	ase 3:08-cv-04548-MHP [	Document 221	Filed 0	3/19/2009	Page 1 of 58
1 2 3 4 5 6 7 8 9	JAMES A. DiBOISE, State Ba Email: jdiboise@wsgr.com LEO CUNNINGHAM, State B Email: lcunningham@wsgr.co COLLEEN BAL, State Bar No Email: cbal@wsgr.com MICHAEL A. BERTA, State B Email: mberta@wsgr.com TRACY TOSH LANE, State B Email: ttosh@wsgr.com WILSON SONSINI GOODRIG Professional Corporation One Market St., Spear Tower, San Francisco, CA 94105 Bus: (415) 947-2000 Fax: (415) 947-2099  Attorneys for Plaintiffs and Co REALNETWORKS, INC. and HOME ENTERTAINMENT, 1	Sar No. 121605 m . 167637 Bar No. 194650 Bar No. 184666 CH & ROSATI Suite 3300 unterclaim Defen REALNETWOR			
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17	Plaintiff	S,	{		WORKS, INC. AND WORKS HOME
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19	DVD COPY CONTROL ASSO Delaware nonprofit corporation		, a (		NARY INJUNCTION
20	ENTERPRISES, INC., a Delay PARAMOUNT PICTURES CO	vare corporation;		Date: Time:	April 1, 2009 9:00 a.m.
21	corporation; SONY PICTURE Delaware corporation; TWENT	S ENTER., INC.,	a )	Dept:	15
22	FOX FILM CORP., a Delaward UNIVERSAL, INC., a Delaward	e corporation; NE		[PUBLIC I	REDACTED VERSION]
23	WARNER BROS. ENTER. IN	C., a Delaware	{		
24	corporation; and VIACOM, Inc	, a Delaware	)		
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27	17 U.S.C. §1201(b)(2)(A)
28	17 U.S.C. §1204

#### INTRODUCTION

The question at the heart of this case is whether the Studios can force consumers to pay twice for the same content – to pay once for a DVD, and then to pay *again* for the fair use right to back up that DVD to, and watch it from, a hard drive. RealNetworks ("Real") has developed two innovative products (collectively, the "RealDVD Products") that allow consumers to exercise their right to do this without paying twice. This motion is an effort by the Studios to eliminate those products. They are not entitled to do so.

The first challenged product, released in September 2008, is software for a Windows PC called Vegas.

Both of the RealDVD Products were designed from the ground up to comply with technology known as "CSS" ("Content Scramble System"), which has been licensed to Real, and which is used by the Studios to protect DVD content. Not only do both Products strictly comply with CSS at all times, when they save a movie using CSS it is *far more* secure than it was on the original DVD.

The products increase the security of a saved movie in two ways.

And second, both products absolutely prevent the distribution of a saved movie. DVDs saved using the RealDVD Products:

- cannot be posted to peer-to-peer ("P2P") networks or otherwise distributed via the Internet;
- cannot be played if moved to any other hard drive;
- cannot be burned to a recordable DVD; and
- cannot be shared over a home network.

The Studios nonetheless seek to position this as a case about piracy. It is not. The RealDVD Products were designed to *prevent* piracy. To be sure, movie piracy thrives on the Internet. But the RealDVD Products will not contribute to that piracy. They cannot – movie content that is saved using the RealDVD Products is locked to those products and cannot be shared at all, much less over the Internet. Nor can there be any claim that the RealDVD Products will be used to

Injunction Motion

REALNETWORKS' OPPOSITION TO PRELIMINARY

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Left without the piracy "hooks," the Studios claim to be concerned about what they term "rent-rip-and-return" -- the possibility that consumers might use the RealDVD Products to save a copy of a movie they have rented and return the rented copy. But the Studios have failed to show that "rent-rip-and-return" is at all likely to increase—or even occur—using the RealDVD Products, much less that it would displace any movie sales or otherwise cause the Studios harm.

This failure of evidence is not for a lack of opportunity. More than four years ago, a company called Kaleidescape released a CSS-licensed product that, like the RealDVD Products, allows consumers to securely save DVDs to a hard drive. Other companies, including AMX and Telestream, have also released CSS-licensed products with similar functionality. Yet the Studios have done nothing to prevent the sale or distribution of these products and have no evidence that they have caused the Studios any harm, whether by "rent-rip-and-return" or otherwise.

To the extent "rent-rip-and-return" is even a potential problem, it is a problem the Studios have always had the power to eliminate.

Were they to do so, the RealDVD Products could easily be updated to detect that a DVD was rented and then prevent it from being saved. To date, the Studios have refused to implement this simple fix. The idea of "rent-rip-and-return" is worth more to them as a live legal argument against the RealDVD Products than as a dead threat in the real world.

Real, therefore, has adopted its own safeguards to ensure that the RealDVD Products cannot and will not be used for "rent-rip-and-return." Before saving a DVD, users are reminded by a "splash screen" to only save DVDs that they own. They are also required by contract to agree to save only DVDs that they own. Given these legal restrictions, and the tight security safeguards built into the RealDVD Products, it is no surprise that market research conducted by Real confirms that the consumers most interested in the RealDVD Products are those who care about legality and actively avoid stealing movie and television content.

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The reality is that there is no cognizable harm that could result from the use of the RealDVD Products. Consumers have long known that they have the right and permission to make a fair use copy of DVDs that they purchase, whether to back up a safety copy of the notoriously fragile DVD medium or to enable them to watch content at their convenience.

The Studios, of course, know this as well. And when it suits them, they pay lip service to fair use rights. For instance, to the Supreme Court in *MGM v. Grokster*, counsel for the Studios (including some of the plaintiffs in the present case – Disney, Paramount and 20<sup>th</sup> Century Fox Film) stated:

The record companies, my clients, have said, for some time now, and it's been on their Website for some time now, that it's perfectly lawful to take a CD that you've purchased, upload it onto your computer, put it onto your iPod. There is a very, very significant lawful commercial use for that device, going forward.

But when it comes to DVDs, the Studios would like to pretend that fair use does not exist. Why? The Studios realize that if they prevent consumers from making a digital copy of their purchased DVDs, the Studios can *sell* those rights to consumers a second time. It's all about money.

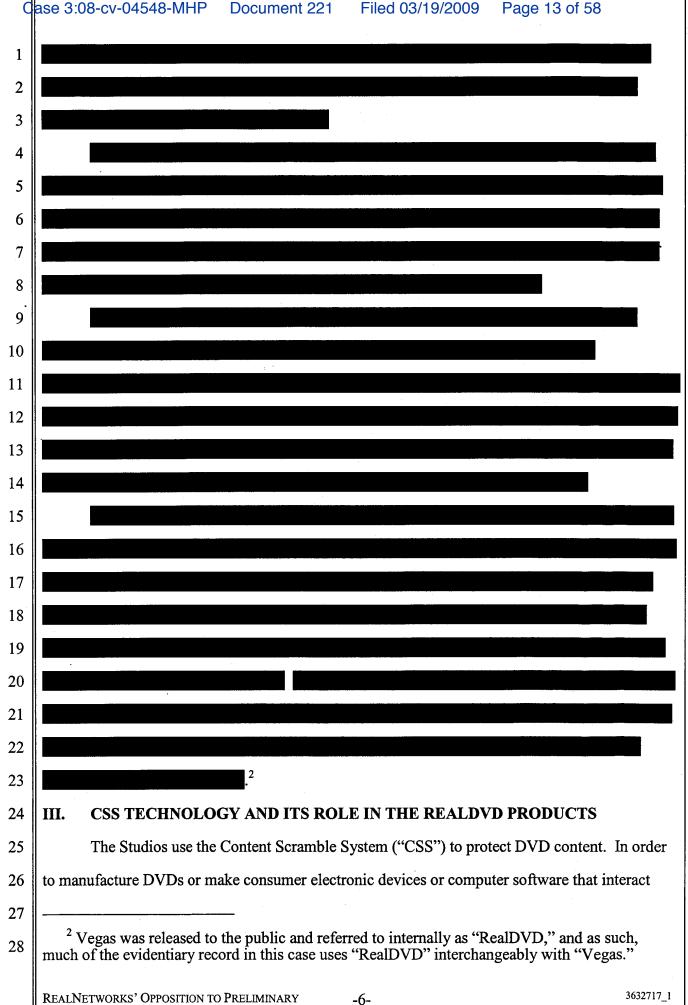
They (and the DVD CCA) have come up with two theories to try to prevent Real from ensuring that DVD consumers only have to pay once. The first is a claim that *any* product that allows DVD content to be copied to a hard drive violates the CSS Agreement. The Defendants are wrong. Real is a CSS Licensee, and the RealDVD Products comply with the CSS License Agreement ("CSS Agreement"). The RealDVD Products even comply with all of the restrictions and requirements that are kept secret from CSS Licensees until after execution and payment of the License (and thus are not even part of the CSS Agreement at all).

