc., 114 F.3d 1467, 1481

1 (9th Cir. 1997). Canal+ does not even argue that it alleged detrimental reliance. Although  
2 Canal+ contends that “reliance is not a necessary element of the wire fraud offense” under 18  
3 U.S.C. § 1343, Opp. at 19:7-12, none of the Ninth Circuit cases Canal+ cites involved RICO  
4 claims. United States v. Oren, 893 F.2d 1057, 1059 (9th Cir. 1990); United States v. Halbert, 712  
5 F.2d 388, 389 (9th Cir. 1983); United States v. Goldberg, 455 F.2d 479, 480 (9th Cir. 1972).  
6 Indeed, the New York district court case cited by Canal+ explains the significant difference  
7 between wire fraud as an offense and wire fraud as a predicate act for RICO: While reliance is  
8 not an element of mail or wire fraud, it is nonetheless the case that “[i]nsofar as the injury is  
9 attributed to predicate acts of mail or wire fraud, plaintiff must show that the defendant’s  
10 misrepresentations were relied upon.” In re Crazy Eddie Sec. Litig., 812 F. Supp. 338 350, 355  
11 (E.D.N.Y. 1993). Thus, Canal+’s failure to allege detrimental reliance requires that the wire  
12 fraud allegations be stricken as a predicate act for the RICO claim.

13 **X. CONCLUSION**

14 For the reasons stated above and in NDS’s opening memorandum, NDS requests  
15 that the Court dismiss with prejudice all counts of the complaint. Alternatively, NDS requests  
16 that the Court strike as immaterial complaint ¶¶ 36, 80(iii), 85, as well as ¶ 86 on page 19:23-25.

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