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8
9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**
11 **WESTERN DIVISION**

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Los Angeles, CA 90071-1543

12 MPEG LA, L.L.C.,
13 Plaintiff,
14 vs.
15 NERO AG;
and DOES 1 through 10, inclusive,
16 Defendants.

Case No. 2:10-CV-0382-RGK(PJWx)
[The Honorable R. Gary Klausner]
**DEFENDANT NERO AG'S
COUNTERCLAIMS FOR: VIOLATION
OF SECTION 2 OF THE SHERMAN
ACT; BREACH OF THE COVENANT
OF GOOD FAITH AND FAIR
DEALING; PROMISSORY ESTOPPEL;
INTENTIONAL
MISREPRESENTATION
(CONCEALMENT); CONSTRUCTIVE
FRAUD; VIOLATION OF CAL. BUS. &
PROF. CODE § 17200 et seq.; UNJUST
ENRICHMENT; DECLARATORY
RELIEF; AND REFORMATION**

[Jury Trial Demanded]

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22 NERO AG,
23 Counterclaimant,
24 vs.
25 MPEG LA, L.L.C.,
26 and ROES 1 through 10, inclusive,
27 Counterdefendants

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2 Defendant and Counterclaimant Nero AG (“Nero”) hereby counterclaims
3 against Plaintiff and Counterdefendant MPEG LA, L.L.C. (“MPEG LA”) and ROES 1
4 through 10, inclusive, as follows:

5 **JURISDICTION AND VENUE**

6 1. This action arises under Section 2 of the Sherman Act, 15 U.S.C. § 2.

7 2. This Court has jurisdiction over the subject matter of this action under 28
8 U.S.C. §§ 1331, 1337, and 1367. Jurisdiction over the state law counterclaims is
9 proper because those claims are so related to the federal law claims herein alleged that
10 they form part of the same case or controversy under Article III of the United States
11 Constitution.

12 3. Venue properly lies in this Court under 28 U.S.C. § 1391 in that on
13 information and belief, MPEG LA resides and/or is doing business in this District on a
14 systematic and continuous basis, and many of the acts described below have been and
15 are being conceived, carried out, and made effective in this District.

16 4. Personal jurisdiction over MPEG LA is proper in this district because
17 MPEG LA has consented to the personal jurisdiction of this Court by filing and
18 maintenance of this suit in this district against Nero.

19 **INTRODUCTION**

20 5. MPEG LA—the self-proclaimed “world’s leading patent licensing
21 administrator”—sued Nero pursuant to MPEG LA’s scheme to maintain and abuse its
22 monopoly power, and collect additional tens of millions of dollars in unbargained-for
23 royalties on top of its already above-market profits. As MPEG LA’s Chief Operating
24 Officer stated in Counterclaims against the company in a 2006 corporate waste
25 lawsuit, MPEG LA has “collect[ed] billions” of dollars in monopoly profits, allowing
26 some if its executives to live a lavish lifestyle that included “bonuses to Company
27 executives” such as a “Porsche automobile” and “a Mercedes Benz sports car.”

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1 6. Nero is a creator of liquid media technology—software that allows users
2 to play, create, receive or distribute digital video content from personal computers,
3 DVD players, cell phones, and other devices. MPEG LA has a monopoly on the
4 licensing of certain patent pools containing some patents that are included in
5 mandatory industry standards necessary to Nero’s software.

6 7. Before entering into the first written patent pool-licensing agreement
7 with Nero, MPEG LA’s Manager of Licensing represented to Nero’s Founder and
8 Chief Operating Officer in writing that no royalties would be due on free trials (fully-
9 functional software that expires after 15 or 30 days) of software incorporating the
10 licensed pooled patents. Instead, each free trial would be treated as a sale and return:
11 “[I]f the MPEG-2 functionality disables (e.g., within 30 days) or is otherwise rendered
12 unusable so that it can be treated as a product return, we assume that a Licensee will
13 account for that as a ‘return’ by paying a royalty on every product sent out and taking
14 a credit for those returned (in which case the return products are not licensed) in
15 accordance with its normal practices.”

16 8. But contrary to its representation, and pursuant to its scheme to abuse its
17 monopoly power, MPEG LA demands in its complaint that Nero pay more than \$15
18 million in royalties for free trials. That demand would more than double the amount
19 of royalties already properly paid by Nero for permanent sales. In other words,
20 MPEG LA refuses to treat a free trial as a sale and return as it had represented. On
21 information and belief, MPEG LA is making, or intends to make, similar demands on
22 certain other of its approximately 1,500 licensees in the patent pools in question.

23 9. MPEG LA’s demand is also contrary to the parties’ course of dealing.
24 For years after signing the first agreement, both parties treated free trials as a sale and
25 return. At MPEG LA’s instruction, its auditor even conducted an audit that treated
26 free trials as a sale and return as to the first patent pool. (The audit also concluded
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1 that MPEG LA owes Nero a refund of more than \$1.5 million in royalties that Nero
2 overpaid unrelated to free trials.)

3 10. Leveraging its monopoly power in the market covered by the first
4 agreement, MPEG subsequently established monopoly power in at least two other
5 patent pool licensing markets for subsequent advanced standards under terms and
6 conditions that are not fair, reasonable, and nondiscriminatory.

7 11. In signing subsequent agreements for those updated patent standards—
8 which contain language that is virtually identical to the relevant language in the first
9 agreement—MPEG LA intentionally concealed its intent to terminate the treatment of
10 free trials as a sale and return, and ultimately charge millions of dollars in royalties for
11 free trials.

12 12. Six (6) years of free trials later, MPEG LA revealed that free trials were
13 not free after all and now seeks to obtain a windfall profit of more than \$15 million in
14 unjustified royalties and interest. Such profits would never have been available had
15 MPEG LA communicated its intent to suddenly charge royalties for free trials. Had it
16 known of MPEG LA’s unilateral intent to modify the meaning of terms, Nero would
17 have changed its business practices to avoid the windfall payment that MPEG LA now
18 demands.

19 13. Of course, free trials are free to consumers. It is commercially infeasible
20 to distribute free trials and pay full royalties for each distribution. MPEG LA attempts
21 to wield its monopoly power to charge supracompetitive royalties for free trials that
22 have significantly less market value than the royalty charged.

23 14. MPEG LA’s scheme, deception and illegal business practices are, among
24 other things, an abuse of monopoly power, illegal maintenance of a monopoly, and an
25 unlawful, unfair or fraudulent business practice. The surprise “royalties” that MPEG
26 LA demands on free trials after the fact make the pricing of patent pool-licensing
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1 royalties in the relevant markets both supracompetitive and discriminatory, preventing
2 Nero from competing in those markets.

3 15. Nero seeks just compensation for—and an injunction to terminate—
4 MPEG LA’s abuses of monopoly power, and its other illegal business practices.

5 **PARTIES**

6 16. Plaintiff and Counterdefendant MPEG LA, L.L.C. is a Delaware limited
7 liability company with its principal place of business at 6312 South Fiddlers Green
8 Circle, Suite 400E, Greenwood Village, Colorado 80111.

9 17. Defendant and Counterclaimant Nero AG is a German private company
10 with its principal place of business at Im Stoeckmaedle 13-15, Karlsbad, 76307,
11 Germany.

12 18. On information and belief, Counterdefendants ROES 1 through 10 are
13 individuals or corporations whose exact character is presently unknown and who
14 conducted and are responsible for the matters of which Nero complains herein. The
15 true names and identities of ROES 1 through 10 are not presently known to
16 Counterclaimant. When such Counterdefendants’ true names and capacities are
17 ascertained, Nero will seek leave of court to amend this Counterclaim accordingly.

18 **GENERAL ALLEGATIONS**

19 **A. Nero AG is a Forerunner and Innovator in Liquid Media Technology.**

20 19. Nero is a creator of liquid media technology whose mission is to enable
21 liquid content creation and distribution anytime, anywhere, and on any device. Nero
22 provides consumers with the freedom to simply enjoy their music, photos, and videos,
23 regardless of hardware or file format, by taking a unique device-neutral, standards-
24 based approach to solution development.

25 20. Nero has developed award-winning digital multimedia solutions that lead
26 the industry in sales and technology. For example, Nero Vision software allows
27 individuals without technical knowledge to create family movies and to easily share
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1 their movies with friends and family. More than 300 million units of Nero’s trusted
2 software solutions are used in the home, on the go, and professionally. Nero users
3 worldwide enjoy products and applications that integrate key technologies designed to
4 improve the digital life.

5 21. Nero’s many digital multimedia solutions for consumers require that
6 Nero access relevant patents that are licensed through MPEG LA’s patent pools. In
7 order for Nero to distribute its products without infringing upon these patents it must
8 deal with MPEG LA. Therefore, Nero has signed several MPEG LA license
9 agreements, as discussed in detail below.

10 22. The three patent pool license agreements at issue here are:

- 11 a. the MPEG-2 Patent Portfolio (the “MPEG-2 License”) (a true and
- 12 correct copy of the MPEG-2 License is attached hereto as Exhibit
- 13 1);
- 14 b. the MPEG-4 Visual Patent Portfolio License (the “MPEG-4 Visual
- 15 License”) (Compl. Ex. A); and
- 16 c. the AVC/H.264 Patent Portfolio License (the “AVC License”)
- 17 (Compl. Ex. B).

18 **B. MPEG LA Monopolizes the MPEG-2 Patent Portfolio Market.**

19 23. MPEG LA packages patents, some of which are essential to meet
20 standards and other technology platforms used in consumer electronics, as well as
21 chemical, eCommerce, education, energy, environment, healthcare and biotechnology,
22 manufacturing and materials, transportation and wireless technology. MPEG LA’s
23 patent portfolios include the family of MPEG standards used for coding audio and
24 video in a compressed digital format. These standards include MPEG-2, MPEG-4
25 Visual and AVC. Through its patent portfolios, MPEG LA wields significant power
26 over the digital technology industry.

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1 **Standard Setting**

2 24. In 1988, the International Organization for Standardization established
3 the Moving Pictures Experts Group (MPEG) to create standards for audio and video
4 compression.

5 25. In the 1990s, the MPEG-2 standard, which is required for digital
6 television applications, DVDs and DVD players, among other technologies, faced a
7 patent thicket. In other words, software and hardware manufacturers required to meet
8 the MPEG-2 standard to distribute and sell their products could not do so without
9 potentially infringing upon approximately 27 patents. Therefore, the single biggest
10 challenge to MPEG-2 standard adoption was access to these essential patents.

11 26. The many essential patents owned by many parties made it virtually
12 impossible for most users to negotiate the number of licenses necessary to meet the
13 standard. MPEG LA took advantage of the situation and created the first modern-day
14 patent pool. MPEG-2 became the most successful standard in software and consumer
15 electronics history, allowing MPEG LA, which stands for MPEG Licensing Authority,
16 to collect billions of dollars in royalties.

17 27. As MPEG LA’s Chief Operating Officer, Maria O’Reilly, stated in
18 Counterclaims against the company—after MPEG LA sued both her and its Manager
19 and Chief Executive Officer, Baryn Futa, for corporate waste in 2006, MPEG LA has
20 “collect[ed] billions” of dollars in royalties. In fact, MPEG LA has wielded its
21 monopoly power with such success that it “typically awarded vehicles as bonuses to
22 Company executives.” Ms. O’Reilly got a “Porsche automobile” and “Dean
23 Skandalis [Manager of Licensing] likewise received a Mercedes Benz sports car.”

24 **The 1997 U.S. Department of Justice’s Business Review Letter**

25 28. On June 26, 1997, the U. S. Department of Justice (“DOJ”) issued a
26 Business Review Letter addressing its concerns regarding MPEG LA’s MPEG-2
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1 patent pool, tentatively stating that it did not intend to investigate the MPEG-2 patent
2 pool. The DOJ made this determination under certain conditions.

3 29. At that time the patent pool accounted for only “27 Essential Patents,
4 which [were] most, but not all, of the Essential Patents.” The DOJ made its decision
5 on the basis that MPEG LA “would grant licenses under the Portfolio on a
6 nondiscriminatory basis” It also emphasized the importance of an independent
7 patent expert tasked with determining the essentiality of the patents, noting that “[t]he
8 Portfolio combines patents that an independent expert has determined to be essential
9 to compliance with the MPEG-2 standard; there is no technical alternative to any of
10 the Portfolio patents within the standard.”

11 30. The DOJ made its decision based on the nondiscriminatory licensing and
12 an independent expert with several reservations. It noted that “some patent pools can
13 restrict competition, whether among intellectual property rights within the pool or
14 downstream products incorporating the pooled patents” And it pointed out the
15 potential anticompetitive effects that would stem from “aggregat[ing] competitive
16 technologies and set[ting] a single price.” “Such possible concerns might include the
17 likelihood that the Licensors could use the Portfolio license as a vehicle to
18 disadvantage competitors in downstream product markets”

19 31. Likewise, in 1998, the DOJ issued a Business Review Letter addressing
20 its concerns regarding a DVD patent pool. The DOJ concluded that it did not at the
21 time intend to launch an investigation, however, it expressed significant reservations.

22 32. In its letter, the DOJ noted the potential competitive hazards of such a
23 patent pool. Again, a primary concern for the DOJ was that the patent expert engaged
24 to determine whether a particular patent is essential to the standard make the
25 evaluation “scrupulously and independently.” It noted that “the structure of this pool,
26 however, creates some concern about the expert’s ability to apply this criterion
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1 entirely independent of the Licensors.” The DOJ concluded that “the patent-expert
2 mechanism is flawed.”

3 33. But the DOJ, once again, decided to take a “wait and see approach” with
4 regard to the independence of the patent expert and asserted that if the licensors’
5 “assurances prove insufficient either to ensure the expert’s ability to function
6 independently and objectively or to ensure that the pool will contain only essential
7 patents, the Department’s enforcement intentions as to the proposed arrangement
8 might be very different.”

9 34. At the time the DOJ issued its Letter, it trusted MPEG LA to administer
10 the MPEG-2 license in a fair, reasonable, and nondiscriminatory manner and to
11 engage an independent expert to assess the essentiality of patents included in the pool.
12 MPEG LA, however, has not fulfilled its promises to the DOJ.

13 **C. MPEG LA Abuses Its Monopoly Power In The MPEG-2 Standard**
14 **Licensing Market And Fails To Manage And Administer The Patent Pool**
15 **In A Fair, Reasonable, And Nondiscriminatory Manner.**

16 35. The digital technology industry has changed drastically since the
17 issuance of the DOJ’s letter in 1997. MPEG LA has improperly used and extended its
18 monopoly power to capitalize on the growth of digital technology and monopolize the
19 use of advancements in digital technology. MPEG LA has since cornered the market
20 for subsequent audio and video standards, including the MPEG-4 Visual and AVC
21 standards.

22 36. On information and belief, MPEG LA has failed to abide by the required
23 standards of independence and nondiscrimination in the management and
24 administration of MPEG-2 and the subsequent MPEG-4 Visual and AVC standards.

25 37. For example, MPEG LA has engaged a patent expert, Kenneth
26 Rubenstein, who does not meet the DOJ’s requirement of independence. On
27 information and belief, Mr. Rubenstein does not operate as an independent expert, but
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1 instead has been intimately involved in the creation of MPEG LA and the
2 maintenance of its monopoly position, interacting with MPEG LA on a day-to-day
3 basis since 1997. Mr. Rubenstein has been referred to as MPEG LA’s lead attorney
4 and its licensing attorney, and has represented MPEG LA—as well as some of the
5 patent holders in its pools—in various business matters and disputes outside of duties
6 related to those of an independent patent evaluator. MPEG-LA’s success and that of
7 Mr. Rubenstein are intertwined, and have been from the conception of MPEG LA.