The Defendants know this to be true. The DVD CCA has already made the same arguments that they and the Studios are advancing in this case to a California Court applying California law to this California contract. And there, Judge Nichols of Santa Clara County determined that the DVD CCA was wrong. He found that the DVD CCA failed to prove that the product in that case – the Kaleidescape system that also makes a copy of a DVD to a hard drive – violated the CSS Agreement. Significantly, in 2007, after that decision was handed down following a full trial on the merits, the DVD CCA attempted to pass amendments to the CSS Agreement prohibiting saving DVD content to a hard drive. Those Amendments failed. Now, the

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<sup>1</sup> All references to ("Ex. \_\_") are attached to the Declaration of Christopher F. Nelson, filed herewith.

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4	For all these reasons, a preliminary						
5	injunction must be denied.						
6	FACTUAL BACKGROUND						
7	I. REALNETWORKS						
8	Real is not a company operating on the fringes of the Internet. During its nearly 15 year						
9	history, Real has been a leading innovator in digital entertainment. Its "RealPlayer" software has						
10	been downloaded hundreds of millions of times over the years. Real's "Rhapsody" music						
11	service is the second largest online music business next to iTunes and delivered more than 1						
12	billion song plays in 2008. Real currently provides music and video services for many major						
13	mobile phone companies including Verizon, T-Mobile, AT&T, Vodafone and SK Telecom, and						
14	it delivers nearly 1 billion mobile messages every day for its carrier customers. In short, Real is						
15	a digital media company at the center of creating legal digital entertainment services.						
16	II. DEVELOPMENT OF THE REALDVD PRODUCTS						
17	The RealDVD products were the brainchild of a handful of Real's senior executives,						
18	including its CEO, Rob Glaser,						
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22	Since 2000, Real's major competitors released product after						
23	product designed to save, organize, and play back digital movies, music and games, by						
24	connecting a device containing a large-capacity hard drive to a TV. But none, in Glaser's view,						
25	had figured out how to make digital video "really take off." Id. at 10:18-11:19.						
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website. Ex. 19 ("Drive-in is an innovative application that allows you to store your personal DVD movie library on your Mac."). Kaleidescape has offered its CSS-licensed hardware system for placing back-up copies of CSS-scrambled movies on a home network since 2003. Ex. 20 at REAL004543; Ex. 4.

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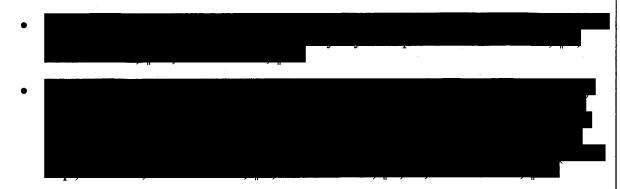
picture of the DVD cover appears, along with a description of the movie, and links to reviews and more information on the DVD. March 19, 2009 Declaration of Jeff Chasen, submitted herewith ("Chasen Decl.") ¶¶ 4-5. This information does not come from the DVD itself but is an enhancement created by Real. *Id.* Real obtains all this information about the movie, the reviews, and the cover art from a licensed third-party Internet database. *Id.*; Ex. 21 (Coppinger Dep.) at 149:12-17. When the user has saved several movies, the collection can be browsed by cover art, genre, title, rating, or actors. Ex. 3 (Glaser Dep.) at 61:18-62:4; March 19, 2009 Declaration of James Brennan, submitted herewith ("Brennan Decl.") ¶ 4.

When a movie or television show is playing, the RealDVD Products remember what the viewer has watched, allowing users to stop in the middle then pick up later where they left off. Chasen Decl., ¶ 6. The RealDVD Products will organize a television series by season and episode, and remember which episode was last watched. *Id.* They also offer parental controls to make certain selections unavailable to children. The RealDVD Products add these enhancements to the movie and television watching experience to make the user's DVD collection more accessible, more reliable and more enjoyable to use. In short, the RealDVD Products permit consumers to conveniently save, manage and play their collection of DVDs, without worrying about storing, damaging or losing the fragile DVD disks.

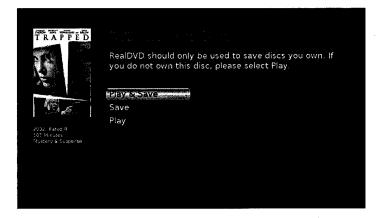
### A. The RealDVD Products Protect Against Unauthorized Copying

The RealDVD Products offer all of this functionality in a manner compliant with the CSS Agreement and the law. In fact, the RealDVD Products contain restrictions that protect DVD content far more securely than the CSS technology alone. For example:



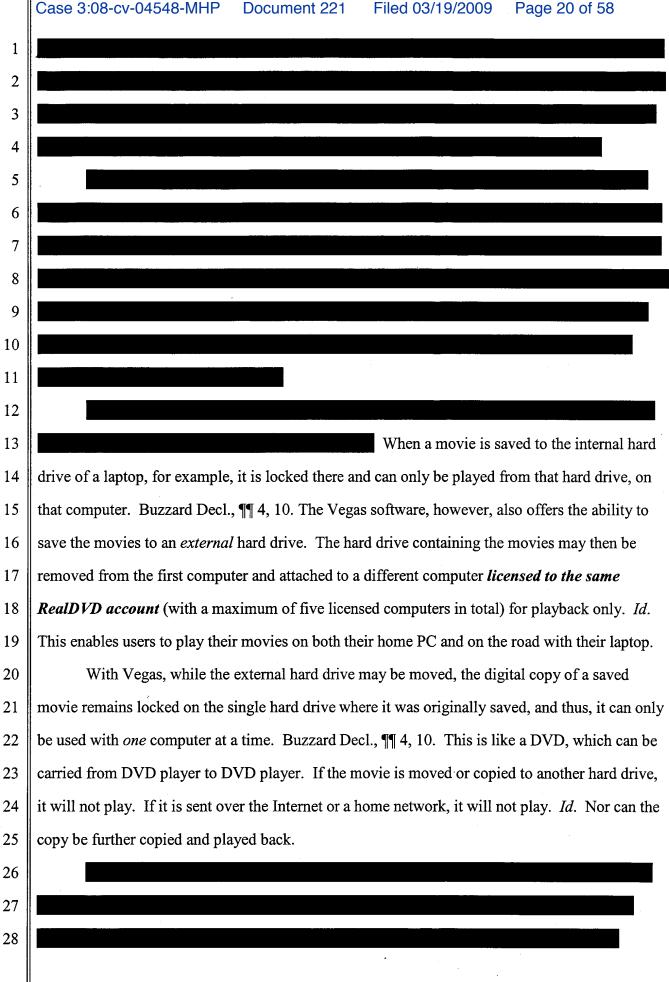


The RealDVD Products are designed only for fair use, and Real specifically reminds users of this purpose. Ex. 3 (Glaser Dep.) at 170:12-171:4. Before users purchase a RealDVD product, they must contractually agree: "You may use the saving functionality of the Software only with DVDs that you own. You may not use the Software to save DVDs that you do not own, such as rental or borrowed DVDs." Ex. 22 at § 2(b). Users running the RealDVD Products are also presented with an "admonition screen": "RealDVD should only be used to save discs you own. If you do not own this DVD, please select Play."



The RealDVD Products also preserve the FBI Warning Screen that warns viewers that unauthorized copying is strictly prohibited and a punishable criminal offense. Most importantly, the RealDVD Products are built to prevent piracy. They make a secure copy of a movie for the owner's personal use and lock that copy to a single hard drive – but do not permit further dissemination of DVD content.

B. \_\_\_\_\_\_



# C. Unlicensed "Ripper" Products Do Not Implement These Protections Against Unauthorized Copying

There are hundreds of unlicensed products that allow users to copy DVDs but do not implement the protections that the RealDVD Products do. *See* March 18, 2009 Declaration of Larry Gerbrandt, submitted herewith ("Gerbrandt Decl.") ¶ 7 and Ex. 2 thereto. Many are offered for free on the Internet. They do not have a CSS license. They do not maintain CSS encryption. They do not have technical restrictions to prohibit sharing of saved content over the Internet. They do not "lock" the saved content to a particular hard drive to prevent a playable copy from being made of a copy (nor do they lock the copy to a particular user's account). They do not limit the number of devices on which a saved DVD may be played back. *See* Gerbrandt Decl., ¶ 7.

