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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

NETFLIX, INC., a Delaware corporation,

No. C 06-02361 WHA

Plaintiff,

v.

BLOCKBUSTER, INC., a Delaware  
corporation, and DOES 1-50,

Defendants.

**CASE MANAGEMENT ORDER,  
REFERENCE TO MAGISTRATE  
JUDGE FOR SETTLEMENT/  
MEDIATION, AND FURTHER  
REFERENCE TO MAGISTRATE  
JUDGE FOR DISCOVERY  
SUPERVISION**

\_\_\_\_\_  
AND RELATED COUNTER ACTION.  
\_\_\_\_\_

After a case management conference, the Court enters the following order pursuant to Rule 16 of the Federal Rules of Civil Procedure ("FRCP") and Civil Local Rule 16-10:

1. All initial disclosures under FRCP 26 must be completed by **JULY 28, 2006**, on pain of preclusion.
2. Leave to add any new parties or pleading amendments must be sought by **JULY 28, 2006**.
3. Blockbuster may have until **SEPTEMBER 18, 2006**, to file its preliminary invalidity contentions and to produce supporting documents under Local Patent Rules 3-3 and 3-4.
4. The claim-construction hearing will be held on **JANUARY 31, 2007**, at **1:30 P.M.** Counsel shall meet and confer and propose a briefing schedule leading up to the

1 hearing. This must be filed by **JULY 28, 2006**, and entitled "PROPOSED ORDER RE  
2 SCHEDULE FOR CLAIM CONSTRUCTION" and send it by email to  
3 whapo@cand.uscourts.gov.

4 5. For the claim-construction hearing, the parties must isolate no more than  
5 **EIGHT PHRASES** in all claims at issue and limit the hearing to those phrases. All other  
6 phrases in dispute will be determined at trial absent further order. In the Court's  
7 experience, most patent cases turn on the meaning of only a few phrases. Once  
8 defined, the case will usually resolve by motion or settlement. If it does not, then the  
9 Court will construe any remaining phrases at issue during summary judgment or, at a  
10 minimum, before the jury is instructed. Counsel must conduct the presentations at the  
11 claim-construction hearing. Expert testimony will normally not be needed but all sides  
12 may have an expert present to address points outside the intrinsic record should they  
13 arise. A tutorial for the Court (to be conducted by counsel only, not experts) shall be  
14 set on **JANUARY 17, 2007**, at **1:30 P.M.**

15 6. The non-expert discovery cut-off date shall be **APRIL 27, 2007**.

16 7. The deadline for producing opinions of counsel under Patent Local Rule 3-8 shall be  
17 **28 CALENDAR DAYS** before the non-expert discovery cut-off, irrespective of the  
18 timeline in said rule.

19 8. The last date for designation of expert testimony and disclosure of full expert reports  
20 under FRCP 26(a)(2) as to any issue on which a party has the burden of proof  
21 ("opening reports") shall be **APRIL 27, 2007**. **WITHIN FOURTEEN CALENDAR DAYS**  
22 thereafter, all other parties may disclose responsive expert testimony with full expert  
23 reports responsive to opening reports ("opposition reports"). Within  
24 **SEVEN CALENDAR DAYS** thereafter, the opening parties may disclose any reply reports  
25 limited solely to rebutting specific material in opposition reports. Reply reports must  
26 be limited to true rebuttal and should be very brief. They should not add new material  
27 that should have been placed in the opening report. The cutoff for all expert discovery  
28 shall be **FOURTEEN CALENDAR DAYS** after the deadline for reply reports. In aid of

1 preparing an opposition or reply report, a responding party may depose the adverse  
2 expert sufficiently before the deadline for the opposition or reply report so as to use the  
3 testimony in preparing the response. Experts must make themselves readily available  
4 for such depositions. Alternatively, the responding party can elect to depose the expert  
5 later in the expert-discovery period. An expert, however, may be deposed only once  
6 unless the expert is used for different opening and/or opposition reports, in which case  
7 the expert may be deposed independently on the subject matter of each report. At least  
8 **28 CALENDAR DAYS** before the due date for opening reports, each party shall serve a  
9 list of issues on which it will offer any expert testimony in its case-in-chief (including  
10 from non-retained experts). This is so that all parties will be timely able to obtain  
11 counter-experts on the listed issues and to facilitate the timely completeness of all  
12 expert reports. Failure to so disclose may result in preclusion.

13 9. As to damages studies, the cut-off date for *past damages* will be as of the expert report  
14 (or such earlier date as the expert may select). In addition, the experts may try to  
15 project *future damages* (*i.e.*, after the cut-off date) if the substantive standards for  
16 future damages can be met. With timely leave of Court or by written stipulation, the  
17 experts may update their reports (with supplemental reports) to a date closer to the time  
18 of trial.

19 10. At trial, the direct testimony of experts will be limited to the matters disclosed in their  
20 reports. Omitted material may not ordinarily be added on direct examination. This  
21 means the reports must be complete and sufficiently detailed. Illustrative animations,  
22 diagrams, charts and models may be used on direct examination only if they were part  
23 of the expert's report, with the exception of simple drawings and tabulations that  
24 plainly illustrate what is already in the report, which can be drawn by the witness at  
25 trial or otherwise shown to the jury. If cross-examination fairly opens the door,  
26 however, an expert may go beyond the written report on cross-examination and/or  
27 redirect examination. By written stipulation, of course, all sides may relax these  
28 requirements.