8 38. MPEG LA has used Mr. Rubenstein to evaluate whether patents are
9 essential for the MPEG-4 Visual and AVC standards as well. Indeed, MPEG LA has
10 engaged Mr. Rubenstein as an “independent” expert for over 10 years.

11 39. On information and belief, MPEG LA has engaged its patent expert to
12 assess essentiality with the goals of maintaining and abusing its monopoly power. In
13 so doing, it has included nonessential patents to artificially extend the life of the patent
14 pool as important patents expire. Because many of the seminal patents in the original
15 MPEG-2, MPEG-4 Visual and AVC patent pool have expired or are going to expire,
16 continually and aggressively adding new patents artificially extends the life of the
17 patent pool. Through this anticompetitive behavior MPEG LA has abused its
18 monopoly power and harmed competition.

19 40. Under MPEG LA’s control, the number of patents deemed essential to
20 the MPEG-2 standard by MPEG LA’s non-independent patent expert has jumped
21 dramatically from 27, at the time of the DOJ’s determination, to more than 800.
22 Given the number of patents in each pool, it is commercially impossible for licensees
23 to examine the essentiality of each patent in each licensed pool.

24 41. Therefore, under MPEG LA’s reign, the opportunity for a potential
25 licensee to enter into the voluminous number of individual licenses needed to meet the
26 standard has gone from impractical at best to effectively impossible. Accordingly, as
27 MPEG LA admits, the MPEG LA licensees “account[] for most MPEG-2 products in
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1 the current world market, including set-top boxes, DVD players, digital televisions
2 sets, personal computers and DVD video discs.”

3 42. But MPEG LA has not stopped there. MPEG LA has also engaged in
4 deceptive, discriminatory, and abusive conduct in an illegal attempt to maintain and
5 expand its monopoly so as to charge supracompetitive royalties and collect even more
6 monopoly profits. It has done so by harming competition and consumers.

7 43. The static nature of the royalties charged by MPEG LA is evidence of
8 abuse of monopoly power to maintain supracompetitive pricing. Since the 1990s,
9 there have been continual and dramatic advances in technology. As a result of such
10 progress, technologies continue to decrease in price. The royalty rates MPEG LA
11 charges for MPEG-2, MPEG-4 Visual and AVC, in contrast, have remained relatively
12 constant. MPEG LA, as a monopolist has maintained supracompetitive royalty rates,
13 without reducing the royalties charged to reflect the declining value of technology or
14 the expiration of seminal patents.

15 44. MPEG LA is a private company and there is no transparency regarding
16 the evaluation of patents that may or may not be essential to the standards, or MPEG
17 LA’s management and administration of its patent pools, including MPEG-2, MPEG-
18 4 Visual and AVC.

19 45. The administration of these important patent pools by a single private
20 company has led to substantial monopoly abuses. Simply put, MPEG LA has been
21 allowed to wield its power over an entire industry under a veil of secrecy. Such
22 unchecked power has enabled MPEG LA to enjoy enormous profits and coerce
23 supracompetitive royalties.

24 46. The unchecked power has permeated MPEG LA’s business structure and
25 practices. MPEG LA, after providing its managers with exorbitant bonuses and lavish
26 perks, such as Porches and Mercedes Benzes, sued its founder, Mr. Futa, for corporate
27 waste. Notably, the DOJ in 1997 left “the day-to-day conduct of MPEG LA’s
28

1 business, including its licensing activities, under the sole control of [Baryn] Futa and
2 his staff.”

3 **D. MPEG LA Monopolizes The MPEG-4 Visual And AVC Standards**
4 **Licensing Markets.**

5 **The MPEG-4 Visual License**

6 47. MPEG LA’s MPEG-4 Visual License provides access to patents
7 necessary to comply with the MPEG-4 Visual standard used in media player and other
8 personal computer software, mobile devices including telephones, DVD players and
9 recorder accessories such as DivX®, game machines, personal media player devices,
10 security and surveillance systems equipment, still and video cameras, subscription and
11 pay-per view or title video mobile and internet services and other products.

12 48. The MPEG-4 Visual license incorporates over 930 patents owned by 31
13 different patent holders.

14 49. The MPEG-4 Visual License enables signatories to manufacture and sell
15 software incorporating the MPEG-4 Visual standard.

16 **The AVC License**

17 50. MPEG LA’s AVC License provides access to patents necessary to
18 comply with the AVC standard used in set-top boxes, media player and other personal
19 computer software, mobile devices including telephones and mobile television
20 receivers, Blu-ray Disc™ players and recorders, Blu-ray video optical discs, game
21 machines, personal media player devices, still and video cameras, subscription and
22 pay-per view or title video services, free broadcast television services, and other
23 products.

24 51. The AVC License incorporates over 1,020 patents owned by 26 different
25 licensors.

26 52. The AVC License enables signatories to manufacture and sell software
27 incorporating the AVC/H.264 digital video standard.

E. MPEG LA Abuses Its Monopoly Power In The MPEG-4 Visual And AVC Markets

Free Trials Are Commonly Treated As Sales And Returns In The Industry

53. Free trials are essential to the digital and computer technology industry. Companies creating high tech products in a constantly changing industry use free trial to enable customers to discover and try out new products and technologies.

54. For example, a consumer is able to download a new software product for free and try it out for a limited period of time (typically, fifteen or thirty days) before deciding to purchase it. When the trial period expires, the consumer can choose to upgrade to the full version of the product or let the subscription expire.

55. Free trials are important to competition and innovation in the software industry. The ability to offer free trials enables competitors with superior quality products to demonstrate the benefits of their product to consumers. This fosters competition based on product quality rather than other factors, such as marketing dollars and name recognition (which favor the biggest companies and disadvantage new entries to the market). In this way, free trials also encourage innovation, furthering competitors' efforts to continually create added value to the consumer.

56. The concept of a sale and return, and/or the payment of royalties for net sales is well known in many industries, including this one. Further, it is common practice in the industry that free trials are not sales upon which royalties are due. This practice is in line with the treatment of free trials in a competitive market. The overwhelming majority of free trials do not result in an upgrade. Free trials that do not result in an upgrade do not provide any revenue to the distributor and thus if the distributor was required to pay a royalty for each free trial as if it were an actual sale, free trials would be eliminated because of the large negative return to the distributor.

57. As MPEG LA is well aware, free trials are a standard practice in the digital and computer technology industry. Indeed, because free trials are a well

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1 known practice in the industry, they are addressed in some manner by most patent
2 licensors.

3 **MPEG LA Confirms That Free Trials Are A Sale And A Return**

4 58. MPEG LA began offering the MPEG-2 License in 1997.

5 59. In 2001, Nero decided to support the MPEG-2 standard and entered into
6 MPEG LA's MPEG-2 License.

7 60. Nero was an early adopter of MPEG LA's MPEG-2 Patent Portfolio,
8 which now has over 1,500 licensees.

9 61. As with most of the industry, free trials were an essential part of Nero's
10 business model and thus Nero intended to use free trials for its marketing and sales of
11 software incorporating the MPEG-2 standard.

12 62. Although free trials are essential to exposing consumers to the benefits of
13 a new software, an individual free trial has zero market value due to the extremely
14 small percentage of free trials that actually result in upgrades. Therefore, Nero would
15 only continue to use free trials if it was not required to pay a royalty for each free trial
16 distributed.

17 63. As a result of MPEG LA's failure to address free trials in its license
18 agreement, before signing the MPEG-2 License, Nero inquired with MPEG LA
19 whether royalty payments would be required for free trials. Because Nero intended to
20 use free trials an integral part of its business plan, the answer to this question was
21 crucial to Nero.

22 64. In response to Nero's inquiry regarding free trials, MPEG LA responded
23 that it would treat a free trial as a sale and then a return. MPEG LA's treatment of
24 free trials as sales and subsequent returns was described in a July 2001 email from
25 Dean Skandalis, MPEG LA's Manager of Licensing, to Richard Lesser, Nero's
26 founder. In the email, MPEG LA confirmed: "we assume that a licensee will account
27 for that as a 'return' by paying a royalty on every product sent out and taking a credit
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1 for those returned.” Therefore, as long as the free trial was deactivated after the
2 fifteen or thirty day period, MPEG LA would not require a royalty payment.

3 65. The MPEG-2 License states:

4 “1.30 Sale (Sold) - shall mean any sale, rental, lease, license or
5 other form of distribution of an MPEG-2 Royalty Product to an
6 end user, either directly or through a chain of distribution.”
7 (Ex. 1, ¶ 1.30.)

8 66. Therefore, according to MPEG LA’s interpretation of a “sale”, as
9 clarified by its correspondence with Nero, a transaction is categorized as a “sale” for
10 purposes of actually collecting a royalty payment only when the sale is *not* followed
11 by a return. Because MPEG LA considered a free trial a sale and a return, free trials
12 did not require a royalty payment.

13 67. In other words, MPEG LA confirmed that a free trial—treated as a sale
14 and a return—would not be treated as a sale under the MPEG LA license.

15 68. With express approval and knowledge of MPEG LA, Nero used free
16 trials—each treated as a sale and return—as an essential part of its business model.

17 **The Relevant Portions Of MPEG-4 Visual And AVC Licenses Are Virtually
18 Identical To The MPEG-2 License**

19 69. MPEG LA knew of, and by its silence condoned, Nero’s use of free
20 trials.

21 70. This treatment of free trials necessarily stemmed from MPEG LA’s
22 interpretation of a “sale,” such that a sale with a subsequent return would not require a
23 royalty payment. Indeed, under both the MPEG-4 Visual and AVC Licenses, MPEG
24 LA does *not* charge a royalty for a sale and a return.

25 71. Individual licensees, such as Nero, have absolutely no power to negotiate
26 the terms of any MPEG LA license. Nor do the licensees have any input regarding the
27 license’s terms or definitions therein. Instead, as the sole licensor of the patent
28

1 portfolios, MPEG LA requires that “[a]ll Licensees sign the same License” and
2 provides the license for signature on a “take it or leave it basis.”

3 72. MPEG LA was aware that there was more than one clear understanding
4 amongst licensees regarding free trials and returns under MPEG LA’s licenses
5 agreements.

6 73. Because the licenses are presented to licensees on “take it or leave it”
7 terms, MPEG LA, as the monopoly holder, was solely and uniquely able to clarify the
8 definition of “sale” and the treatment of sales and returns or free trails under its
9 licenses. Nonetheless, MPEG LA knowingly and/or intentionally continued its refusal
10 to address the issue of free trials or returns in the MPEG-4 Visual and AVC Licenses.

11 74. Instead, the definition of a “sale” in the MPEG-4 Visual and AVC
12 Licenses is virtually identical to that in the MPEG-2 License.

13
14 a. MPEG-2:

15 “**1.30 Sale (Sold)** - shall mean any sale, rental, lease, license or
16 other form of distribution of an MPEG-2 Royalty Product to an
17 end user, either directly or through a chain of distribution.”
(Ex. 1, ¶ 1.30.)

18
19 b. MPEG-4 Visual:

20 “**1.39 Sale (Sell) (Sold)** - shall mean any sale, rental,
21 lease, license, copying, reproduction, Transmission, or
22 other form of distribution of an MPEG-4 Visual Royalty
23 Product or the Transmission of MPEG-4 Video for use in
24 connection with an MPEG-4 Visual Royalty Product.”
(Compl. Ex. A, ¶ 1.39.)

25
26 c. AVC:

27 “**1.39 Sale (Sell) (Sold) (Seller)** - shall mean any sale,
28 rental, lease, license, copying, transfer, reproduction,
Transmission, or other form of distribution of an AVC

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1 Product or the transmission by any means of AVC video
2 either directly or through a chain of distribution.”
3 (Compl. Ex. B, ¶ 1.39.)

4 75. Therefore, presumably the treatment of a return subsequent to a sale
5 would have the same effect under the MPEG-4 Visual and AVC Licenses.

6 76. On or about April 21, 2003, Nero and MPEG LA entered into the MPEG-
7 4 Visual License. The MPEG-4 Visual License was effective as of January 1, 2000.

8 77. On or about December 23, 2004, MPEG LA and Nero entered into the
9 AVC License. The AVC License was effective as of August 1, 2002.

10 78. Again in 2007, MPEG LA confirmed its treatment of free trials as a sale
11 and a return as it had in 2001. In February 2007, Dean Skandalis, MPEG LA’s
12 Manager of Licensing, approved a letter to Lite-On IT Corp., a Nero customer,
13 emphasizing that free trials of MPEG-2 products would be treated as sales and returns.

14 79. Throughout this six-year period from 2001 to 2007, verbally and in
15 writing, confirmed its treatment of free trials. During this period, MPEG LA
16 undoubtedly knew that Nero was distributing large numbers of trials with the
17 understanding that it would be responsible for royalty payments only on those
18 distributions that resulted in purchased upgrades.

19 **F. In 2008, MPEG LA Changes Its Position On Free Trials, And Demands**
20 **Unjustified Additional Royalties Exceeding \$15 Million.**

21 80. Suddenly, in or around February 2008, MPEG LA informed Nero that it
22 intended to treat free trials of MPEG-4 Visual and AVC products as a sale without a
23 return.

24 81. After learning that MPEG LA now intended to treat free trials as a sale
25 rather than a sale and a return, Nero promptly stopped the use of MPEG-4 Visual and
26 AVC free trials as soon as was commercially possible.

1 82. On information and belief, MPEG LA purposefully concealed
 2 information regarding the treatment of free trials for the updated MPEG-4 Visual and
 3 AVC standards for a windfall of millions of dollars in royalties later. Such conduct
 4 clearly runs afoul of MPEG LA's promise—and the DOJ's reliance on the promise—
 5 to license its portfolios in a fair, reasonable and nondiscriminatory manner.

6 **In 2007, MPEG LA Engages A Non-Independent Auditor To Audit Nero's**
 7 **Books Regarding MPEG-2, MPEG-4 Visual And AVC**

8 83. In October 2007, MPEG LA conducted an audit of Nero. The audit
 9 included an evaluation of royalties paid to MPEG LA as a result of MPEG-2, MPEG-
 10 4 Visual and AVC related sales.

11 84. Under the MPEG-2, MPEG-4 Visual and AVC Licenses, MPEG LA was
 12 required to engage "an *independent* certified public accountant(s) or equivalent
 13 ('Auditor')" "acceptable to Licensee." (Compl. Ex. A, ¶ 3.12.2.1; Compl. Ex. B, ¶
 14 3.12.2.1; Ex. 1, ¶ 3.10.2.1 (emphasis added).)

15 85. But the auditor engaged was not independent. Instead, on information
 16 and belief, MPEG LA wrongfully engaged a biased auditor to assist it in its scheme to
 17 extort additional royalties from Nero.

18 86. On January 6, 2009, MPEG LA sent one invoice to Nero for the results of
 19 the audit report covering MPEG-2, MPEG-4 Visual, and AVC.

20 87. MPEG LA, however, despite requests from Nero, has not provided Nero
 21 with a copy of the audit so that Nero could understand how the results were
 22 calculated.

23 **The MPEG-2 Audit Revealed An Overpayment Of \$1,521,886 And Confirmed That**
 24 **Free Trials Are Royalty Free**

25 88. In performing the audit for MPEG-2, KMPG assumed that each free trial
 26 was to be treated as a sale and a return and thus did not require a royalty payment.
 27 Therefore, through the audit, MPEG LA confirmed once again that the definition of a
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1 “sale” does not encompass sales and returns and thus free trials do not require a
2 royalty payment.