The RealDVD Products' limitations and protections against unauthorized copying place them in a completely different category from these widely-available unlicensed DVD rippers, as the following table demonstrates.

Feature	RealDVD Products	DVD "Rippers"		
Can share playable copy over the Internet	NO	YES		
Can play saved copy on more than one computer simultaneously	NO	YES		
Can transmit playable copy to another computer, hard drive or thumb drive	NO	YES		
Permits playback on unlimited number of computers	NO	YES STEEL		
Can save to a shared network of computers	NO	YES		
Can save to a portable device (e.g., iPod)	NO NO	YES		
Can make a playable copy of a copy	NO	YES		
Maintains CSS encryption	YES	NO NO		

Given the availability of rippers and the restrictions imposed by the RealDVD Products, the RealDVD Products are unlikely to appeal to any persons interested in stealing DVD content. Bresnahan Decl., ¶ 18; Gerbrandt Decl., ¶¶ 7-8, 13.

### V. THE STUDIOS CHANGED THEIR CIRCUMVENTION THEORIES

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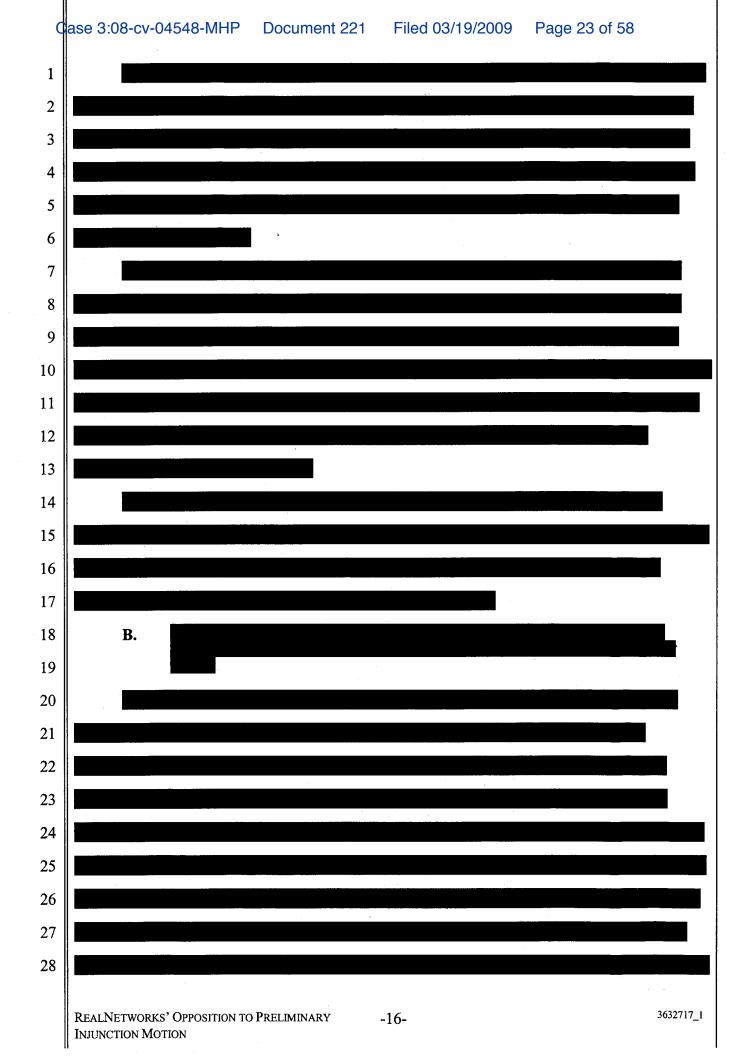
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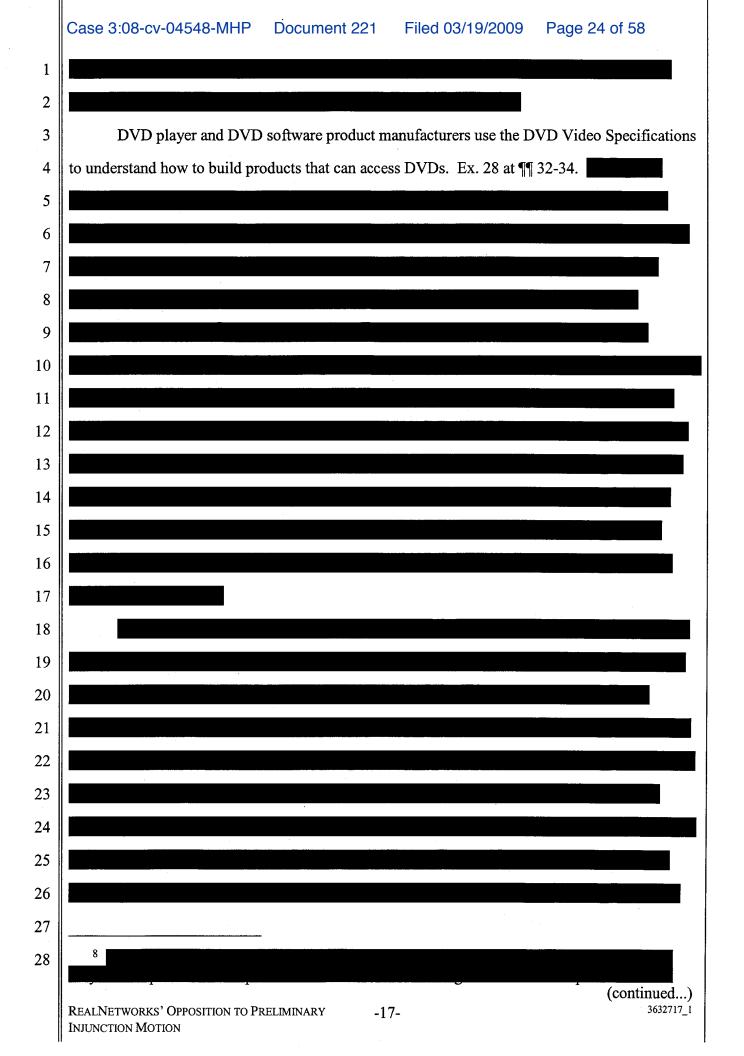
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Months after the Studios obtained a TRO, recognizing the weakness in their CSS claims, the Studios sought to dramatically alter the focus of their circumvention claims. In mid-December, just as fact discovery was originally set to close, the Studios indicated their intent to contend that Ex. 23. The new theories formed no part of the Complaint filed by the Studios, no part of the TRO proceedings, and no part of the temporary injunction that resulted and is still in effect. In late December, the Court allowed the new ARccOS and RipGuard claims but also extended discovery to allow the parties to prepare. Real's Knowledge Of ARccOS and RipGuard A.

REALNETWORKS' OPPOSITION TO PRELIMINARY INJUNCTION MOTION





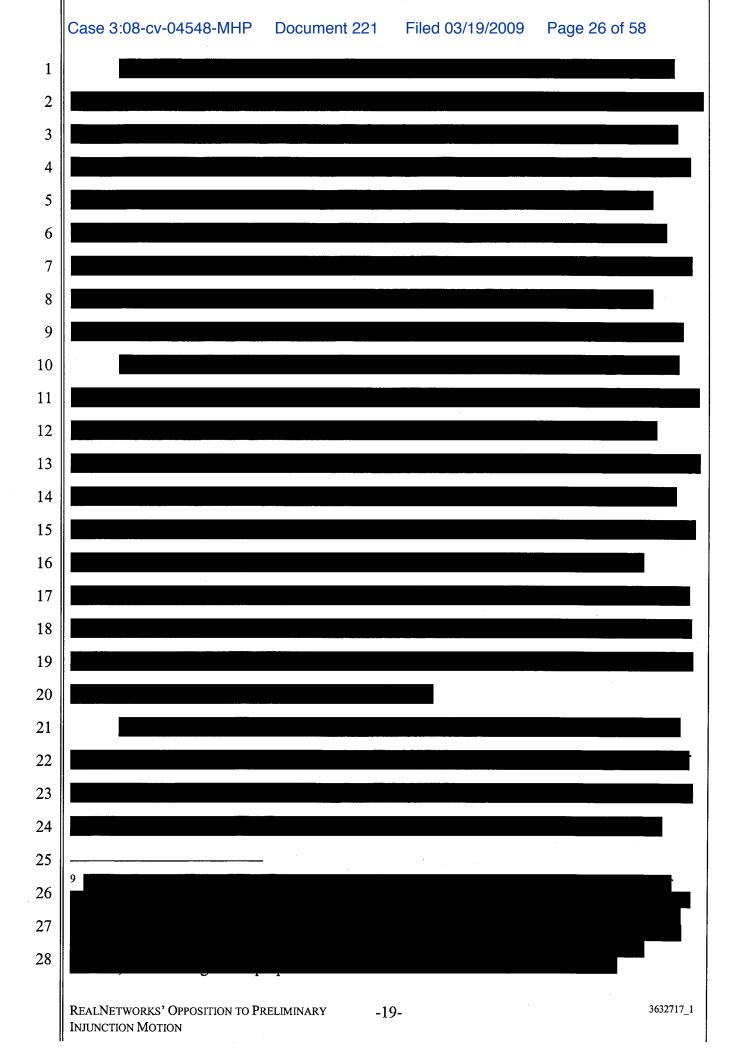
#### VI. VEGAS WAS MARKETED TO PROMOTE FAIR USE