- 1 11. To head off a recurring problem, experts lacking percipient knowledge should avoid  
2 vouching for the credibility of witnesses, *i.e.*, whose version of the facts in dispute is  
3 correct. This means that they may not, for example, testify that based upon a review of  
4 fact depositions and other material supplied by counsel, a police officer did (or did not)  
5 violate standards. Rather, the expert should be asked for his or her opinion based —  
6 explicitly — upon an assumed fact scenario. This will make clear that the witness is  
7 not attempting to make credibility and fact findings and thereby to invade the province  
8 of the jury. Of course, a qualified expert can testify to relevant customs, usages,  
9 practices, recognized standards of conduct, and other specialized matters beyond the  
10 ken of a lay jury. This subject is addressed further in the trial guidelines referenced in  
11 paragraph 18 below.
- 12 12. The last date to file dispositive motions shall be **JUNE 14, 2007**. No dispositive motions  
13 shall be heard more than 35 days *after* this deadline, *i.e.*, if any party waits until the last  
14 day to file, then the parties must adhere to the 35-day track in order to avoid pressure  
15 on the trial date.
- 16 13. The **FINAL PRETRIAL CONFERENCE** shall be at **2:00 P.M.** on **AUGUST 20, 2007**. For the  
17 form of submissions for the final pretrial conference and trial, please see paragraph 18  
18 below.
- 19 14. A **JURY TRIAL** shall begin on **SEPTEMBER 17, 2007**, at **7:30 A.M.**, in Courtroom 9,  
20 19th Floor, 450 Golden Gate Avenue, San Francisco, California, 94102. The trial  
21 schedule and time limits shall be set at the final pretrial conference. Although almost  
22 all trials proceed on the date scheduled, it may be necessary on occasion for a case to  
23 trail, meaning the trial may commence a few days or even a few weeks after the date  
24 stated above, due to calendar congestion and the need to give priority to criminal trials.  
25 Counsel and the parties should plan accordingly, including advising witnesses.
- 26 15. Counsel may not stipulate around the foregoing dates without Court approval.
- 27 16. While the Court encourages the parties to engage in settlement discussions, please do  
28 not ask for any extensions on the ground of settlement discussions or on the ground that

1 the parties experienced delays in scheduling settlement conferences, mediation or ENE.  
2 The parties should proceed to prepare their cases for trial. No continuance (even if  
3 stipulated) shall be granted on the ground of incomplete preparation without competent  
4 and detailed declarations setting forth good cause.


5 17. To avoid any misunderstanding with respect to the final pretrial conference and trial,  
6 the Court wishes to emphasize that all filings and appearances must be made — on pain  
7 of dismissal, default or other sanction — unless and until a dismissal fully resolving the  
8 case is received. It will not be enough to inform the clerk that a settlement in principle  
9 has been reached or to lodge a partially executed settlement agreement or to lodge a  
10 fully executed agreement (or dismissal) that resolves less than the entire case. Where,  
11 however, a fully-executed settlement agreement clearly and fully disposing of the entire  
12 case is lodged reasonably in advance of the pretrial conference or trial and only a  
13 ministerial act remains, the Court will arrange a telephone conference to work out an  
14 alternate procedure pending a formal dismissal.

15 18. If you have not already done so, please read and follow the “Supplemental Order to  
16 Order Setting Initial Case Management Conference in Civil Cases Before Judge  
17 William Alsup” and other orders issued by the Clerk’s office when this action was  
18 commenced. Among other things, the supplemental order explains when submissions  
19 are to go to the Clerk’s Office (the general rule) versus when submissions may go  
20 directly to chambers (rarely). With respect to the final pretrial conference and trial,  
21 please read and follow the “Guidelines For Trial and Final Pretrial Conference in Civil  
22 Jury Cases Before The Honorable William Alsup.” All orders and guidelines  
23 referenced in the paragraph are available on the district court’s website at  
24 <http://www.cand.uscourts.gov>. If you do not have access to the Internet, you may  
25 contact Deputy Clerk Dawn K. Toland at (415) 522-2020 to learn how to pick up a hard  
26 copy.

- 1 19. This matter is hereby **REFERRED** to **MAGISTRATE JUDGE ELIZABETH D. LAPORTE** for  
2 **SETTLEMENT/MEDIATION**, the Court believing that such a conference would be more  
3 effective in settling the present case than any other avenue.
- 4 20. This case is **REFERRED** to a **MAGISTRATE JUDGE** to be assigned for resolution of all  
5 discovery motions. The deadline for bringing all discovery motions or extension  
6 motions based on discovery violations will be **45 CALENDAR DAYS** prior to the fact  
7 discovery cutoff (for fact discovery) and **TEN CALENDAR DAYS** prior to the expert  
8 discovery cutoff (for expert discovery). The purpose of these lead times is to allow  
9 briefing, resolution and follow-up, to the extent practical, before the discovery cutoffs.  
10 Each side may take **UP TO TWENTY** fact depositions, four of which may be as long as  
11 **FOURTEEN HOURS** each. The Court's discovery guidelines shall be followed and  
12 enforced by the magistrate judge.
- 13 21. All pretrial disclosures under FRCP 26(a)(3) and objections required by FRCP 26(a)(3)  
14 must be made on the schedule established by said rule.

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16 **IT IS SO ORDERED.**

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18 Dated: June 30, 2006.

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21 **WILLIAM ALSUP**  
22 **UNITED STATES DISTRICT JUDGE**  
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