3 89. According to the audit invoice MPEG LA sent to Nero, the results of the
4 audit showed that Nero had overpaid MPEG LA for royalties based on MPEG-2
5 usage. MPEG LA was overpaid by \$1,521,886.

6 90. Nero, however, has no way to confirm the audit results because MPEG
7 LA refuses to provide Nero with a copy of the audit report unless Nero first
8 indemnifies KPMG from damages suffered as a result of any use of the report, which
9 requirement is unreasonable. Therefore, MPEG LA may owe Nero more than the
10 \$1,521,886 it has admitted for overpayments on MPEG-2.

11 91. Further, MPEG LA has refused to reimburse Nero for this overpayment.

12 **The Non-Independent Auditor Interpreted Identical Contract Language Differently**
13 **To Determine That Nero Owed Royalties For Free Trials Of MPEG-4 Visual And**
14 **AVC Products.**

15 92. When MPEG LA ordered an audit of MPEG-2 sales, it also had Nero’s
16 MPEG-4 Visual and AVC records audited as part of the same audit. The same
17 auditor, KMPG, was used for all three audits.

18 93. KPMG audited Nero’s books and records for the period of July 1, 2004,
19 through June 30, 2007, with respect to the MPEG-4 Visual License and January 1,
20 2005, through June 30, 2007, with respect to the AVC License.

21 94. KPMG was not independent. Instead, KMPG was partial to MPEG LA.
22 Further, on information and belief, MPEG LA acted in bad faith in intentionally
23 pressuring KPMG to interpret issues and make findings contrary to reason and in
24 accordance with MPEG LA’s untenable position.

25 95. For example, MPEG LA told KMPG to interpret the identical language
26 defining a “sale” in the MPEG-2, MPEG-4 and AVC Licenses differently, to Nero’s
27 detriment and to MPEG LA’s benefit.

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1 96. KPMG treated a sale and a return for each of the three licenses as
2 royalty-free. At the same time, it counted free trials as not requiring a royalty under
3 the MPEG-2 License, but as requiring a royalty under the MPEG-4 Visual and AVC
4 Licenses. A "sale" is defined in the same way in each License and free trials are not
5 mentioned in any of them. Therefore, such inexplicable treatment is not warranted by
6 the Licenses, and was impressed upon KMPG by MPEG LA to ensure that the audit
7 would result in windfall profits for MPEG LA.

8 97. When Nero objected to and requested an explanation for the illogical
9 treatment of identical contract language, KMPG, on two occasions, promised Nero a
10 response. KMPG, however, did not keep its promise to reply to Nero's objections and
11 instead ignored them and finalized the report based on MPEG LA's disingenuous
12 interpretations.

13 98. As a result of the non-independent interpretation of the MPEG 4 Visual
14 License, and improper pressure that MPEG LA applied to KPMG, the audit
15 purportedly found that Nero underpaid royalties for the MPEG-4 Visual and AVC
16 Licenses by \$12,115,829. This alleged underpayment was primarily a result of MPEG
17 LA's assertion that Nero should have to pay royalties for free trials.

18 99. Moreover, MPEG LA demands that Nero pay KPMG's bill for the
19 MPEG-4 Visual and AVC audits, but has refused to provide Nero with a copy of the
20 audit report.

21
22 **FIRST CLAIM FOR RELIEF**

23 **(Abuse of Monopoly Power in Violation of Section 2 of the Sherman Act by Nero**
24 **against All Counterdefendants)**

25 100. Nero repeats and realleges the allegations of paragraphs 1 through 99
26 above, as if fully restated herein.

1 101. MPEG LA possesses monopoly power in the relevant markets, which are
2 the worldwide markets for the licensing of the MPEG-2, MPEG-4 Visual, and AVC
3 standards.

4 102. On information and belief, MPEG LA has abused and willfully
5 maintained its monopoly power in the relevant markets, in violation of Section 2 of
6 the Sherman Act, 15 U.S.C. § 2, by engaging in the anticompetitive conduct alleged
7 herein, including:

- 8 a. failing to engage an independent patent expert to evaluate the
9 essentially of patents included in its MPEG-2, MPEG-4 Visual, and
10 AVC patent portfolios;
- 11 b. using a non-independent expert intimately intertwined with MPEG-
12 LA to include nonessential patents in its portfolios for the purpose
13 of artificially extending the life of its patent portfolios;
- 14 c. maintaining supracompetitive royalty rates for its MPEG-2,
15 MPEG-4 Visual and AVC patent portfolios;
- 16 d. discriminating among competitors selling the same products in the
17 same place in the distribution chain—treating licensees that
18 compete directly with each other differently;
- 19 e. unfairly, unreasonably and discriminately providing disparate
20 information to Nero and its competitors, and intentionally
21 withholding information from Nero and other licensees, regarding
22 important practices and License terms;
- 23 f. formulating, discriminately disseminating, and unilaterally
24 changing secret rules;
- 25 g. unreasonably and unfairly dictating without exception all contract
26 terms;

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- 1 h. intentionally making the validity of free trials under its licenses
- 2 unclear, treating the practice differently under various license
- 3 agreements despite virtually identical contract language, and
- 4 creating an ambiguity as to the definition of the term "sale" under
- 5 the MPEG-4 Visual and AVC Licenses to its benefit and to the
- 6 detriment of competition and innovation in the relevant markets;
- 7 i. intentionally concealing its intent to charge for free trials and then,
- 8 after the fact, demanding millions of dollars in supracompetitive
- 9 royalties from Nero, and other licensees;
- 10 j. manipulating competition in the markets by giving Nero and other
- 11 licensees different information regarding free trials and enforcing
- 12 such interpretations inequitably, enabling some competitors to
- 13 continue to use free trials without paying royalties for them;
- 14 k. fostering the confusion to its benefit instead of attempting to clarify
- 15 its position to Nero or any other licensee when it knew that free
- 16 trials were a standard practice in the industry and that there was
- 17 more than one clear understanding amongst its licensees regarding
- 18 the treatment of free trials under MPEG LA's licenses and when
- 19 the power to clarify any ambiguity rested solely with MPEG LA.
- 20 l. engaging a non-independent auditor to gain a windfall in
- 21 supracompetitive royalties;

22 103. . The acts alleged herein have had a not insubstantial effect on interstate
 23 commerce in that such conduct has and will restrain and adversely effect interstate
 24 commerce by, among other things, impeding competition throughout the United States
 25 in the markets for licensing of the MPEG-2, MPEG-4 Visual and AVC standards.

26 104. Patents give their owners the right to exclude others from making, using,
 27 offering for sale, selling, or importing the invention in the absence of a license.

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1 Where, as here, technology standards consist of many patents owned by many patent
2 owners, the number of licenses required of users is too costly, inefficient, and likely
3 impossible for users to negotiate.

4 105. MPEG LA is effectively the sole licensor of the MPEG-2, MPEG-4
5 Visual, and AVC patent portfolios. Therefore, MPEG LA has enjoyed and continues
6 to enjoy a near 100% market share in the relevant markets. Because of the practical
7 impossibility of acquiring individual licenses for each patent from each licensor, there
8 are effectively no substitutes for MPEG LA's patent portfolios.

9 106. Access to the essential patents for the MPEG-2, MPEG-4 Visual, and
10 AVC standards is necessary for entry into the respective licensing markets. The
11 numerous significant, and in practicality, insurmountable barriers prevent entry into
12 the MPEG-2, MPEG-4 Visual and AVC standard licensing markets. These barriers to
13 entry in conjunction with MPEG LA's monopoly position allow MPEG LA to wield
14 unchecked power in the relevant markets.

15 107. Access to the patents in MPEG LA's patent portfolios are crucial to the
16 digital technology industry for the development and manufacture of its software and
17 hardware, including digital television, DVD players, DVDs, Blu-Ray, as well as
18 media players on computers and other personal devices.

19 108. The abusive and discriminatory conduct alleged herein is a misuse of
20 MPEG LA's monopoly position as the sole administrator of the MPEG patent pools.

21 109. MPEG LA's abusive conduct has had and/or is likely to have the
22 following anticompetitive consequences in the relevant markets:

- 23 a. an improper extension of MPEG LA's monopoly both temporally
24 and with regard to the number of patents in its pools;
- 25 b. supracompetitive royalty rates, which have remained stagnant
26 despite the dramatic advances in technology—and reduction in the
27 cost of the technology—over the past decade;

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- 1 c. actual or potential competitors are forced to submit to licensing
- 2 conditions that are subject to change at the will of MPEG LA, that
- 3 do not reflect market conditions, stifling competition and
- 4 innovation;
- 5 d. discriminated-against competitors are punished and are less able to
- 6 compete in the relevant markets;
- 7 e. a substantial decrease in or effective elimination of free trials for
- 8 technologies and software incorporating the MPEG-4 Visual or
- 9 AVC standards. And it has done so on a discriminatory basis, to
- 10 the detriment of Nero. Not only has this conduct injured Nero, it
- 11 also harms competition and innovation in the software industry.

12 110. The injury to Nero is of the type that the antitrust laws were designed to
13 prevent and flows from that which makes MPEG LA's actions unlawful. As a result
14 of MPEG LA's anticompetitive conduct, Nero has been and is being harmed in its
15 business or property.

16 111. Therefore, MPEG LA's unlawful actions have caused Nero irreparable
17 harm for which it has no adequate remedy at law.

18 112. In sum, MPEG LA's predatory and abusive conduct has caused antitrust
19 injury to Nero, competition and consumers.

20 113. Unless enjoined, the natural and proximate result of MPEG LA's conduct
21 will be to leave the monopolist to its abusive practices as the sole provider of MPEG-
22 2, MPEG-4 Visual and AVC Licenses, substantially injuring Nero, innovation,
23 competition, and consumer choice in the relevant markets.

24 **SECOND CLAIM FOR RELIEF**

25 **(Breach of the Covenant of Good Faith and Fair Dealing by Nero against All**
26 **Counterdefendants)**

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1 114. Nero repeats and realleges the allegations of paragraphs 1 through 113
2 above, as if fully restated herein.

3 115. The MPEG-4 Visual License and AVC License contain an implied
4 covenant of good faith and fair dealing that requires the parties to act reasonably and
5 in good faith in fulfilling their respective obligations to one another, and to refrain
6 from undertaking any actions to deprive the other of the benefit of the bargain.

7 116. MPEG LA has breached this covenant by the acts alleged herein, which
8 include but are not limited to, (1) demanding royalty payments for free trials of
9 MPEG-4 Visual and AVC, which MPEG LA represented would be treated as sales
10 and returns; (2) not providing Nero and its competitors with the same information
11 regarding the conditions of its licenses and the meanings of the terms contained
12 therein; and (3) subjecting Nero to a audit of its records that was not independent,
13 improperly influencing the results of that audit and refusing to provide Nero with a
14 copy of the audit.

15 117. As a direct and proximate result of MPEG LA's breach, Nero has been
16 damaged in an amount to be determined at trial.

17 **THIRD CLAIM FOR RELIEF**

18 **(Promissory Estoppel by Nero against All Counterdefendants)**

19 118. Nero repeats and realleges the allegations of paragraphs 1 through 117
20 above, as if fully restated herein.

21 119. From 2001 to 2007, MPEG LA made clear and unambiguous promises to
22 Nero, both orally and in writing, that free trials of products would be treated as sales
23 and returns.

24 120. For example, in a July 2001 email from Dean Skandalis, MPEG LA's
25 Manager of Licensing, to Richard Lesser, Nero's founder, MPEG LA confirmed: "we
26 assume that a licensee will account for that as a 'return' by paying a royalty on every
27 product sent out and taking a credit for those returned."
28

1 121. MPEG LA knew, or reasonably should have known, that its clear and
2 unambiguous promises to Nero would induce substantial action by Nero.

3 122. MPEG LA's promises did in fact induce substantial action by Nero. In
4 reasonable reliance on MPEG LA's promises, Nero, among other things, developed its
5 business model for the next several years substantially around the distribution of free
6 trials of products that require MPEG LA patent portfolio licenses.

7 123. MPEG LA breached the promise set forth above by demanding royalties
8 from Nero for free trials under the MPEG-4 Visual and AVC License contracts.

9 124. As a direct result of reasonably and detrimentally relying on MPEG LA's
10 promises, Nero has suffered unconscionable injury and MPEG LA has been unjustly
11 enriched. Injustice can be avoided only by enforcing MPEG LA's promise
12 completely—namely, by requiring MPEG LA to treat all free trials of products
13 included in the MPEG-4 Visual and AVC Licenses as sales and returns, pursuant to its
14 promises.

15 **FOURTH CLAIM FOR RELIEF**

16 **(Intentional Misrepresentation (Concealment) by Nero against All** 17 **Counterdefendants)**

18 125. Nero repeats and realleges the allegations of paragraphs 1 through 124
19 above, as if fully restated herein.

20 126. From 2001 to 2007, MPEG LA made clear and unambiguous
21 representations to Nero, both orally and in writing, that a free trial of product
22 incorporating technology covered by a patent portfolio license would be treated as a
23 sale and return.

24 127. For example, in a July 2001 email from Dean Skandalis, MPEG LA's
25 Manager of Licensing, to Richard Lesser, Nero's founder, MPEG LA confirmed: "we
26 assume that a licensee will account for that as a 'return' by paying a royalty on every
27 product sent out and taking a credit for those returned."
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1 128. When Nero signed the form MPEG-4 Visual License and AVC License
2 in 2003 and 2004 respectively, MPEG LA knew that Nero believed that free trials of
3 products in MPEG LA's patent portfolio licenses to Nero would be treated as sales
4 and returns. When Nero signed the form MPEG-4 Visual License and AVC License
5 in 2003 and 2004, MPEG LA also knew it intended to demand royalties from Nero for
6 free trials of products from those patent portfolio licenses but concealed its intent from
7 Nero. MPEG LA's concealment of material facts extended into 2007, when Dean
8 Skandalis, acting in his capacity as agent for MPEG LA at all material times,
9 approved a letter to Lite-On IT Corp., a Nero customer, emphasizing that free trials of
10 products under the MPEG-2 License would be treated as sales and returns.

11 129. MPEG LA intended that its concealment of material facts from Nero
12 would induce substantial action by Nero.

13 130. In reasonable reliance on the concealment by MPEG LA of its intention
14 to demand royalties from Nero for free trials of MPEG-4 Visual and AVC products,
15 Nero, among other things, developed its business model for the next several years
16 partially around free trials of products included in the MPEG-4 Visual and AVC
17 Licenses.

18 131. As a direct result of MPEG LA's intentional concealment, Nero has been
19 harmed. MPEG LA's concealment was a substantial factor in causing Nero's harm.

20 132. Further, in committing these acts, MPEG LA acted willfully, and
21 maliciously, intending to wrongfully advantage themselves at Nero's expense and
22 detriment. Therefore, Nero is entitled to an award of punitive and exemplary
23 damages, in an amount to be proven at trial.

24 **FIFTH CLAIM FOR RELIEF**

25 **(Constructive Fraud by Nero against All Counterdefendants)**

26 133. Nero repeats and realleges the allegations of paragraphs 1 through 132
27 above, as if fully restated herein.

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1 134. Due to their ongoing business relationship, Nero reposed trust and
2 confidence in the integrity and fidelity of MPEG LA.