As it prepared to release Vegas (known to the public as "RealDVD"), Real began promoting the product and educating the market (and the movie studios) about its functionality. Understanding that its target market consisted of law-abiding users wishing to make back-up copies of DVDs that they owned, Real marketed Vegas only in the context of fair use copying of the user's own DVD collection. Gerbrandt Decl. ¶ 14. None of Real's marketing materials suggest that Vegas could be used to compile libraries of rental or borrowed DVDs – to the contrary, Real explains precisely why RealDVD is "legal" and both advises and requires that users only save DVDs they own. *Id.*; *see also*, *supra* at 11-12. Real emphasizes this same point both through the end-user license agreement and on the "admonition screen" when a customer is using Facet or Vegas. *See id.*; Ex. 22. Real's marketing is entirely consistent with RealDVD's fair use purpose and the opposite of condoning or encouraging piracy.

#### VII. REAL APPROACHED THE STUDIOS BEFORE RELEASING VEGAS

В	efore it launched Vega	s, Real contacte	d the Studios			
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#### **ARGUMENT**

#### I. LEGAL STANDARD

Two tests determine whether to grant a preliminary injunction. Under the first test, the studios must demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Johnson v. Cal. State Bd. of Accountancy*, 72 F.3d 1427, 1430 (9th Cir. 1995). "Alternatively, a court may issue a preliminary injunction if the moving party demonstrates *either* a combination of probable success on the merits and the possibility of irreparable injury *or* that serious questions are raised and the balance of hardships tips sharply in his favor." *Id.* (citations and quotations omitted).

## II. THE STUDIOS AND DVD CCA HAVE NO LIKELIHOOD OF SUCCESS ON THE MERITS

### A. Creating Personal Backup Copies of Purchased DVDs is a Fair Use

At least since the U.S. Supreme Court ruled in *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984) that consumers have a fair use right to make a copy of broadcast television using their VCRs, consumers have come to expect that they can make a backup copy of media that they have legitimately obtained. The policy of permitting a back up copy of digital content is explicitly endorsed in the Copyright Act itself. Pursuant to Section 117, the owner of a copy of a computer program – and the contents of a DVD are a computer program – is authorized to make an additional copy for archival purposes. 10 17 U.S.C. §117.

That is consistent with what other courts have said about personal backup copies of other types of purchased electronic media. For instance, in *U.S. v. Elcom Ltd.*, 203 F. Supp. 2d 1111,

<sup>&</sup>lt;sup>10</sup> A DVD qualifies as a "computer program" under §117. 17 U.S.C. §101 defines a "computer program" as "a set of statements or instructions to be used directly or indirectly in a computer in order to bring about a certain result." Any DVD that can be played on a software DVD player (*i.e.*, all DVDs) satisfies that definition.

1135 (N.D. Cal. 2002), a case involving "ebooks" (digital books to be read on computers), the court noted: "Courts have been receptive to the making of an archival copy of electronic media in order to safeguard against mechanical or electronic failure." The *Elcom* court wrote: "Making a back-up copy of an ebook, for personal noncommercial use would likely be upheld as a non-infringing fair use." *Id.* at 1135.

In Recording Indus. Assoc. of Am. v. Diamond Multimedia Sys., Inc., 180 F.3d 1072 (9th Cir. 1999), the defendant manufactured and sold a product called the "Rio," a portable device for playing digital music, like the iPod. Id. Interpreting the Audio Home Recording Act of 1992, not the Copyright Act, the Ninth Circuit noted that "[t]he Rio merely makes copies in order to render portable, or 'space-shift," those files that already reside on a user's hard drive." Id. This use, the Ninth Circuit concluded, is "paradigmatic noncommercial personal use." Id.

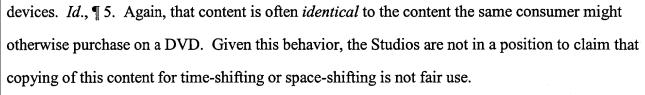
When it suits their purposes, the Studios *expressly* permit the copying of digital content. Such was the case during oral argument before the Supreme Court in *Metro-Goldwyn-Mayer Studios v. Grokster. See, supra* at 3. Likewise, Sony BMG posted the following message on its website:

"SonyBMG wants music to be easily transferable to any device that supports secure music. Currently, music from our protected CDs may be transferred to hundreds of such devices, as both Microsoft and Sony have assisted to make the user experience on our discs as seamless as possible with their secure formats."

Ex. 37.

Even with movie content, the Studios have created an atmosphere in which consumers believe that back-up copying, as well as space and timing shifting, are authorized. The Studios provide movie and television content in partnership with cable and satellite companies to consumers, and that content is freely copyable and storable <u>forever</u> using Tivos or other home digital video recorders (DVRs). Gerbrandt Decl., ¶ 32. Consumers can also transfer that content to DVD discs or to their computers. The movie and television content copied in this manner is often *identical* to the content the same consumer might otherwise purchase on a DVD. *Id.* The Studios also provide movie and television content on such services as iTunes at the same price as a DVD or less. Consumers are then free to make unlimited copies of that content, back it up to any number of computers, and space-shift that content on up to five of a variety of portable

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# 1. The CSS Agreement Is A Contract of Adhesion That Must Be Construed According to Real's Reasonable Interpretation

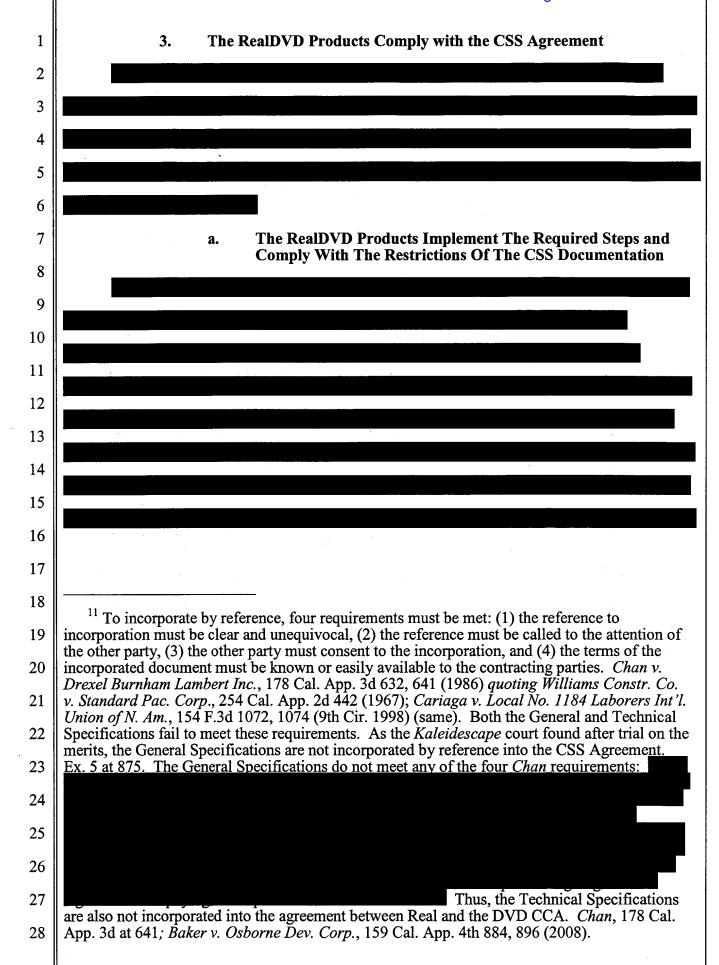
Because the CSS Agreement is a contract of adhesion, it must be construed consistent with Real's reasonable interpretation of its terms. Contracts of adhesion are agreements offered by a party of superior bargaining strength on a "take it or leave it basis." *Ting v. AT&T*, 319 F.3d 1126, 1149 (9th Cir. 2003); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061, 1069-70 (N.D. Cal. 2007). In this case, access to CSS technology is *essential* for anyone intending to manufacture legally a DVD playback device for CSS-protected discs. To make a viable DVD product, Real had to acquire a CSS License. Ex. 6 (Pak Dep.) at 49:11-20. That requirement, and the absence of any alternatives, eliminated Real's bargaining power (and the DVD CCA permitted no bargaining). *Madden v. Kaiser Found. Hosps.*, 17 Cal. 3d 699, 711 (1976) ("In many cases of adhesion contracts, the weaker party lacks not only the opportunity to bargain but also any realistic opportunity to look elsewhere for a more favorable contract."). That is no less true because Real is a well-counseled corporation. Real had no choice but to accept the CSS Agreement as is. *Graham v. Scissor-Tail, Inc.*, 28 Cal. 3d 807, 818 (1981).

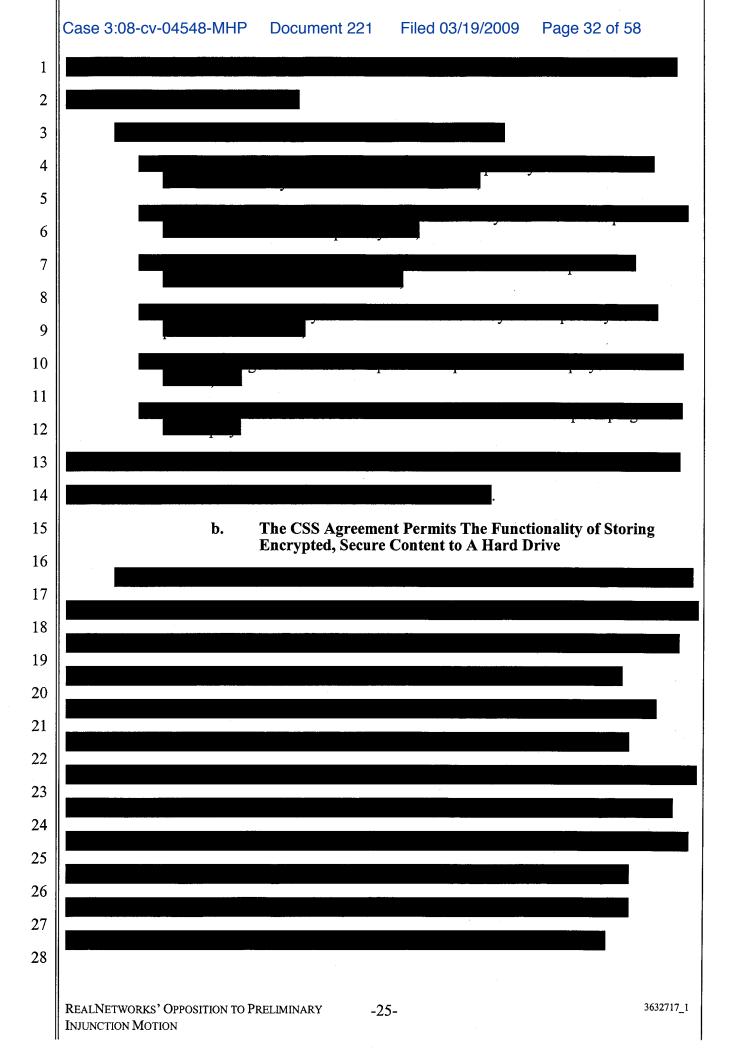
The CSS Agreement is a 'take-it-or-leave-it' contract.

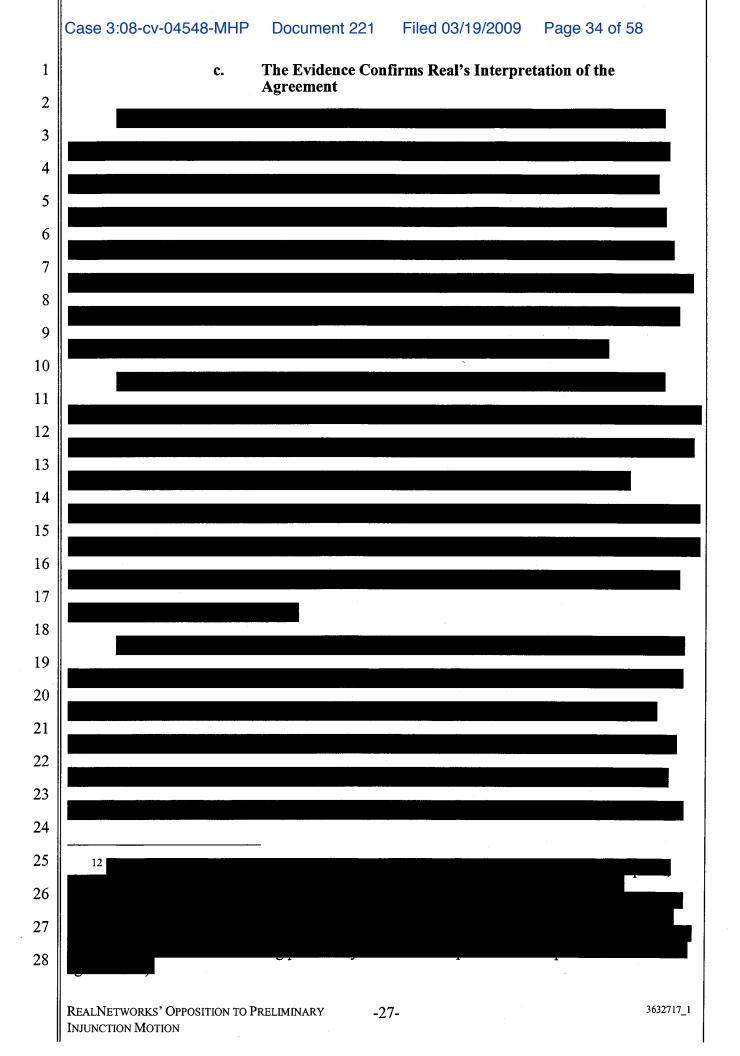
Under these circumstances, the CSS Agreement is a "standardized contract, imposed upon the subscribing party without an opportunity to negotiate the terms" – the very definition of a contract of adhesion. *Armendariz v. Found. Health PsychCare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000).

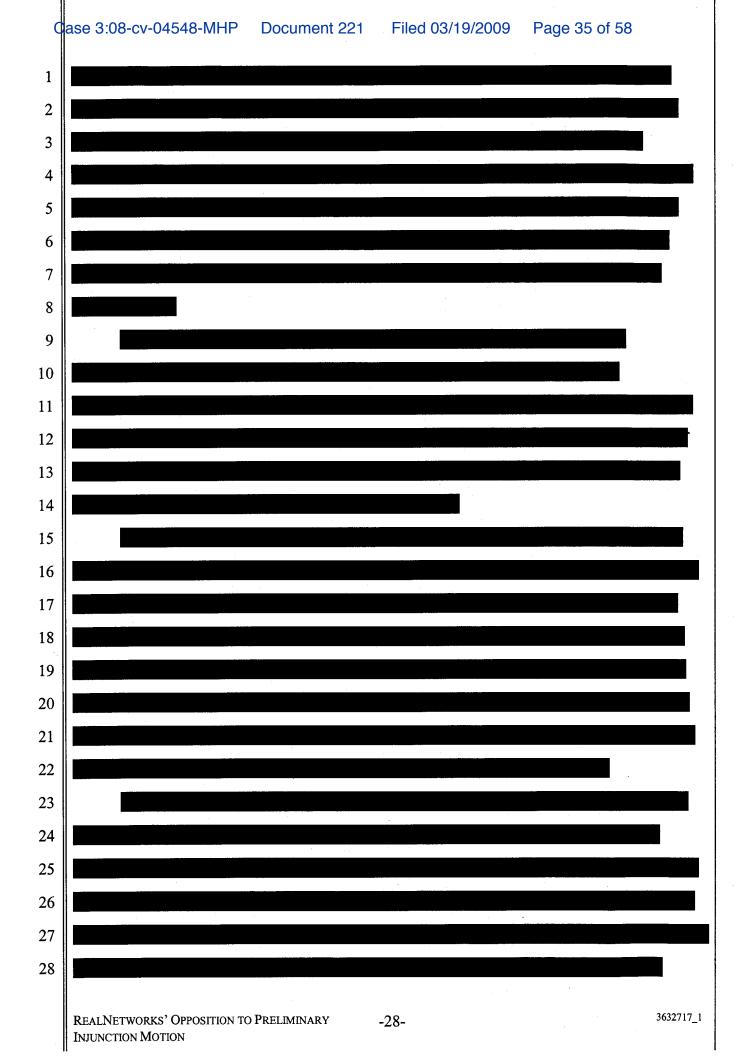
Because it is a contract of adhesion, it must be interpreted consistent with Real's reasonable expectations of its terms. *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1173 (N.D. Cal. 2002) (adhesive agreement will be interpreted according to the reasonable interpretation of the adhering party); *State Farm Fire & Cas. Co. v. Keenan*, 171 Cal. App. 3d 1, 14 (1985) (contract of adhesion interpreted in light of the reasonable expectations of the *adhering* parties, and not "from the subjective intent of the people who drew up those policies of adhesion"). Any ambiguities must be interpreted against the DVD CCA. *Acorn*, 211 F. Supp. 2d at 1173; Cal. Civ. Code §1654. The undisclosed subjective intent of the DVD CCA and Studios is irrelevant. *Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944, 956 (2003); *Oritani Sav. & Loan Ass'n v. Fidelity & Deposit Co. of Md.*, 744 F. Supp. 1311, 1315 (D. N.J. 1990) ("[T]he subjective intent of a person drafting a contract is not, by any means, determinative as to the meaning of the contract especially where, as here, the contract is one of adhesion.").