3 135. MPEG LA had a duty to disclose all material facts that it knew or should
4 have known might affect Nero's decisions related to the execution of the MPEG-4
5 Visual and AVC licenses.

6 136. In a July 2001 email from Dean Skandalis, MPEG LA's Manager of
7 Licensing, to Richard Lesser, Nero's founder, MPEG LA confirmed: "we assume that
8 a licensee will account for that as a 'return' by paying a royalty on every product sent
9 out and taking a credit for those returned."

10 137. When Nero signed the form MPEG-4 Visual License and AVC License
11 in 2003 and 2004 respectively, MPEG LA knew that Nero believed that free trials of
12 products in MPEG-LA's patent portfolio licenses to Nero would be treated as a sale
13 and a return. When Nero signed the MPEG-4 Visual License and AVC License in
14 2003 and 2004, MPEG LA also knew it intended to demand royalties from Nero for
15 free trials of products from those patent portfolio licenses but concealed its intent from
16 Nero. MPEG LA's concealment of material facts extended into 2007, when Dean
17 Skandalis, acting in his capacity as an agent for MPEG LA at all material times,
18 approved a letter to Lite-On IT Corp., a Nero customer, emphasizing that free trials of
19 products under the MPEG-2 License would be treated as sales and returns.

20 138. In reasonable reliance on the absence of any representations by MPEG
21 LA that it intended to demand royalties from Nero for free trials of products from
22 MPEG-4 Visual License and AVC License patent portfolios, Nero, among other
23 things, continued to distribute free trials of MPEG-4 Visual and AVC products.

24 139. MPEG LA gained an advantage by then demanding millions of dollars in
25 royalties from Nero's distribution of free trials of MPEG-4 Visual and AVC products.

26 140. As a proximate result thereof, Nero has been and will be damaged in an
27 amount to be proven at trial, but not less than the general jurisdictional requirement.

1 141. Further, in committing these acts, MPEG LA acted willfully, and
2 maliciously, intending to wrongfully advantage themselves at Nero’s expense and
3 detriment. Therefore, Nero is entitled to an award of punitive and exemplary
4 damages, in an amount to be proven at trial.

5 **SIXTH CLAIM FOR RELIEF**

6 **(Violation of California Business & Professions Code § 17200 et seq. by Nero**
7 **against All Counterdefendants)**

8 142. Nero repeats and realleges the allegations of paragraphs 1 through 141
9 above, as if fully restated herein.

10 143. California Business & Professions Code § 17200 et seq. broadly covers
11 acts that are unlawful, unfair or fraudulent. The code is intended to protect both
12 competitors and consumers.

13 144. The conduct of MPEG LA as detailed herein, constitutes unlawful
14 business practices within the meaning of Section 17200.

15 145. As alleged herein, the actions of MPEG LA also constitute unfair and
16 fraudulent business practices under Section 17200. Such practices may be considered
17 unfair or fraudulent even if they are not specifically proscribed by law.

18 146. The effect of the aforementioned conduct includes but is not limited to
19 extracting supracompetitive royalties for MPEG-2, MPEG-4 Visual, and AVC
20 products; increasing Nero’s costs in competing in the market for MPEG-4 Visual and
21 AVC products; forcing Nero to expend effort and capital in the defense of this action;
22 and otherwise restraining trade and injure competition in the market for MPEG-4
23 Visual and AVC products.

24 147. In addition, because of such unlawful conduct, Nero was, is, and will be
25 in the future, deprived of profits and the benefits of current and future business/client
26 relationships, agreements, and transactions.

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1 148. As a direct and proximate result of MPEG LA’s unlawful, unfair, and
2 fraudulent acts, Nero has suffered and will continue to suffer damages as well as
3 irreparable injury to its business reputation and goodwill.

4 149. There is no adequate remedy at law to compensate Nero, and thus Nero is
5 entitled to preliminary and permanent injunctive relief.

6 150. Nero is informed and believes, and thereon alleges, that MPEG LA will
7 continue to engage in that conduct unless the Court orders MPEG LA to cease and
8 desist.

9 151. Further, in committing these acts, MPEG LA acted willfully, and
10 maliciously, intending to wrongfully advantage themselves at Nero’s expense and
11 detriment. Therefore, Nero is entitled to an award of punitive and exemplary
12 damages, in an amount to be proven at trial.

13 **SEVENTH CLAIM FOR RELIEF**

14 **(Unjust Enrichment by Nero against All Counterdefendants)**

15 152. Nero repeats and realleges the allegations of paragraphs 1 through 151
16 above, as if fully restated herein.

17 153. MPEG LA has also received overpayment for Nero’s sales of MPEG in
18 the amount of at least \$1,521,886.

19 154. In its Complaint against Nero, MPEG LA alleges that Nero owes
20 underpaid royalties for free trials of MPEG-4 Visual and AVC products. The amount
21 of this alleged underpayment, including royalties on MPEG-4 Visual and AVC
22 products and accrued interest, is in excess of \$15,085,846. For the reasons alleged
23 here, Nero does not in fact owe MPEG LA royalties for free trials.

24 155. As a result, MPEG LA has and will be unjustly enriched and have and
25 will benefit at the direct expense of Nero in an amount of at least \$16,607,732.

26 156. MPEG LA should be required to disgorge this unjust enrichment.

27 **EIGHTH CLAIM FOR RELIEF**

1 (For Declaratory Relief re Interpretation of the MPEG-4 Visual and AVC
2 Licenses by Nero against All Counterdefendants)

3 157. Nero repeats and realleges the allegations of paragraphs 1 through 156
4 above, as if fully restated herein.

5 158. An actual controversy has arisen and now exists between Nero and
6 MPEG LA concerning the treatment of free trials under the MPEG-4 Visual and AVC
7 Licenses.

8 159. A declaration is necessary and appropriate at this time in order that Nero
9 may ascertain its rights with respect to the MPEG-4 Visual and AVC Licenses.
10 Without the requested declaration of its rights, MPEG LA will continue to jeopardize
11 Nero's interests.

12 160. MPEG LA misrepresented its intention regarding the treatment of free
13 trials as sales and returns.

14 161. MPEG LA also fraudulently and intentionally concealed information
15 regarding the treatment of free trials under the MPEG-4 Visual and AVC Licenses,
16 leading Nero to reasonably believe that a free trial would be treated as a sale and a
17 return.

18 162. MPEG LA acted willfully and in bad faith in order to extract millions of
19 dollars in additional royalties from Nero.

20 163. Nero is therefore entitled to a declaration from the Court that pursuant to
21 MPEG LA's representations, and the parties well-established course of dealing, free
22 trials of MPEG-4 Visual and AVC products will be treated as sales and returns and
23 that therefore Nero is not in breach of those agreements.

24 **NINTH CLAIM FOR RELIEF**

25 (For Declaratory Relief re Patent Misuse by Nero against All
26 Counterdefendants)
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1 164. Nero repeats and realleges the allegations of paragraphs 1 through 163
2 above, as if fully restated herein.

3 165. MPEG LA misused the patent pools by fraudulently and intentionally
4 concealing information regarding the treatment of free trials under the MPEG-4
5 Visual and AVC Licenses.

6 166. Further, MPEG LA’s abusive conduct with regard to its administration of
7 the MPEG-4 Visual and AVC patent pools is unlawful monopolization in violation of
8 section two of the Sherman Act.

9 167. In contravention to the MPEG-4 Visual and AVC Licenses, which
10 require an independent audit of Nero’s records, MPEG LA engaged KPMG, which
11 performed a biased audit under the coercive influence of MPEG LA. MPEG LA then
12 filed its lawsuit against Nero in bad faith to recoup an alleged underpayment of
13 royalties identified by a non-independent KPMG.

14 168. The actions of MPEG LA thus described constitute patent misuse and
15 render the licensing agreements that are the subject of MPEG LA’s suit, and/or the
16 underlying patents, unenforceable.

17 169. Consequently, Nero is entitled to a declaration from the Court that the
18 MPEG-4 Visual and AVC Licenses, and/or the underlying patents that are part of
19 those licensing agreements, are unenforceable until MPEG LA’s misuse is
20 discontinued.

21 **TENTH CLAIM FOR RELIEF**

22 **(For Reformation of the MPEG-4 Visual and AVC Licenses by Nero against All**
23 **Counterdefendants)**

24 170. Nero repeats and realleges the allegations of paragraphs 1 through 169
25 above, as if fully restated herein.

26 171. Between 2001 and 2007, MPEG LA represented to Nero that a free trial
27 was treated as a sale and a return and thus not treated as a “sale” which would require
28

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1 a royalty payment to MPEG LA. This representation was an interpretation of the
2 terms of an existing agreement between the parties.

3 172. In or around, April 2003 and December 2004, respectively, the parties
4 enter into similar agreements for the MPEG-4 Visual and AVC Licenses, which both
5 included a virtually identical definition of a “sale” with no mention of returns or free
6 trials. Thus, the oral agreement regarding the definition of “sale” understood by the
7 parties to exclude royalties for sale followed by a return—*i.e.*, a free trial—was again
8 reduced to writing in the MPEG-4 Visual and AVC Licenses.

9 173. MPEG LA now asserts that a free trial is not to be treated as a sale and a
10 return and thus incurs a royalty payment.

11 174. To the extent that the Licenses fail to reflect the true intent of the parties
12 at the time they were executed, such failure results from MPEG LA’s false
13 representations to Nero that the above-mentioned written instrument embodied their
14 real agreement and/or Nero’s intentional concealment of any change in the
15 interpretation of the established meaning of the terms.

16 175. Without the knowledge of the true facts and in reliance on MPEG LA’s
17 false representations, Nero was deceived and misled into signing a writing that
18 differed materially from the prior oral understanding of the parties. Nero’s reliance on
19 defendant’s false representations that the Licenses conformed to the parties’ intended
20 agreement was reasonable and justified in that the parties had established such through
21 an extensive course of dealing, including the previous MPEG-2 License. Nothing in
22 the relationship of the parties with regard to the new Licenses or the written
23 instruments indicated anything to the contrary.

24 176. As a result of the fraud or unilateral mistake on the part of Nero, Nero is
25 entitled to have the MPEG-4 Visual and AVC Licenses revised to reflect the
26 understanding of the parties regarding free trials.

Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543

PRAYER FOR RELIEF

WHEREFORE, Counterclaimant Nero AG prays that this Court enter judgment on its counterclaims as follows:

1. Awarding damages to Nero and against MPEG LA for damages suffered by Nero on account of the acts in violation of the antitrust laws, with such amounts increased by a factor of three;

2. Awarding damages to Nero and against MPEG-LA for damages according to proof;

3. For equitable relief enforcing MPEG-LA’s promise to Nero that free trials would be treated as sales and returns under the MPEG-4 Visual and AVC Licenses.

4. For disgorgement of any profits obtained by MPEG-LA as a result of its unfair, unlawful and fraudulent conduct;

5. For disgorgement of any unjust enrichment obtained by MPEG-LA;

6. For restitution of any gain or benefit obtained by MPEG-LA as a result of its unfair, unlawful, and fraudulent conduct;

7. For injunctive relief to prevent future unfair, unlawful and fraudulent conduct;

8. For an award of punitive or exemplary damages against MPEG-LA;

9. For a judicial declaration that:

a. Free trials would be treated as sales and returns under the MPEG-4 Visual and AVC Licenses;

b. Nero is not in breach of the MPEG-4 Visual or AVC Licenses; and

c. the MPEG-4 Visual and AVC Licenses and/or the underlying patents, are unenforceable during the period of MPEG-LA’s misuse of those patents;

1 10. For reformation of the MPEG-4 Visual and AVC Licenses to reflect the
2 true understanding of the parties that free trials are treated as sales and returns;

3 11. For an award to Nero and against MPEG-LA of costs of suit, including
4 without limitation expert consultant and witness fees;

5 12. For an amount to Nero and against MPEG-LA of attorney fees expended
6 in this litigation, pursuant to the License Agreements;

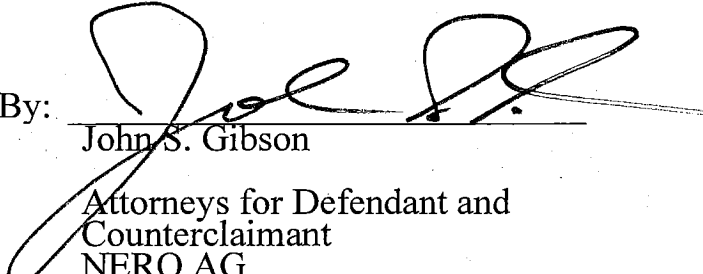
7 13. For any other and further relief as the Court may deem just and proper.
8

9 Dated: January 26, 2010

Respectfully Submitted,

10 Winston & Strawn LLP

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Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543

By: 
John S. Gibson
Attorneys for Defendant and
Counterclaimant
NERO AG

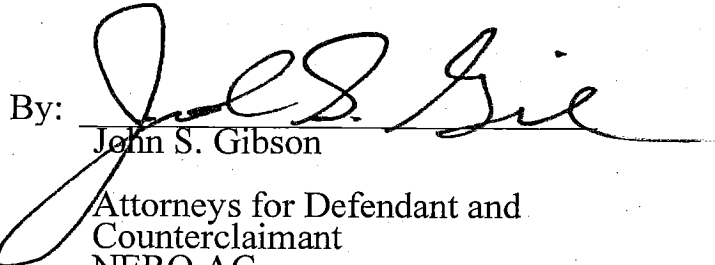
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JURY TRIAL DEMANDED

Counterclaimant Nero AG, demands a trial by jury of all the claims asserted in this Counterclaim so triable.

Dated: January 26, 2010

Respectfully Submitted,
Winston & Strawn LLP

By: 
John S. Gibson
Attorneys for Defendant and
Counterclaimant
NERO AG

Winston & Strawn LLP
333 S. Grand Avenue
Los Angeles, CA 90071-1543

250 Steele Street Suite 300
Denver, Colorado 80206
303 331.1880
FAX 303 331.1879



VIA DHL

December 14, 2001

Dear Licensee:

This letter constitutes an Agreement by and between MPEG LA[®] and the undersigned Licensee that any and all prior MPEG-2 Patent Portfolio Licenses are hereby cancelled upon the effectiveness of the attached MPEG-2 Patent Portfolio License.

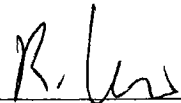
Best regards,

A handwritten signature in black ink, appearing to read 'Baryn S. Futa', written over a horizontal line.

Baryn S. Futa
Manager and CEO
MPEG LA, L.L.C.

Agreed to:

Licensee: Ahead Software AG

By: 
(authorized signatory)

Date: Dec. 20th, 2001

MPEG-2 PATENT PORTFOLIO LICENSE

This Agreement is made this 1st day of January, 2002 , by and between MPEG LA, L.L.C., a limited liability company of Delaware having a principal place of business in Denver, Colorado, U.S.A. (hereinafter "Licensing Administrator"); and Ahead Software AG , having a principal place of business at Im Stoeckmaedle 18 , Karlsbad, 76307 Germany (hereinafter "Licensee").