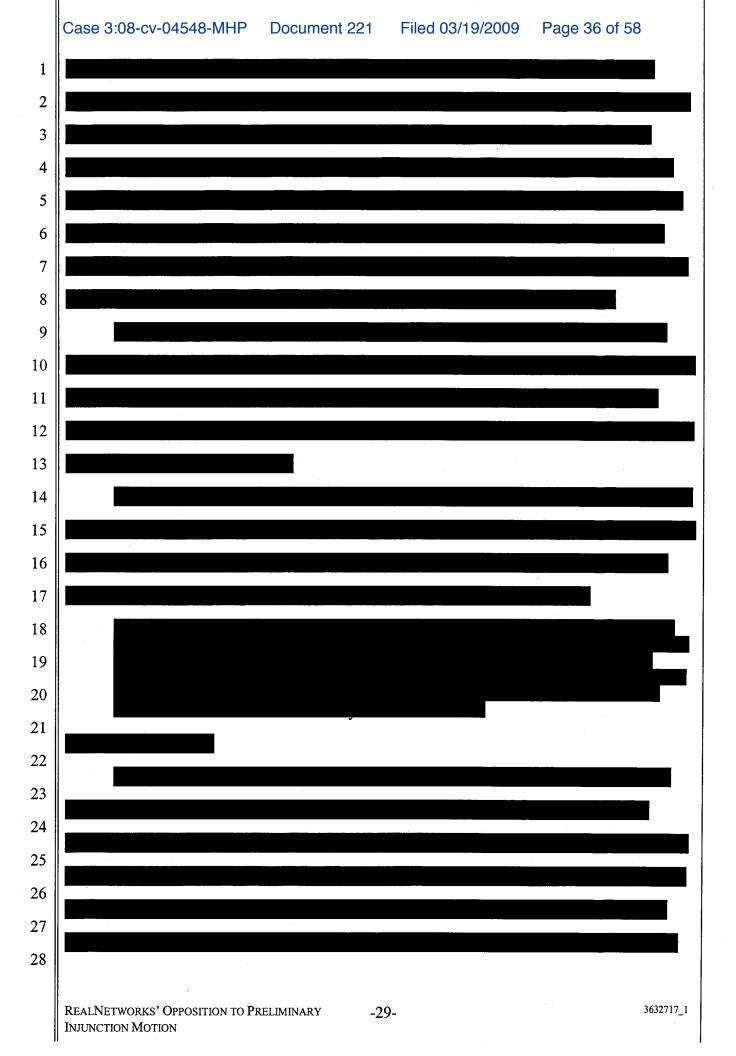
#### 2. Real's Interpretation of the CSS Agreement Is Reasonable

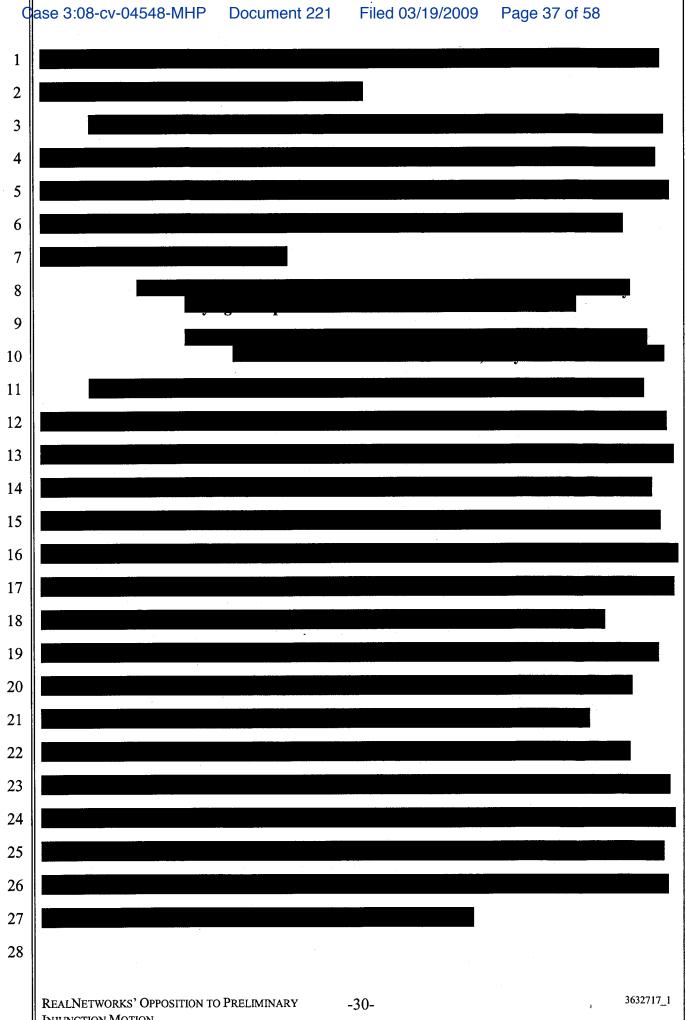


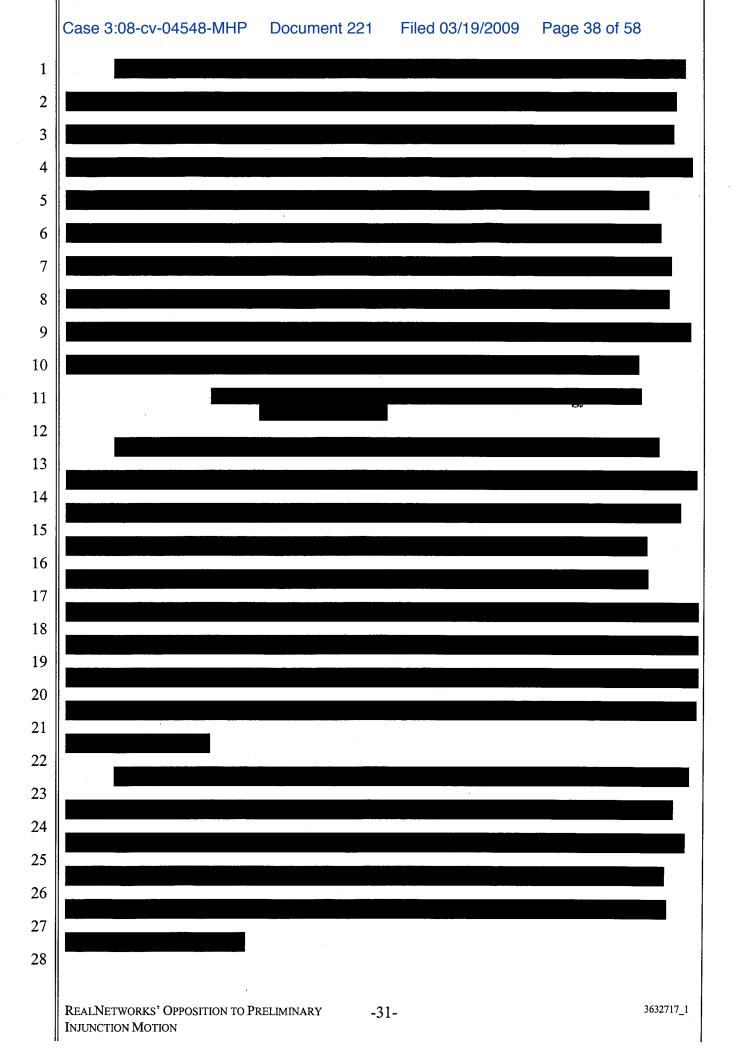


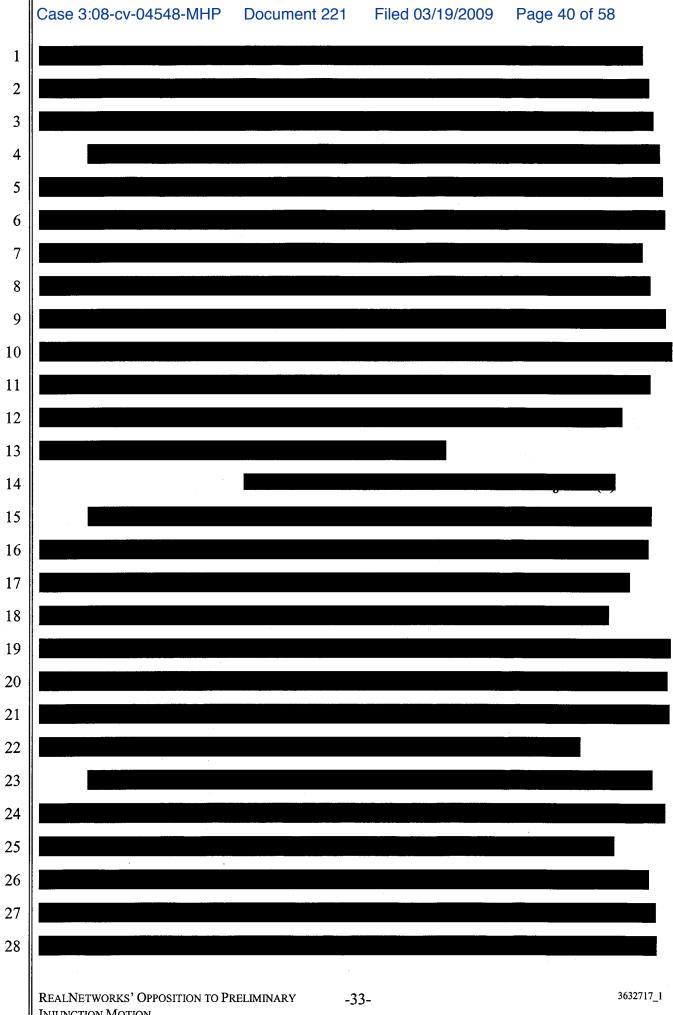


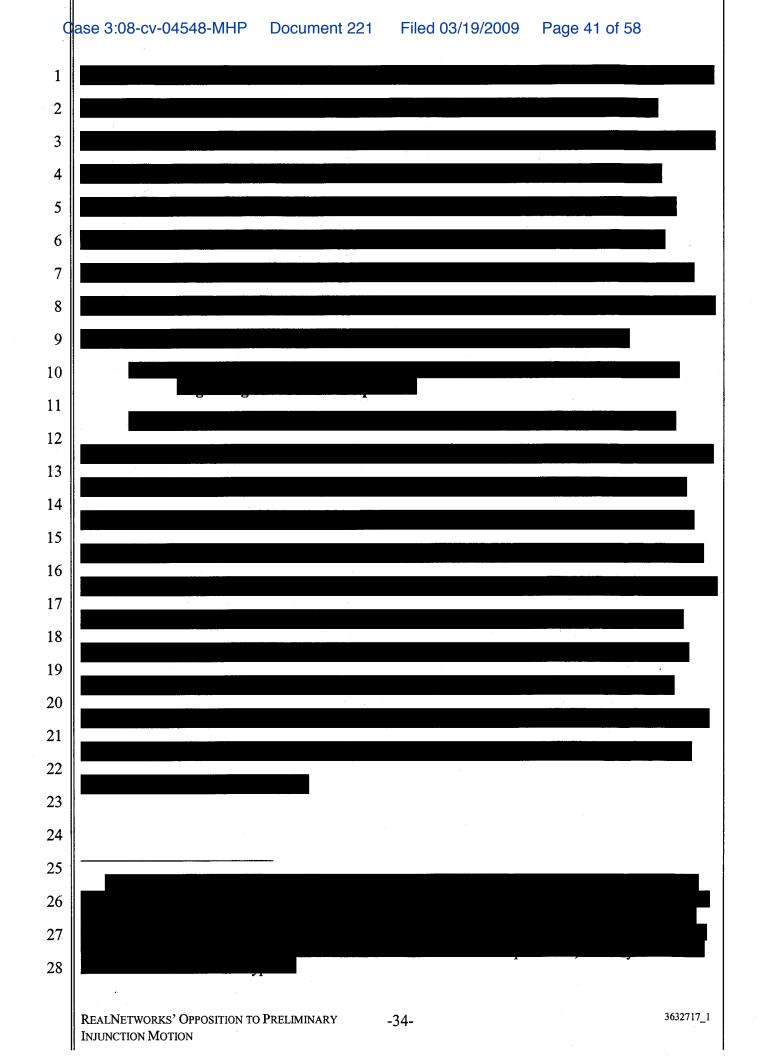