WHEREAS, ISO/IEC JTC 1 and The International Telecommunications Union have jointly adopted an international standard relating to video data compression and data transport, formally known as ISO/IEC 13818-1 and 13818-2, and referred to in this Agreement as the "MPEG-2 Standard" (as more fully defined herein below);

WHEREAS, Canon Inc., a corporation of Japan, having a principal place of business in Tokyo, Japan; The Trustees of Columbia University in the City of New York, a not-for-profit corporation of New York, U.S.A., having a principal place of business in New York City, New York, U.S.A.; France Télécom, société anonyme, a corporation of France, having a principal place of business in Paris, France; Fujitsu Limited, a corporation of Japan, having a principal place of business in Kawasaki, Japan; GE Technology Development, Inc., a corporation of Delaware, U.S.A., having a principal place of business in Princeton, New Jersey, U.S.A.; General Instrument Corporation, a corporation of Delaware, U.S.A., having a principal place of business in Horsham, Pennsylvania, U.S.A.; Hitachi, Ltd., a corporation of Japan, having a principal place of business in Tokyo, Japan; KDDI Corporation, a corporation of Japan, having a principal place of business in Tokyo, Japan; Koninklijke Philips Electronics N.V. ("PENV"), a corporation of The Netherlands, having a principal place of business in Eindhoven, The Netherlands, and U.S. Philips Corporation ("USPC"), a corporation of Delaware, U.S.A., having a principal place of business in Tarrytown, N.Y., U.S.A. (PENV and USPC being hereinafter referred to, individually or collectively, as "Philips"); Matsushita Electric Industrial Co., Ltd., a corporation of Japan, having a principal place of business in Osaka, Japan; Mitsubishi Electric Corporation, a corporation of Japan, having a principal place of business in Tokyo, Japan; Nippon Telegraph and Telephone Corporation, a corporation of Japan, having a principal place of business in Tokyo, Japan; Samsung Electronics Co., Ltd., a corporation of Korea, having a principal place of business in Seoul, Korea; SANYO Electric Co., Ltd., a corporation of Japan, having a principal place of business in Osaka, Japan; Scientific-Atlanta, Inc., a corporation of Georgia, U.S.A., having a principal place of business in Norcross, Georgia, U.S.A.; Sony Corporation, a corporation of Japan, having a principal place of business in Tokyo, Japan; Toshiba Corporation, a corporation of Japan, having a principal place of business in Tokyo, Japan; and Victor Company of Japan, Limited, a corporation of Japan, having a principal place of business in Yokohama, Japan (hereinafter collectively the "Licensors" or individually "Licensor," as more fully defined in this Agreement), each own and have the right to license, or have the right to sublicense one or more patents, utility models and/or allowed patent or utility model applications published for opposition which claim apparatus and/or methods necessary for compliance with the MPEG-2 Standard (hereinafter referred to as "MPEG-2 Essential Patent(s)");

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

WHEREAS, each Licensor believes that the MPEG-2 Standard represents a significant advance in the field of digital video data compression for transmission and storage, which will make available innovative new products and services to the public, and for this reason desires to encourage widespread adoption of the MPEG-2 Standard by video product and video service industries throughout the world;

WHEREAS, each Licensor has signed an ISO undertaking or hereby commits to make available licenses and/or sublicenses under any and all MPEG-2 Essential Patents licensable or sublicensable by the Licensor to any individual, company or other entity desiring such a license and/or sublicense on fair, reasonable and nondiscriminatory terms and conditions;

WHEREAS, each Licensor has granted the Licensing Administrator a worldwide, nonexclusive license and/or sublicense under all MPEG-2 Essential Patents licensable or sublicensable by the Licensor to allow the Licensing Administrator to grant worldwide, non-exclusive sublicenses under all such MPEG-2 Essential Patent(s) under the terms hereof;

WHEREAS, the Licensors desire to make available through the Licensing Administrator, license rights under their respective MPEG-2 Essential Patents in a single sublicense for the convenience of any individual, company or other entity desirous of acquiring such rights, thereby avoiding the need of such individual, company or other entity to obtain a separate license from each of the Licensors under its MPEG-2 Essential Patent(s);

WHEREAS, the Licensing Administrator desires to grant MPEG-2 Patent Portfolio Licenses to all individuals, companies and other entities desiring such a license under the terms and conditions set forth herein;

WHEREAS, nothing in this Agreement precludes the respective Licensors from licensing or sublicensing rights under individual MPEG-2 Essential Patent(s) to make, use, sell, or offer to sell products or processes including but not limited to the rights licensed in the MPEG-2 Patent Portfolio License;

WHEREAS, Licensee understands that this MPEG-2 Patent Portfolio License is offered for the convenience of Licensee and that Licensee is free to contact any Licensor to negotiate a license for any patent offered herein on terms and conditions different from those set forth herein which may be mutually acceptable to such Licensee and Licensor; and

WHEREAS, Licensee desires for its own convenience to obtain rights under the MPEG-2 Essential Patent(s) of all the Licensors in a single sublicense from the Licensing Administrator under the terms hereof.

NOW, THEREFORE, the Licensing Administrator AND Licensee AGREE AS FOLLOWS:



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

0. EFFECTIVE DATE

0.1 This License Agreement shall be deemed effective as of June 1, 1994.

1. DEFINITIONS

The definitions set forth in this Article shall apply to the following terms when used with initial capital letters in this Agreement, its attachments, and amendments hereto.

1.1 Affiliate - shall mean a corporation, company, or other entity which now or hereinafter, directly or indirectly, controls, is controlled by or is under common control with a party. The term "control" as used in this Section 1.1 shall mean ownership of more than 50% of the outstanding shares representing the right to vote for directors or other managing officers of such corporation, company or other entity, or for a corporation, company or other entity which does not have outstanding shares, more than 50% of the ownership interest representing the right to make decisions for such corporation, company or other entity; provided, however, such corporation, company or other entity shall be deemed an Affiliate only so long as such "control" exists.

1.2 Agreement - shall mean this sublicense between the Licensing Administrator and Licensee, including exhibits, attachments, amendments and modifications hereto.

1.3 Channel (Channels) - shall mean a single path for transmitting signals, including by way of example and without limitation, a path which is separated from another path by frequency division or time division.

1.4 Confidential Information - shall mean any information given to the Licensing Administrator pursuant to Article 5 of this Agreement which is designated "confidential" by Licensee.

1.5 Consumer Product - shall mean a Licensed Product, which is not an MPEG-2 Intermediate Product, Sold directly to an end user primarily for personal, family, or household use, including without limitation a cable television "set top box", a direct satellite broadcast converter, and a personal computer having a manufacturer's suggested retail price of less than \$15,000 U.S. or the equivalent in the currency of another country. For purposes of this Agreement, an MPEG-2 Packaged Medium shall not be considered a Consumer Product.

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 1.6 **Days** - shall mean calendar days unless otherwise specifically stated in this Agreement.
- 1.7 **Licensed Product (Licensed Products)** - shall mean any product, including software, licensed under Article 2 of this Agreement.
- 1.8 **Licensors (individually Licensor)** - shall mean Canon Inc.; The Trustees of Columbia University in the City of New York; France Télécom, société anonyme; Fujitsu Limited; GE Technology Development, Inc.; General Instrument Corporation; Hitachi Ltd.; KDDI Corporation; Koninklijke Philips Electronics N.V.; U.S. Philips Corporation; Matsushita Electric Industrial Co., Ltd.; Mitsubishi Electric Corporation; Nippon Telegraph and Telephone Corporation; Samsung Electronics Co., Ltd.; SANYO Electric Co., Ltd.; Scientific-Atlanta, Inc.; Sony Corporation; Toshiba Corporation; and Victor Company of Japan, Limited subject to additions and deletions from time to time, identified in Attachment I hereto.
- 1.9 **Manufacture (Manufactured)** - shall mean fabrication, assembly, or otherwise making of substantially the entire finished MPEG-2 Royalty Product.
- 1.10 **Movie** - shall mean a single motion picture as well as related video materials typically packaged with the motion picture including, without limitation, previews of other motion pictures, information about the making of the motion picture or the artists appearing therein. Movie shall not include a second motion picture regardless of whether such second motion picture is related to the first.
- 1.11 **MPEG-1 Standard** - shall mean the MPEG-1 video standard as defined in ISO document IS 11172.
- 1.12 **MPEG-2 Bundled Decoding Software** - shall mean (i) any storage medium, including by way of example and without limitation, magnetic tape, magnetic disk and CD ROM, storing an operating system having one or more computer programs for decoding video information in accordance with the MPEG-2 Standard, and which is Sold; or (ii) an operating system having one or more computer programs for decoding video information in accordance with the MPEG-2 Standard, and which is directly distributed to an end user through electronic communication means. For purposes of this Agreement, MPEG-2 Bundled Decoding Software licensed or sold to a computer manufacturer and loaded in a computer product Sold by the computer manufacturer shall be deemed an MPEG-2 Intermediate Product.



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 1.13 MPEG-2 Bundled Encoding Software** - shall mean (i) any storage medium, incorporating an operating system having one or more computer programs for encoding video information into a format in compliance with the MPEG-2 Standard, and which is Sold, including by way of example and without limitation, magnetic tape, magnetic disk and CD ROM; or (ii) an operating system having one or more computer programs for encoding video information into a format in compliance with the MPEG-2 Standard, and which is directly distributed to an end user through electronic communication means. For purposes of this Agreement, MPEG-2 Bundled Encoding Software licensed or sold to a computer manufacturer and loaded in a computer product Sold by the computer manufacturer shall be deemed an MPEG-2 Intermediate Product.
- 1.14 MPEG-2 Decoding Product** - shall mean any instrumentality or combination of instrumentalities, including by way of example and without limitation: a television receiver; cable, terrestrial broadcast and satellite broadcast receiving equipment; a computer card; a camcorder; video telecommunications equipment; video packaged media playback equipment; and video game equipment, which is primarily designed in whole or in part for decoding video information in accordance with the MPEG-2 Standard, and which is Sold. For purposes of this Agreement, a computer or digital processor loaded with MPEG-2 Decoding Software or MPEG-2 Bundled Decoding Software shall be deemed an MPEG-2 Decoding Product.
- 1.15 MPEG-2 Decoding Software** - shall mean: (i) any storage medium, including by way of example and without limitation, magnetic tape, magnetic disk and CD ROM, storing one or more computer programs designed in whole or in part for decoding video information in accordance with the MPEG-2 Standard, and which is Sold; (ii) one or more computer programs designed in whole or in part for decoding video information in accordance with the MPEG-2 Standard and which is directly distributed to an end user through electronic communication means; or (iii) one or more computer programs designed in whole or in part for decoding video information in accordance with the MPEG-2 Standard that are included in an MPEG-2 Packaged Medium together with video information in a format in compliance with the MPEG-2 Standard. MPEG-2 Decoding Software shall not mean software which is part of an operating system. For purposes of this Agreement, MPEG-2 Decoding Software licensed or sold to a computer manufacturer and loaded in a computer product Sold by the computer manufacturer shall be deemed an MPEG-2 Intermediate Product.
- 1.16 MPEG-2 Distribution Encoding Product** - shall mean an MPEG-2 Encoding Product which is primarily designed for encoding video information into a format in compliance with the MPEG-2 Standard and for commercial distribution of



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

such encoded video information, including by way of example and without limitation, distribution by terrestrial broadcast, satellite broadcast, and cable transmission. For purposes of this Section 1.16, the term "distribution" shall not be construed to include distribution by way of MPEG-2 Packaged Medium.

- 1.17 MPEG-2 Encoding Product** - shall mean any instrumentality or combination of instrumentalities, including by way of example and without limitation, television signal transmitting equipment, a computer card, a camcorder, video telecommunications equipment and consumer video recording equipment, which is primarily designed in whole or in part for encoding video information into a format in compliance with the MPEG-2 Standard, and which is Sold. For purposes of this Agreement, a computer or digital processor loaded with MPEG-2 Encoding Software or MPEG-2 Bundled Encoding Software shall be deemed an MPEG-2 Encoding Product.
- 1.18 MPEG-2 Encoding Software** - shall mean: (i) any storage medium, including by way of example and without limitation, magnetic tape, magnetic disk and CD ROM, storing one or more computer programs designed for encoding video information into a format in compliance with the MPEG-2 Standard, and which is Sold; or (ii) one or more computer programs designed for encoding video information in compliance with the MPEG-2 Standard, and which is directly distributed to an end user through electronic communication means. MPEG-2 Encoding Software shall not mean software which is part of an operating system. For purposes of this Agreement, MPEG-2 Encoding Software licensed or sold to a computer manufacturer and loaded in a computer product Sold by the computer manufacturer shall be deemed an MPEG-2 Intermediate Product.
- 1.19 MPEG-2 Essential Patent** - shall mean any Patent claiming an apparatus and/or method necessary for compliance with the MPEG-2 Standard under the laws of the country which issued or published the Patent.
- 1.20 MPEG-2 Intermediate Product** - shall mean any instrumentality or combination of instrumentalities, including by way of example and without limitation an integrated circuit chip or chip set, a subsystem circuit board(s), firmware, and software, which is primarily designed to be used, alone or with other instrumentalities, to encode or decode video information in a format in compliance with the MPEG-2 Standard, or to produce a transport stream or program stream in accordance with the MPEG-2 Standard, but which is not a product that is Sold.



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 1.21 **MPEG-2 Packaged Medium (Media)** - shall mean any storage medium, including by way of example and without limitation magnetic tape, magnetic disk and optical disk, storing one or more MPEG-2 Video Events.
- 1.22 **MPEG-2 Patent Portfolio** - shall mean the portfolio of MPEG-2 Essential Patent(s) identified in Attachment 1 hereto, which portfolio may be supplemented or reduced from time to time in accordance with the provisions of this Agreement.
- 1.23 **MPEG-2 Patent Portfolio Patent** - shall mean an MPEG-2 Essential Patent under which a Licensor has the right to grant a license or sublicense to a third party with the right of such third party to grant sublicenses, and which is included in the MPEG-2 Patent Portfolio.
- 1.24 **MPEG-2 Related Patent** - shall mean any Patent which is not an MPEG-2 Essential Patent but which has one or more claims directed to an apparatus or a method that may be used in the implementation of a product or a service designed in whole or in part to exploit the MPEG-2 Standard under the laws of the country which issued or published the Patent.
- 1.25 **MPEG-2 Royalty Product** - shall mean a hardware and/or software product for which a royalty is payable to the Licensing Administrator hereunder.
- 1.26 **MPEG-2 Standard** - shall mean the MPEG-2 video standard as defined in ISO documents IS 13818-1 (including annexes C, D, F, J and K), IS 13818-2 (including annexes A, B, C and D, but excluding scalable extensions), and IS 13818-4 (only as it is needed to clarify IS 13818-2).
- 1.27 **MPEG-2 Transport or Program Stream Product** - shall mean any instrumentality or combination of instrumentalities for use alone or with other instrumentalities, which is primarily designed in whole or in part for generating and/or processing video information to provide an MPEG-2 transport stream or an MPEG-2 program stream as defined by the MPEG-2 Standard, and which is Sold. The term MPEG-2 Transport or Program Stream Product shall not be construed to include one or more MPEG-2 Encoding Products.
- 1.28 **MPEG-2 Video Event** - shall mean video information having a normal playing time of any length up to and including 133 minutes encoded into a format in compliance with the MPEG-2 Standard that comprises video programming, including by way of example and without limitation, one or more Movies, television shows, video games, video advertisements, music videos and short subject video clips, or any compilation of any of the foregoing.

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 1.29 Patent** - shall mean any issued patent or issued utility model of any country, or any allowed patent application or allowed utility model application, published for opposition in any country.
- 1.30 Sale (Sold)** - shall mean any sale, rental, lease, license or other form of distribution of an MPEG-2 Royalty Product to an end user, either directly or through a chain of distribution. For purposes of this Agreement, a Sale under this Section 1.30 shall be deemed to take place in the country where an end user takes delivery of the MPEG-2 Royalty Product which is the subject of the "Sale," irrespective of the manner in which the "Sale" takes place.
- 1.31 White Book Standard** - shall mean the document entitled VIDEO CD Specification version 2.0, published by Philips Consumer Electronics B.V., and dated April, 1995.

2. LICENSING ADMINISTRATOR GRANT

- 2.1 MPEG-2 Intermediate Products.** Subject to Paragraph 7.16.1 hereof and to the other terms and conditions of this Agreement, the Licensing Administrator hereby grants to Licensee a royalty-free, worldwide, nonexclusive, nontransferable sublicense under all MPEG-2 Essential Patent(s) in the MPEG-2 Patent Portfolio, to make, have made, use only by Licensee solely for internal development and testing purposes, and sell, offer for sale or otherwise distribute, MPEG-2 Intermediate Products. **NO LICENSE IS GRANTED HEREIN, BY IMPLICATION OR OTHERWISE, TO CUSTOMERS OF LICENSEE TO USE MPEG-2 INTERMEDIATE PRODUCTS MANUFACTURED OR SOLD BY LICENSEE.**
- 2.2 MPEG-2 Decoding Products, MPEG-2 Decoding Software, and MPEG-2 Bundled Decoding Software.** Subject to the terms and conditions of this Agreement, the Licensing Administrator hereby grants to Licensee a royalty-bearing worldwide, nonexclusive, nontransferable sublicense under all MPEG-2 Essential Patent(s) in the MPEG-2 Patent Portfolio to make, have made, use, and sell, offer for sale or otherwise distribute MPEG-2 Decoding Products, MPEG-2 Decoding Software, and MPEG-2 Bundled Decoding Software.
- 2.3 MPEG-2 Encoding Products, MPEG-2 Distribution Encoding Products, MPEG-2 Encoding Software, and MPEG-2 Bundled Encoding Software.** Subject to Paragraph 7.16.2 hereof and to the other terms and conditions of this

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

Agreement, the Licensing Administrator hereby grants to Licensee a royalty-bearing worldwide, nonexclusive, nontransferable sublicense under all MPEG-2 Essential Patent(s) in the MPEG-2 Patent Portfolio to make, have made, use for purposes other than encoding an MPEG-2 Video Event for recording on an MPEG-2 Packaged Medium, and sell, offer for sale or otherwise distribute MPEG-2 Encoding Products, MPEG-2 Distribution Encoding Products, MPEG-2 Encoding Software, and MPEG-2 Bundled Encoding Software. NO LICENSE IS GRANTED HEREIN, BY IMPLICATION OR OTHERWISE, TO CUSTOMERS OF LICENSEE TO USE MPEG-2 ENCODING PRODUCTS, MPEG-2 DISTRIBUTION ENCODING PRODUCTS, MPEG-2 ENCODING SOFTWARE, AND/OR MPEG-2 BUNDLED ENCODING SOFTWARE FOR ENCODING OR HAVING ENCODED ONE OR MORE MPEG-2 VIDEO EVENTS FOR RECORDING ON AN MPEG-2 PACKAGED MEDIUM FOR ANY USE OR DISTRIBUTION OTHER THAN PERSONAL USE OF LICENSEE'S CUSTOMER.

- 2.4 MPEG-2 Packaged Medium.** Subject to the terms and conditions of this Agreement, the Licensing Administrator hereby grants to Licensee a royalty-bearing worldwide, nonexclusive, nontransferable sublicense under all MPEG-2 Essential Patent(s) in the MPEG-2 Patent Portfolio to use MPEG-2 Encoding Products, MPEG-2 Distribution Encoding Products, MPEG-2 Encoding Software, and/or MPEG-2 Bundled Encoding Software, for encoding or having encoded one or more MPEG-2 Video Events for recording on an MPEG-2 Packaged Medium, and to sell, offer for sale or otherwise distribute MPEG-2 Packaged Medium.
- 2.5 MPEG-2 Transport or Program Stream Products.** Subject to the terms and conditions of this Agreement, the Licensing Administrator hereby grants to Licensee a royalty-bearing worldwide, nonexclusive, nontransferable sublicense under all MPEG-2 Essential Patent(s) in the MPEG-2 Patent Portfolio to make, have made, use except for the purpose of generating a program stream or transport stream for recording on an MPEG-2 Packaged Medium, and sell, offer for sale or otherwise distribute MPEG-2 Transport or Program Stream Products.
- 2.6** No license or immunity is granted by either party hereto to the other party hereto, either directly or by implication, estoppel or otherwise, other than as expressly provided in Sections 2.1 through 2.5, 2.9, 7.3 and 7.4 of this Agreement.
- 2.7** Except as provided in Section 2.9 of this Agreement, the sublicenses granted in Sections 2.1 to 2.5 of this Agreement do not include the right of the Licensee to grant any further sublicenses.



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

2.8 IT IS UNDERSTOOD AND AGREED THAT ANY LICENSE GRANTED HEREIN SHALL NOT INCLUDE ANY RIGHT TO MAKE, HAVE MADE, USE, OR SELL ANY PRODUCT OR PROCESS CAPABLE OF COMPLYING SOLELY WITH THE MPEG-1 STANDARD AND NO OTHER PORTION OF THE MPEG-2 STANDARD, INCLUDING BUT NOT LIMITED TO A VIDEO-CD WHICH COMPLIES WITH THE WHITE BOOK STANDARD.

2.9 **Extension of Sublicense to Affiliates.** The sublicenses granted herein by the Licensing Administrator shall include the right of Licensee to grant further sublicenses to its Affiliates, subject to the condition that any and all Affiliates of Licensee receiving such further sublicenses be identified in an attachment to this sublicense entitled "Licensed Affiliates." Each sublicensed Affiliate shall be bound by the terms and conditions of this sublicense as if it were named herein in the place of the Licensee; provided, however that Licensee shall pay and account to the Licensing Administrator for royalties hereunder payable as a result of the activities of any and all sublicensed Affiliates. Any sublicense granted to an Affiliate shall terminate automatically and without notice on the date such Affiliate ceases to be an Affiliate.

2.9.1 **Notice to Licensing Administrator of Sublicense Termination.** In the event that a sublicense to an Affiliate of Licensee is terminated either as a result of the Affiliate ceasing to be an Affiliate, or as a result of a termination of the sublicense of the Affiliate by Licensee, Licensee shall notify the Licensing Administrator of the termination within ten (10) Days of such termination, and the attachment entitled "Licensed Affiliates" shall be modified to reflect such termination of an Affiliate.

2.9.2 **Notice to Licensing Administrator of New Sublicense.** In the event that Licensee grants a new further sublicense to either a new Affiliate or an existing Affiliate not previously sublicensed, such new further sublicense shall be effective immediately upon the grant thereof; provided that Licensee notifies the Licensing Administrator within ten (10) Days of the grant of such new further sublicense, and the attachment entitled "Licensed Affiliates" is modified to include the new sublicensed Affiliate.

3. ROYALTY AND PAYMENTS

3.1 **Royalty.** Licensee shall pay to the Licensing Administrator for the benefit of Licensors a running royalty throughout the term of this Agreement as follows:



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

3.1.1 MPEG-2 Decoding Product, MPEG-2 Decoding Software, MPEG-2 Bundled Decoding Software. The royalty for the sublicense granted pursuant to Section 2.2 hereof shall be four United States Dollars (U.S. \$4.00) prior to January 1, 2002, and two and one half United States Dollars (U.S. \$2.50) thereafter upon the Sale of each end product Manufactured or Sold in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force, where the end product is:

3.1.1.1 An MPEG-2 Decoding Product;

3.1.1.2 A copy of MPEG-2 Decoding Software; or

3.1.1.3 A copy of MPEG-2 Bundled Decoding Software.

3.1.2 MPEG-2 Encoding Product, MPEG-2 Encoding Software, and MPEG-2 Bundled Encoding Software. The royalty for the sublicense granted pursuant to Section 2.3 hereof shall be four United States Dollars (U.S. \$4.00) prior to January 1, 2002, and two and one half United States Dollars (U.S. \$2.50) thereafter upon the Sale of each end product Manufactured or Sold in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force, where the end product is:

3.1.2.1 An MPEG-2 Encoding Product;

3.1.2.2 A copy of MPEG-2 Encoding Software; or

3.1.2.3 A copy of MPEG-2 Bundled Encoding Software.

3.1.3 MPEG-2 Distribution Encoding Product. The royalty for the sublicense granted pursuant to Section 2.3 hereof shall be L times four United States Dollars (L x U.S. \$4.00) prior to January 1, 2002, and L times two and one half United States Dollars (L x U.S. \$2.50) thereafter upon the Sale of each MPEG-2 Distribution Encoding Product Manufactured or Sold as an end product in a country where one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force, where L is the number of Channels of the MPEG-2 Distribution Encoding Product for providing video information encoded in a format in compliance with the MPEG-2 Standard.

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- 3.1.4 Consumer Product.** The royalty for the sublicense granted pursuant to Sections 2.2 and 2.3 hereof for a single self-contained end product having both MPEG-2 encoding and decoding capabilities shall be limited to six United States Dollars (U.S. \$6.00) prior to January 1, 2002, and two and one half United States Dollars (U.S. \$2.50) thereafter upon the Sale of each such end product Manufactured or Sold as a Consumer Product in a country where one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force, where the Consumer Product:
- 3.1.4.1** Incorporates both an MPEG-2 Encoding Product and an MPEG-2 Decoding Product;
 - 3.1.4.2** Is a copy of software that is both MPEG-2 Encoding Software and MPEG-2 Decoding Software; or
 - 3.1.4.3** Is a copy of software that is both MPEG-2 Bundled Encoding Software and MPEG-2 Bundled Decoding Software.
- 3.1.5 MPEG-2 Transport or Program Stream Product.** The royalty for the sublicense granted pursuant to Section 2.5 hereof shall be N times four United States Dollars (N x U.S. \$4.00) upon the Sale of each MPEG-2 Transport or Program Stream Product Manufactured or Sold as an end product in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force, where N is the greater of the number of input or output transport or program streams of the MPEG-2 Distribution Transport or Program Stream Product.
- 3.1.6 MPEG-2 Packaged Medium.** The royalty for the sublicense granted pursuant to Section 2.4 hereof upon the Sale of each copy of MPEG-2 Packaged Medium (manufactured or sold in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder is in force) containing one or more MPEG-2 Video Events encoded using an MPEG-2 Encoding Product, an MPEG-2 Distribution Encoding Product, MPEG-2 Encoding Software and/or MPEG-2 Bundled Encoding Software prior to September 1, 2001, shall be four United States Cents (U.S. \$0.04) for the first MPEG-2 Video Event on any MPEG-2 Packaged Medium, plus one United States Cent (U.S. \$0.01) for each additional 30 minutes of video playing time or portion thereof on the same MPEG-2 Packaged Medium. Notwithstanding the above, however, the royalty (i) shall not exceed four



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United States Cents (U.S. \$0.04) for a single Movie; (ii) shall not exceed an additional two United States Cents (U.S. \$0.02) for the second Movie contained on the same MPEG-2 Packaged Medium as the first Movie; and (iii) shall be one United States Cent (U.S. \$0.01) for each MPEG-2 Packaged Medium having a normal playing time up to and including 12 minutes, but not more than 12 minutes, of video programming on the same MPEG-2 Packaged Medium which is encoded into a format in compliance with the MPEG-2 Standard.

3.1.7 MPEG-2 Packaged Medium. For the period commencing as of September 1, 2001 and ending on February 28, 2003, the royalty for the sublicense granted pursuant to Section 2.4 hereof upon the Sale of each copy of MPEG-2 Packaged Medium (manufactured or sold in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force) containing one or more MPEG-2 Video Events encoded using an MPEG-2 Encoding Product, an MPEG-2 Distribution Encoding Product, MPEG-2 Encoding Software and/or MPEG-2 Bundled Encoding Software, shall be three and one half United States Cents (U.S. \$0.035) for the first MPEG-2 Video Event on any MPEG-2 Packaged Medium, plus one United States Cent (U.S. \$0.01) for each additional 30 minutes of video playing time or portion thereof on the same MPEG-2 Packaged Medium. Notwithstanding the above, however, the royalty (i) shall not exceed three and one half United States Cents (U.S. \$0.035) for a single Movie; (ii) shall not exceed an additional two United States Cents (U.S. \$0.02) for the second Movie contained on the same MPEG-2 Packaged Medium as the first Movie; and (iii) shall be one United States Cent (U.S. \$0.01) for each MPEG-2 Packaged Medium having a normal playing time up to and including 12 minutes, but not more than 12 minutes, of video programming on the same MPEG-2 Packaged Medium which is encoded into a format in compliance with the MPEG-2 Standard.

3.1.8 MPEG-2 Packaged Medium. For the period commencing as of March 1, 2003 through the term of the License, the royalty for the sublicense granted pursuant to Section 2.4 hereof upon the Sale of each copy of MPEG-2 Packaged Medium (manufactured or sold in a country in which one or more MPEG-2 Patent Portfolio Patent(s) that would be infringed absent a license thereunder, is in force) containing one or more MPEG-2 Video Events encoded using an MPEG-2 Encoding Product, an MPEG-2 Distribution Encoding Product, MPEG-2 Encoding Software and/or MPEG-2 Bundled Encoding Software, shall be three United States Cents (U.S. \$0.03) for the first MPEG-2 Video Event on any MPEG-2



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Packaged Medium, plus one United States Cent (U.S. \$0.01) for each additional 30 minutes of video playing time or portion thereof on the same MPEG-2 Packaged Medium. Notwithstanding the above, however, the royalty (i) shall not exceed three United States Cents (U.S. \$0.03) for a single Movie; (ii) shall not exceed an additional two United States Cents (U.S. \$0.02) for the second Movie contained on the same MPEG-2 Packaged Medium as the first Movie; and (iii) shall be one United States Cent (U.S. \$0.01) for each MPEG-2 Packaged Medium having a normal playing time up to and including 12 minutes, but not more than 12 minutes, of video programming on the same MPEG-2 Packaged Medium which is encoded into a format in compliance with the MPEG-2 Standard.

3.1.9 Subject to Paragraph 3.1.4 of this Agreement, the royalties set forth in this Section 3.1 are additive as to each MPEG-2 Royalty Product to the extent that individual royalties are applicable thereto.

3.2 The Payment of Running Royalties Upon the Sale of MPEG-2 Decoding Products, MPEG-2 Decoding Software, MPEG-2 Bundled Decoding Software, MPEG-2 Encoding Products, MPEG-2 Encoding Software or any Combination of the Above Sold in a Single Self-Contained Product (for purposes of this Section 3.2, "Product(s)").

3.2.1 Royalties pursuant to this Article 3 are payable upon the Sale of:

3.2.1.1 Products which allow the end user to decode and/or encode (consistent with the limitations set forth in Section 2.3) MPEG-2 compliant bit streams; provided, however that no royalty shall be payable upon the Sale or distribution of such Products when the Product is incorporated with and used with an MPEG-2 Royalty Product on which a royalty already has been paid to the Licensing Administrator pursuant to Article 3 hereof.

3.2.1.2 Products in which the MPEG-2 functionality of the Product is encrypted, disabled or otherwise unusable only:

3.2.1.2.1 upon the distribution of a key or other instrumentality allowing the Product to be used to decode and/or encode MPEG-2 compliant bit streams; or



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3.2.1.2.2 if the encryption, disablement or other method employed to prevent use is generally breached royalties for all such Products sold shall become payable pursuant to Article 3.

3.2.1.2.3 if Licensee fails to take reasonable steps to insure that the MPEG-2 functionality is encrypted, disabled or otherwise unusable, royalties for all such Products Sold shall become payable pursuant to Article 3.

3.2.1.3 MPEG-2 Decoding Software updates and/or MPEG-2 Encoding Software updates; provided, however, that no royalty shall be due if such update (i) is Sold or distributed for use in connection with an MPEG-2 Royalty Product upon which a royalty has been paid to the Licensing Administrator in accordance with Article 3 and (ii) the update which is Sold or distributed overwrites or otherwise renders not usable the pre-existing MPEG-2 capability on the MPEG-2 Royalty Product which is upgraded.

3.3 Payment Schedule.

3.3.1 Except as provided in Section 3.4 hereof, royalties payable pursuant to Section 3.1 of this Agreement that accrue after the latest signature date specified on the final page of this Agreement shall be payable by Licensee to the Licensing Administrator semiannually as previously agreed between Licensee and the Licensing Administrator in the term prior to this Agreement, or if there was no prior term, as measured from such signature date to the last business day of each six month period thereafter for MPEG-2 Royalty Products Manufactured or Sold during the immediately preceding semiannual period ending on the last business day of the second month preceding the month when royalties are payable. Such royalties shall be paid to the Licensing Administrator and shall be accompanied by a statement pursuant to Section 3.9 of this Agreement, which statement shall be deemed to be true and correct unless shown otherwise in an audit in accordance with Section 3.10 of this Agreement.

3.3.2 **Back Royalties.** Any royalties pursuant to the above schedule which accrued during the period from June 1, 1994 to the latest signature date specified above shall be payable within thirty (30) Days of such signature date, together with accrued interest of 10% per annum and shall

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be accompanied by a royalty statement in accordance with Section 3.9 of this Agreement.

- 3.4 Payments Upon Termination or Expiration.** Within thirty (30) Days after the effective date of termination or expiration of this Agreement, Licensee shall pay the Licensing Administrator any and all amounts that are due pursuant to this Agreement as of the effective date of such termination or expiration, together with a royalty statement for such payment in accordance with Section 3.9 of this Agreement.
- 3.5 Form of Payment.** Any payment made under the provisions of this Agreement shall be made by check drawn on a bank(s) reasonably acceptable to the Licensing Administrator, by cashier's check drawn on immediately available funds, or by other means of payment acceptable to the Licensing Administrator.
- 3.5.1** The amounts payable hereunder shall be paid to the Licensing Administrator by the Licensee in United States Dollars.
- 3.6 Taxes.** In addition to the royalties set forth in Section 3.1 of this Agreement, Licensee shall pay or reimburse the Licensing Administrator for any and all taxes, such as sales, excise, value added, use taxes, and similar taxes of the Licensee, based on payments to be made hereunder in a jurisdiction(s) where such taxes are required. The royalties set forth in Section 3.1 of this Agreement shall be subject to withholding of any taxes of the Licensor required by applicable law.
- 3.6.1** At the Licensee's request, the Licensing Administrator shall file any certificate or other document which may cause any tax that is so payable by the Licensee to be avoided or reduced.
- 3.6.2** The Licensee shall not be required to pay or reimburse the Licensing Administrator for taxes based upon the net worth, capital, net income, or franchise of the Licensing Administrator, nor taxes imposed upon the Licensing Administrator solely by reason of the Licensing Administrator's doing business in or being incorporated in the jurisdiction imposing such taxes.
- 3.6.3** The Licensee shall reasonably cooperate with the Licensing Administrator in respect of mitigating any withholding taxes, including providing such information as may be required by the Licensing Administrator for purposes of obtaining refunds of any taxes withheld.



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- 3.6.4 The Licensing Administrator shall reasonably cooperate and provide such information as may be required by the Licensee for any purpose or reason relating to taxation.
- 3.6.5 If the Licensee in good faith contests any tax that is so payable or reimbursable by the Licensee, the Licensing Administrator shall reasonably cooperate in such contest at the Licensee's expense.
- 3.6.6 The Licensing Administrator shall pass on to the Licensee any tax refunds received by the Licensing Administrator with respect to the Licensee's previous payment or reimbursement of applicable taxes hereunder, if any.
- 3.7 **Late Payments.** Any payment required hereunder that is made late (including unpaid portions of amounts due) shall bear interest, compounded monthly, at the lesser of 10% per annum or the highest interest rate permitted to be charged by the Licensing Administrator under applicable law.
- 3.7.1 Any payment received more than fourteen (14) Days after becoming due as set forth in Section 3.3 of this Agreement shall be deemed late for purposes of this Agreement.
- 3.7.2 Any interest charged or paid in excess of the maximum rate permitted by applicable law shall be deemed the result of a mistake and interest paid in excess of the maximum rate shall be promptly credited or refunded (at Licensee's option) to Licensee.
- 3.8 **Dishonored Checks.** If a payment due under this Agreement is made by Licensee's check and the check is dishonored, the payment may at the Licensing Administrator's option be deemed not to have been made. The Licensing Administrator may at its option, by written notice to Licensee, require subsequent payments to be made by cashier's check in immediately available funds.
- 3.9 **Statements.** Licensee shall provide the Licensing Administrator with a statement for each period as defined in Sections 3.3.1, 3.3.2 and 3.4 showing in reasonable detail and separately identifying for each MPEG-2 Royalty Product both (i) the quantity Manufactured in each country and (ii) the quantity Sold in each country of any and all MPEG-2 Royalty Products Sold during such period by Licensee and its Affiliates, and a calculation of the royalties, if any, which are payable by virtue of such Manufacture and Sale of MPEG-2 Royalty Products during the period when the payment, if any, accrued.



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3.9.1 Such statements shall be certified by an employee of Licensee authorized to make such certification.

3.9.2 The Licensing Administrator shall maintain all information in such statements of Licensee as Confidential Information in accordance with Article 5 of this Agreement, except to the extent that the information is needed by the Licensing Administrator to report to the Licensors the aggregate royalties paid by all sublicensees of the Licensing Administrator. In no event shall the Licensing Administrator provide to any of the Licensors information on royalties paid on a licensee-by-licensee or country-by-country basis unless required by law.

3.10 Audits.

3.10.1 Books and Records. Licensee shall keep and maintain accurate and detailed books and records adequate for the Licensing Administrator to ascertain the royalties payable hereunder. Such books and records shall be maintained for three (3) years from the end of each period when royalties are payable.

3.10.2 Audit Rights. The Licensing Administrator shall have the right to audit or have audited the books and records of Licensee relating to payments hereunder for the sole purpose of verifying the amounts due and payable hereunder, not more than once per calendar year upon reasonable notice to the Licensee. All such audits shall be conducted during reasonable business hours of the Licensee.

3.10.2.1 Any such audit shall be performed by an independent certified public accountant(s) or equivalent (Auditor) reasonably acceptable to Licensee in the country where the audit is to take place. Licensee shall fully cooperate with Auditor in conducting such audit and shall permit Auditor to inspect and copy such portions of the Licensee's books and records that the Auditor deems appropriate and necessary in accordance with the professional standards applicable to the Auditor in the country where the Audit is to take place.

3.10.2.2 The Auditor (and each member or employee thereof participating in the audit) shall agree not to disclose any information learned by the Auditor in the audit to any Licensor, nor use any such information, except for providing



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the Licensing Administrator with a statement of payments due by Licensee.

3.10.2.3 The cost of an audit in accordance with Paragraph 3.10.2 of this Agreement shall be at the expense of the Licensing Administrator; provided, however, the Licensee shall bear the cost of the audit if the audit reveals any underpayment which in the aggregate is greater than five percent (5%) of the amount actually due for the period being audited.

3.10.2.4 Licensee shall pay any shortfalls uncovered in accordance with Paragraph 3.10 of this Agreement, plus interest as set forth in Section 3.7 herein, within thirty (30) Days after receiving notice from the Licensing Administrator of such shortfall.

4. REPRESENTATIONS AND WARRANTIES

4.1 The Licensing Administrator represents and warrants that it has the authority, power and right to grant the rights and licenses to Licensee under this Agreement.

4.2 The Licensing Administrator makes no representation or warranty that the MPEG-2 Patent Portfolio Patent(s) sublicensed hereunder includes all MPEG-2 Essential Patent(s) throughout the world, or that the making, using or selling of products, or providing services covered by the claims of the MPEG-2 Patent Portfolio Patent(s) licensed hereunder will not infringe, directly, contributorily or by inducement under the laws of the United States or under equivalents thereof under the laws of a country other than the United States, any patent or other intellectual property right of a party other than the MPEG-2 Patent Portfolio Patent(s).

4.3 Licensee represents and warrants that it is entering into this Agreement for its own convenience in acquiring patent rights necessary for compliance with the MPEG-2 Standard from multiple licensors in a single transaction rather than entering into separate license agreements with individual licensors, and that Licensee is fully aware that the patents in the MPEG-2 Patent Portfolio may not include all present and future MPEG-2 Essential Patent(s), and that this Agreement may not provide Licensee with all the patent rights needed to perform the activities contemplated by Licensee in entering into this Agreement. The Licensing Administrator and Licensee recognize that Licensee has the right to separately negotiate a license with any or all of the Licensors under any and all of

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the MPEG-2 Patent Portfolio Patents under terms and conditions to be independently negotiated by each Licensor.

- 4.4 Licensee represents and warrants that it has not granted an exclusive license under an MPEG-2 Essential Patent owned by Licensee and has not assigned an MPEG-2 Essential Patent in anticipation of entering into this Agreement. Notwithstanding anything to the contrary in this Agreement, Licensors reserve the right to grant to Licensing Administrator an exclusive license under any MPEG-2 Patent Portfolio Patent with respect to any particular party.
- 4.5 Each party represents and warrants that it will comply with all applicable laws, regulations or ordinances pertaining to its performance hereunder.
- 4.6 Each party represents and warrants that this Agreement and the transactions contemplated hereby do not violate any agreements each party has with its agents, employees, or Affiliates or third parties.
- 4.7 Each party further represents and warrants that in executing this Agreement, it does not rely on any promises, inducements, or representations made by any party or third party with respect to this Agreement or any other business dealings with any party or third party, now or in the future.
- 4.8 Each party represents and warrants that it is not presently the subject of a voluntary or involuntary petition in bankruptcy or the equivalent thereof, does not presently contemplate filing any such voluntary petition, and does not presently have reason to believe that such an involuntary petition will be filed against it.
- 4.9 Other than the express warranties of this Article, there are NO OTHER WARRANTIES, EXPRESS OR IMPLIED.

5. CONFIDENTIAL INFORMATION

- 5.1 For a period of five (5) years as measured from the first date of disclosure pursuant to this Agreement, the Licensing Administrator agrees to use reasonable care and discretion, at least commensurate with that degree of care it uses to protect similar information of its own, to avoid disclosure, publication, or dissemination of received Confidential Information, outside of those employees or consultants of the Licensing Administrator who have a need to know Confidential Information.

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- 5.2 Disclosure by the Licensing Administrator of Confidential Information under Section 5.1 of this Agreement shall be permitted in the following circumstances; provided, that the Licensing Administrator shall have first given reasonable notice to Licensee that such disclosure is to be made:
 - 5.2.1 In response to an order of a court or other governmental body;
 - 5.2.2 Otherwise required by law; or
 - 5.2.3 Necessary to establish rights under this Agreement.
- 5.3 Notwithstanding any other provisions of this Agreement, the obligations specified in Section 5.1 of this Agreement will not apply to any information that:
 - 5.3.1 Is or becomes publicly available without breach of this Agreement; or
 - 5.3.2 Is released for disclosure by written consent of the Licensee.

6. TERM AND TERMINATION

- 6.1 **Term and Certain Royalty Rates on Renewal.** This Agreement shall expire on December 31, 2010. Upon expiration, Licensee shall have the right to renew this sublicense for successive five year periods for the life of any MPEG-2 Patent Portfolio Patent, subject to reasonable amendment of the royalty terms and rates set forth in this sublicense. Such reasonable amendment may take into account prevailing market conditions, changes in technological environment, and available commercial products at the time of each five year renewal. In no event shall the royalty rates upon each renewal of this sublicense increase, if at all, by more than 25% of the royalty rates set forth in this sublicense immediately prior to renewal. The preceding sentence, however, shall not apply to the Licensing Administrator's request at the time of renewal that royalty rates for MPEG-2 Packaged Media which ultimately are offered for rental to consumers be higher than royalty rates for MPEG-2 Packaged Media set forth in this sublicense at the time of renewal. Such request for higher royalty rates shall only be made by the Licensing Administrator, if at all, in the event that the majority of Licensees which are unaffiliated with entities which own copyrights on Movies charge different rates for replication of MPEG-2 Packaged Media depending on whether such MPEG-2 Packaged Media is offered to consumers for sale or rental.
- 6.2 **Termination for Material Breach.** The Licensing Administrator shall have the right to terminate this Agreement upon breach of a material provision thereof by



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the Licensee. Such termination for material breach shall become effective upon the Licensing Administrator sending written notice to the Licensee specifying the breach, and the failure of the Licensee to demonstrate, to the satisfaction of the Licensing Administrator, that Licensee has cured such breach within sixty (60) Days of the sending of such notice. The following are examples of acts or omissions which constitute a material breach of this Agreement:

- 6.2.1 Failure of the Licensee to make payments and provide statements in accordance with Sections 3.2, 3.3 and 3.9 of this Agreement;
- 6.2.2 Failure of the Licensee to maintain adequate books and records in accordance with Paragraph 3.10.1 of this Agreement or to permit an audit in accordance with Paragraph 3.10.2 of this Agreement; or
- 6.2.3 Failure of the Licensee to grant licenses to MPEG-2 Essential Patent(s) licensable or sublicensable by Licensee in accordance with Sections 7.3 or 7.4 of this Agreement.
- 6.2.4 The foregoing list is by way of example and not limitation.

6.3 **Partial Termination in the Event of Litigation.** The Licensing Administrator, upon the instruction of a Licensor, shall terminate Licensee's sublicense under any MPEG-2 Patent Portfolio Patent(s) licensed or sublicensed to the Licensing Administrator by such Licensor in the event that the Licensee has brought a lawsuit or other proceeding for infringement of an MPEG-2 Related Patent(s) and/or an MPEG-2 Essential Patent(s) against such Licensor, and Licensee has refused to grant the Licensor a license on fair and reasonable terms and conditions under the MPEG-2 Related Patent(s) and/or MPEG-2 Essential Patent(s) upon which the lawsuit or other proceeding is based. For purposes of this Section 6.3 only, the Licensor's per patent share of royalties payable pursuant to Section 3.1 of this Agreement shall be presumed to be a fair and reasonable royalty rate for Licensee's Patent(s) considering the essential nature of Licensor's Patent(s) licensed hereunder.

6.4 **Voluntary Termination.** Licensee may terminate this Agreement by providing thirty (30) Days written notice to the Licensing Administrator.

6.5 **Other Terminations.** This Agreement may be terminated by the Licensing Administrator upon the occurrence of the following events:

- 6.5.1 If Licensee files a petition in bankruptcy or the equivalent thereof, or is the subject of an involuntary petition in bankruptcy that is not dismissed



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within sixty (60) Days after the filing date thereof, or is or becomes insolvent, or admits of a general inability to pay its debts as they become due.

- 6.5.2 Upon the de facto or de jure nationalization or expropriation of Licensee by governmental or military action, whether or not with valid authority.
- 6.5.3 Upon any failure by Licensee to provide, within thirty (30) Days after written notice from the Licensing Administrator, satisfactory and adequate assurances that Licensee is able and willing to fully and effectively perform its obligations under this Agreement.
- 6.5.4 In the event that any of the events listed in Sections 6.5.1, 6.5.2 or 6.5.3 hereof occur, this Agreement may be terminated by the Licensing Administrator upon thirty (30) Days written notice to Licensee, without right to cure.
- 6.6 **Survival.** The following provisions of this Agreement shall survive expiration or termination of this Agreement:
 - 6.6.1 The obligation of Licensee to pay all royalties accrued as of the effective date of expiration or termination pursuant to Section 3.4 hereof;
 - 6.6.2 The obligation of Licensee to provide statements under Section 3.9 of this Agreement; and
 - 6.6.3 The obligation of the Licensing Administrator to maintain confidentiality under Article 5 of this Agreement.

7. MISCELLANEOUS PROVISIONS

7.1 Assignment.

- 7.1.1 In the event that the right of the Licensing Administrator to grant MPEG-2 Patent Portfolio Licenses is transferred to a successor Licensing Administrator, this Agreement shall be deemed assigned to the successor Licensing Administrator.
- 7.1.2 This Agreement may not be assigned by the Licensee, other than to a successor of the entire interest of an Affiliate or business division of Licensee manufacturing or selling Licensed Products, or providing a

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service in compliance with the MPEG-2 Standard, or to a purchaser of substantially all of the assets of Licensee or such Affiliate or business division thereof.

7.2 Notice.

7.2.1 All notices required or permitted under this Agreement shall be sent by either Certified Mail with return receipt requested, overnight delivery by commercial or other service which can verify delivery, fax to the number indicated herein, or by e-mail to the address indicated herein. Such notice so sent shall be effective as of the date it is sent. Notwithstanding anything to the contrary herein, amendments to Attachment 1 hereto, if any, shall be effective upon the posting of the new Attachment 1 on the website of the Licensing Administrator and such posting shall constitute notice pursuant to this Section.

7.2.2 All notices from the Licensing Administrator to Licensee shall be sent to:

Name: Mr. Richard Lesser
Title: CEO
Company: Ahead Software AG
Address: Im Stoeckmaedle 18 , Karlsbad, 76307 Germany

Tel: 011-49-724-891-1800
Fax: 011-49-724-891-1888
E-mail: rlesser@nero.com

CC:

Name:
Title:
Company:
Address:

Tel:
Fax:
E-mail:



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7.2.3 All notices from the Licensee to the Licensing Administrator or its successor shall be sent to:

Baryn S. Futa
Manager and Chief Executive Officer
MPEG LA, LLC
250 Steele Street
Denver, Colorado, U.S.A. 80206
Tel: 303-331-1880
Fax: 303-331-1879
E-mail: bfuta@mpegla.com
Website: www.mpegla.com

7.3 **Licensee Grant.** Licensee agrees to grant a worldwide, nonexclusive license and/or sublicense under any and all MPEG-2 Essential Patent(s) that Licensee or its Affiliate(s), if any, has the right to license and/or sublicense, to any Licensor or any sublicensee of the Licensing Administrator desiring such a license and/or sublicense on fair and reasonable terms and conditions. For purposes of this Section 7.3 only, the Licensors' per patent share of royalties payable pursuant to Section 3.1 of this Agreement shall be presumed to be a fair and reasonable royalty rate for the aforementioned license and/or sublicense to be granted by the Licensee.

7.3.1 Licensee's obligation to grant licenses and/or sublicenses pursuant to Section 7.3 of this Agreement shall be effective upon execution of this Agreement.

7.4 **Licensee's Option.** In lieu of Section 7.3 Licensee shall have the option to hereby grant a worldwide, nonexclusive, nontransferable, except to a successor Licensing Administrator, license and/or sublicense under any and all of its MPEG2 Essential Patent(s) to the Licensing Administrator with the right by the Licensing Administrator to grant MPEG-2 Patent Portfolio Licenses that include the MPEG-2 Essential Patent(s) that Licensee or its Affiliate(s), if any, has the right to license or sublicense. Licensee shall identify to the Licensors any and all of its patents and patents of its Affiliate(s), if any, which Licensee believes in good faith to be MPEG-2 Essential Patent(s). Licensors shall determine whether each of the patent(s) identified by Licensee is an MPEG2 Essential Patent(s) according to an established procedure applicable to all new patents identified to the Licensors. The terms and conditions of the license and/or sublicense granted by the Licensee to the Licensing Administrator under this Section 7.4 shall be identical to the terms and conditions of the license and/or sublicense granted by

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each Licensor to the Licensing Administrator. If Licensee elects the option set forth in this Section 7.4, it shall be required to enter into an agreement referred to as the "Agreement Among Licensors," which has been entered into by all Licensors.

7.5 Licensee Covenants.

7.5.1 Licensee hereby covenants to promptly notify the Licensing Administrator in the event that any allowed patent application(s) published for opposition, which is licensed or sublicensed to the Licensing Administrator pursuant to Section 7.4 of this Agreement as an MPEG-2 Essential Patent(s), does not issue as an MPEG-2 Essential Patent(s).

7.5.2 Licensee shall promptly identify to the Licensing Administrator each patent(s), except for MPEG-2 Patent Portfolio Patents of the Licensors, licensable or sublicensable by Licensee or its Affiliate(s), if any, which Licensee believes in good faith to be an MPEG-2 Essential Patent(s) within fourteen (14) Days of execution of this Agreement.

7.5.3 In the event that Licensee has granted an exclusive license to a third party under an MPEG-2 Essential Patent(s) prior to the date of execution of this Agreement, Licensee shall advise the Licensing Administrator of such an exclusive license and identify to the Licensing Administrator such third party.

7.6 Licensing Administrator Covenants.

7.6.1 The Licensing Administrator covenants that if during the term of this Agreement, it acquires rights to grant sublicenses under additional MPEG-2 Essential Patent(s), the MPEG-2 Patent Portfolio License herein will be supplemented to include such additional MPEG-2 Essential Patent(s).

7.6.2 The Licensing Administrator covenants that, with the exception of partial termination under Section 6.3 of this Agreement, any deletion from the MPEG-2 Patent Portfolio shall occur only upon a determination by the Licensors, or upon a final adjudication of a tribunal of competent jurisdiction from which no appeal is taken or allowed, that the deleted Patent(s) is invalid or unenforceable in the country which issued or published the Patent(s), and that any addition to the MPEG-2 Patent Portfolio shall occur only upon the determination by the Licensors that



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

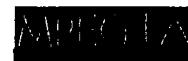
the additional Patent(s) is an MPEG-2 Essential Patent(s) in the country which issued or published the Patent(s).

- 7.6.3** The Licensing Administrator further covenants that if any Patent(s) in the MPEG-2 Patent Portfolio is found not to be an MPEG-2 Essential Patent(s) in the country which issued or published the Patent(s), either by the Licensors or upon a final adjudication of a tribunal of competent jurisdiction from which no appeal is taken or allowed and such Patent(s) is to be deleted from the MPEG-2 Patent Portfolio, the Licensing Administrator shall give notice to Licensee of such deletion, and Licensee shall have the option to retain its sublicense under the deleted Patent(s) for the remainder of the term of this Agreement, including any renewal pursuant to Section 6.1 hereunder.
- 7.6.4** The Licensing Administrator covenants that it shall not delete from or add to the MPEG-2 Patent Portfolio for reasons other than stated in Paragraphs 7.6.1 and 7.6.2 and Section 6.3 herein.
- 7.6.5** The Licensing Administrator covenants that the royalties set forth in Section 3.1 of this Agreement shall not increase during the term of this Agreement, as set forth in Article 6 of this Agreement.

- 7.7 Most Favorable Royalty Rates.** Except as provided in Paragraph 7.7.1 of this Agreement, in the event that the Licensing Administrator grants an MPEG-2 Patent Portfolio License to another party with royalty rates more favorable than those set forth in Section 3.1 of this Agreement, whether or not such more favorable royalty rates are on terms and/or conditions that are different than those set forth herein, the Licensing Administrator shall send written notice to Licensee specifying the more favorable royalty rates and any terms and/or conditions that are different than those set forth herein within thirty (30) Days of the granting of the MPEG-2 Patent Portfolio License providing for such more favorable royalty rates. Licensee shall be entitled to an amendment of this Agreement to the extent of providing for royalty rates as favorable as that available to such other party within thirty (30) Days of sending written notice to the Licensing Administrator requesting such amendment; provided, however, that this Agreement shall also be amended to include any additional benefits to the Licensing Administrator. Any amendment made pursuant to this Section 7.7 shall be effective as of the date it is made, and such more favorable royalty rates shall not be retroactively applicable in favor of the Licensee, and shall not be a basis for claiming any refund of royalties paid prior to such effective date.

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 7.7.1 Section 7.7 shall not apply to:
 - 7.7.1.1 Settlement of litigation;
 - 7.7.1.2 Determination by the Licensing Administrator of back royalties owed by a sublicensee;
 - 7.7.1.3 Compromise or settlement of royalty payments owed by a sublicensee in financial distress;
 - 7.7.1.4 Individual licenses or sublicenses granted by a Licensor to a third party;
 - 7.7.1.5 An order of a court or an administrative body; and
 - 7.7.1.6 An unauthorized act of the Licensing Administrator.
- 7.8 **Freedom of Independent Development.** Nothing in this Agreement shall be construed as prohibiting or restricting Licensee from independently developing competitive video products or video services.
- 7.9 **Relationship.** Nothing in this Agreement shall be construed to create a principal-agent relationship, partnership or joint venture between the parties, or give rise to any fiduciary duty from one party to the other party.
- 7.10 **Severability.** If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable or contrary to law, the remaining provisions of the Agreement will remain in full force and effect.
- 7.11 **No Waiver.** The failure of either party at any time to require performance by the other party of any provision of this Agreement shall not be construed as acquiescence or waiver of such failure to perform such provision. The failure of either party to take action upon the breach of any provision of this Agreement shall not be construed as acquiescence or waiver of any such breach.
- 7.12 **Binding on Successors.** This Agreement shall be binding upon and inure to the benefit of the parties and their successors and assigns to the extent assignment is permitted by this Agreement.



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

- 7.13 **Article and Section Headings.** The Article and Section headings contained in this Agreement are for reference purposes only and shall not in any way control the meaning or interpretation of this Agreement.
- 7.14 **Representation of Counsel; Mutual Negotiation.** Each party has been represented by counsel of its choice in negotiating this Agreement. This Agreement shall therefore be deemed to have been negotiated at arms length, with the advice and participation of counsel, and prepared at the joint request, direction, and instruction of the parties, and shall be interpreted in accordance with its terms without favor to any party.
- 7.15 **English Language.** The parties have required that this Agreement and all documents relating thereto be drawn up in English.
- 7.16 **Notice to Customers.**

7.16.1 **MPEG-2 Intermediate Products Notice:** Licensee agrees to provide to its customers or any other party that receives from it an MPEG-2 Intermediate Product licensed under Section 2.1 of this Agreement a notice which specifies that: **“USE OF THIS PRODUCT IN ANY MANNER THAT COMPLIES WITH THE MPEG-2 STANDARD IS EXPRESSLY PROHIBITED WITHOUT A LICENSE UNDER APPLICABLE PATENTS IN THE MPEG-2 PATENT PORTFOLIO, WHICH LICENSE IS AVAILABLE FROM MPEG LA, L.L.C., 250 STEELE STREET, SUITE 300, DENVER, COLORADO 80206.”**

Licensee understands that the license granted pursuant to Section 2.1 of this Agreement is conditioned on the Licensee providing the notice specified in this Section.

7.16.2 **MPEG-2 Packaged Media Notice:** Licensee agrees to provide to its customers or any other party that receives from it an MPEG-2 Encoding Product, an MPEG-2 Distribution Encoding Product, MPEG-2 Encoding Software or MPEG-2 Bundled Encoding Software licensed under Section 2.3 of this Agreement a notice which specifies that: **“ANY USE OF THIS PRODUCT OTHER THAN CONSUMER PERSONAL USE IN ANY MANNER THAT COMPLIES WITH THE MPEG-2 STANDARD FOR ENCODING VIDEO INFORMATION FOR PACKAGED MEDIA IS EXPRESSLY PROHIBITED WITHOUT A LICENSE UNDER APPLICABLE PATENTS IN THE MPEG-2 PATENT PORTFOLIO, WHICH LICENSE IS AVAILABLE**

**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

**FROM MPEG LA, L.L.C., 250 STEELE STREET, SUITE 300,
DENVER, COLORADO 80206.”**

Licensee understands that the license granted pursuant to Section 2.3 of this Agreement is conditioned on the Licensee providing the notice specified in this Section.

7.17 Bankruptcy.

7.17.1 In the event that the Licensing Administrator should file a petition under the federal bankruptcy laws, or that an involuntary petition shall be filed against the Licensing Administrator, the parties intend that Licensee shall be protected in the continued enjoyment of its rights as licensee under the MPEG-2 Patent Portfolio Patents sublicensed hereunder to the maximum feasible extent including, without limitation, if it so elects, the protection conferred upon licensees under 11 U.S.C. Section 365(n). The Licensing Administrator agrees that it will give Licensee notice of the filing of any voluntary or involuntary petition under the federal bankruptcy laws.

7.17.2 The MPEG-2 Patent Portfolio Patents sublicensed hereunder shall be deemed to be “intellectual property” as the term is defined in 11 U.S.C. Section 101(52). All written agreements entered into in connection with the parties’ performances hereunder from time to time shall be considered agreements “supplementary” to this Agreement for purposes of said Section 365(n).

7.18 Choice of Law. The validity, construction and performance of this Agreement shall be governed by the substantive law of the State of New York, United States of America, without regard to the conflict of law rules in the jurisdiction where a claim arising from this Agreement is brought.

7.19 No Third Party Beneficiaries. Nothing in this Agreement shall be construed to give rise to any obligation on either party hereto for the benefit of a third party other than the Licensors or to confer any rights on any third party other than the Licensors.

7.20 Entire Agreement.

7.20.1 The provisions of this Agreement, including its attachments and any amendments, constitute the entire agreement between the parties, and supersede any and all prior communications and understandings, oral or written, between the parties relating to the subject matter hereof.



**MPEG-2 PATENT PORTFOLIO
LICENSE (cont'd.)**

7.20.2 Except for supplementation of or deletion from the MPEG-2 Patent Portfolio by the Licensing Administrator, no amendment of this Agreement shall be effective unless such amendment is in writing and specifically references this agreement, and is signed by all parties hereto. The Licensing Administrator shall promptly notify Licensee of any supplementation of or deletion from the MPEG-2 Patent Portfolio.

7.21 **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same instrument.

8. USE OF MPEG LA, L.L.C. NAME AND LOGO

Subject to the written approval of the Licensing Administrator, which approval shall not be unreasonably withheld: (1) Licensee shall have the right to indicate on or in connection with its MPEG-2 Royalty Products licensed hereunder that such products are licensed by the Licensing Administrator, and (2) Licensee shall have the right to use an MPEG LA, L.L.C. logo on or in connection with its MPEG-2 Royalty Products licensed hereunder.

(Licensee) Ahead Software AG
Date: Dec. 20th, 2001
By: *[Signature]*
RICHARD LESSER

MPEG LA, L.L.C.
Date: JAN. 17, 2002
By: *[Signature]*
Baryn S. Futa,
Manager and CEO