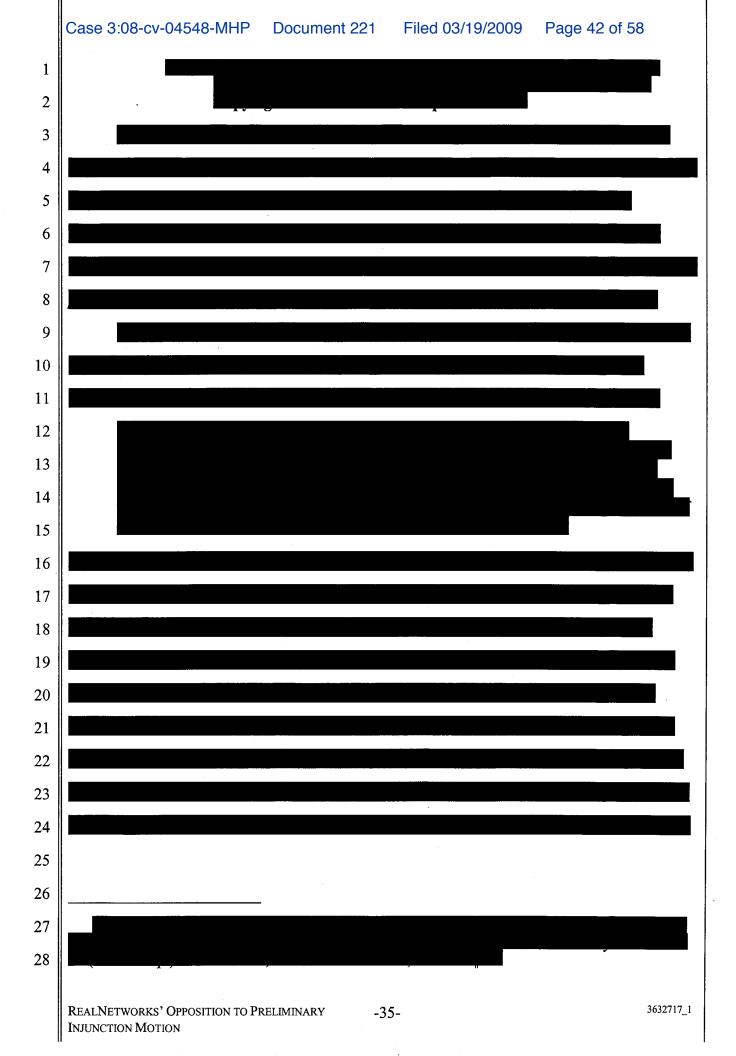


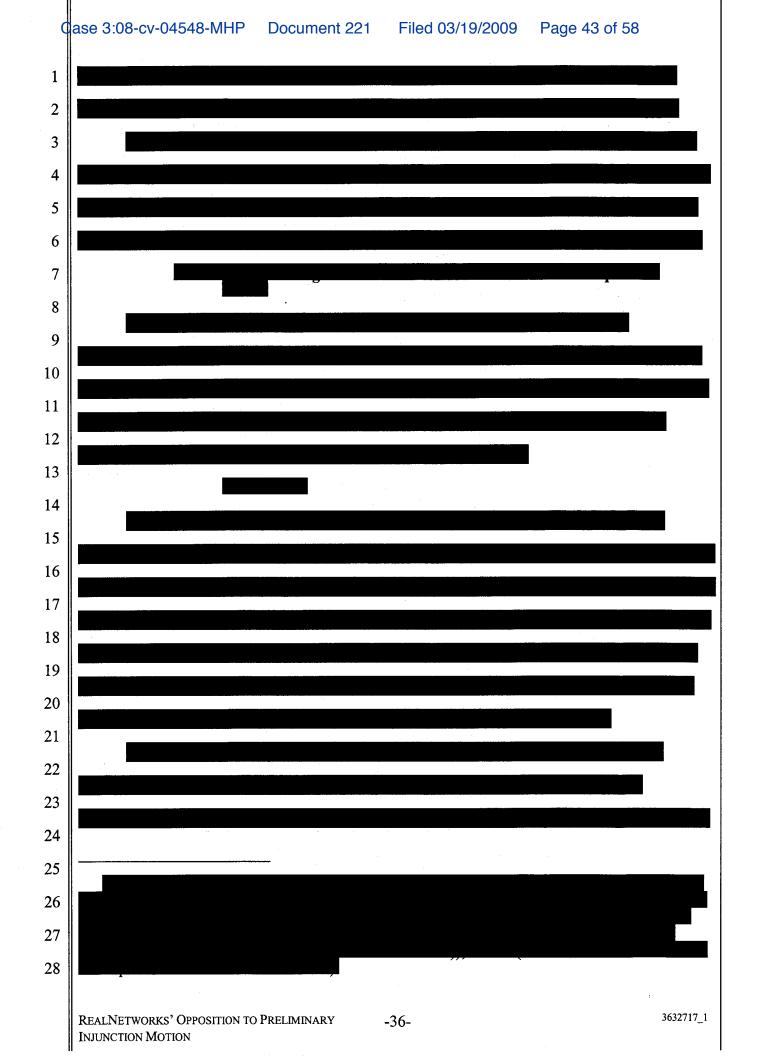


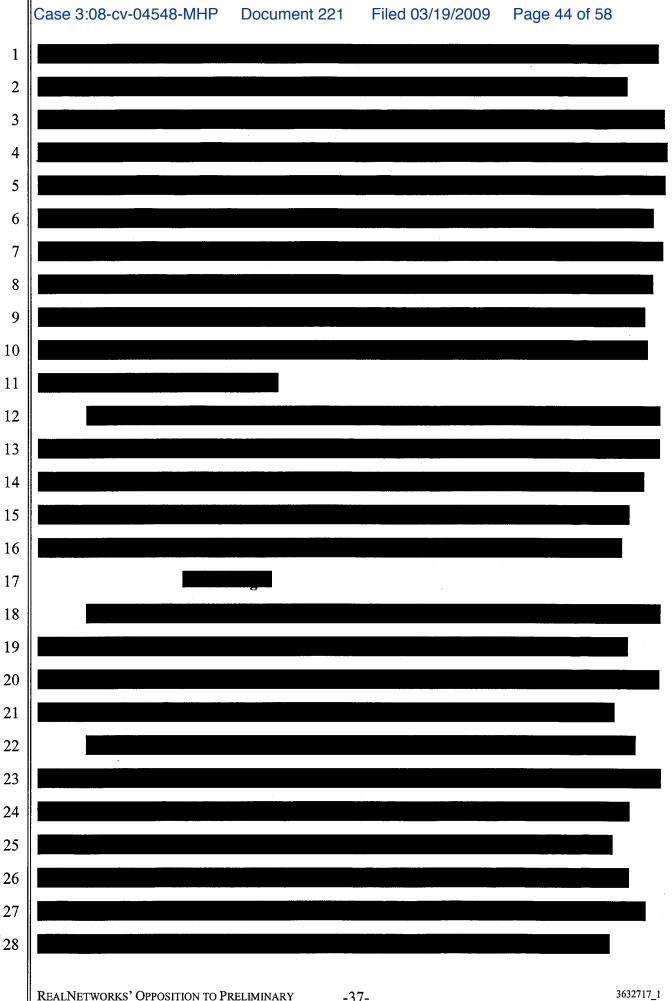


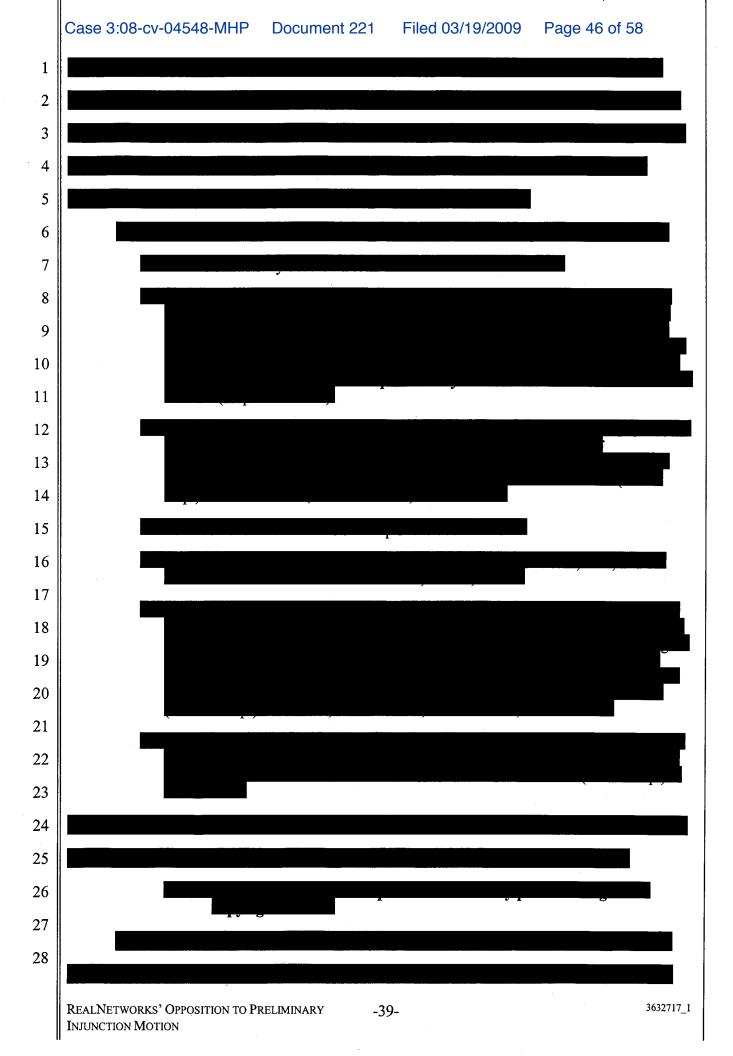


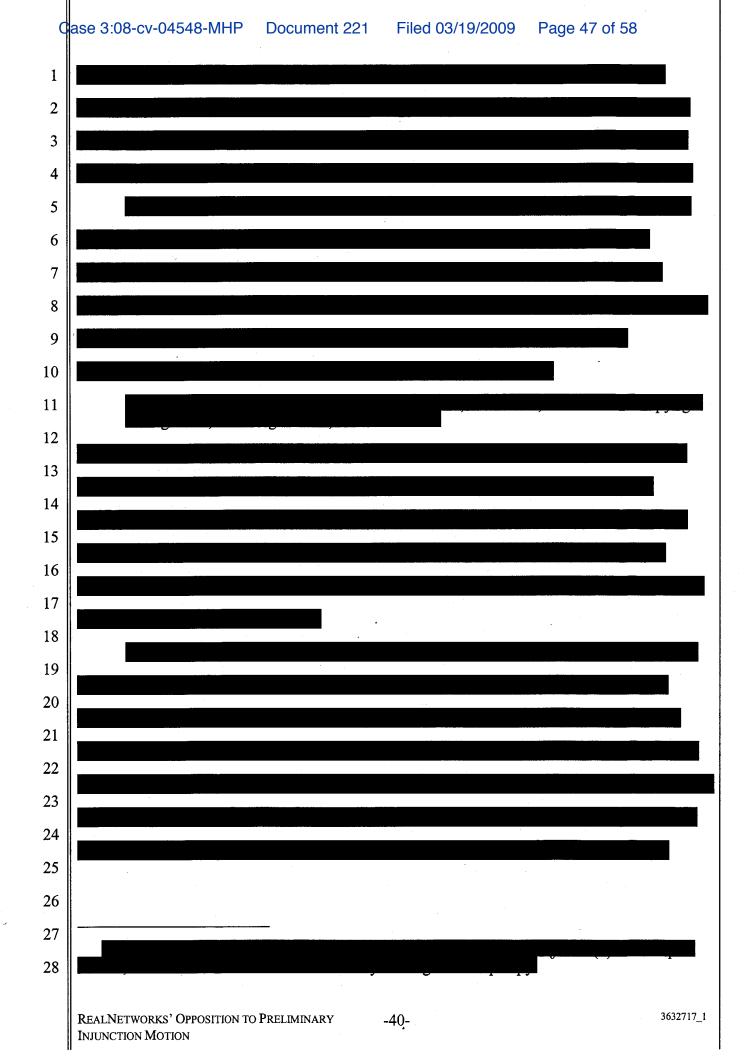


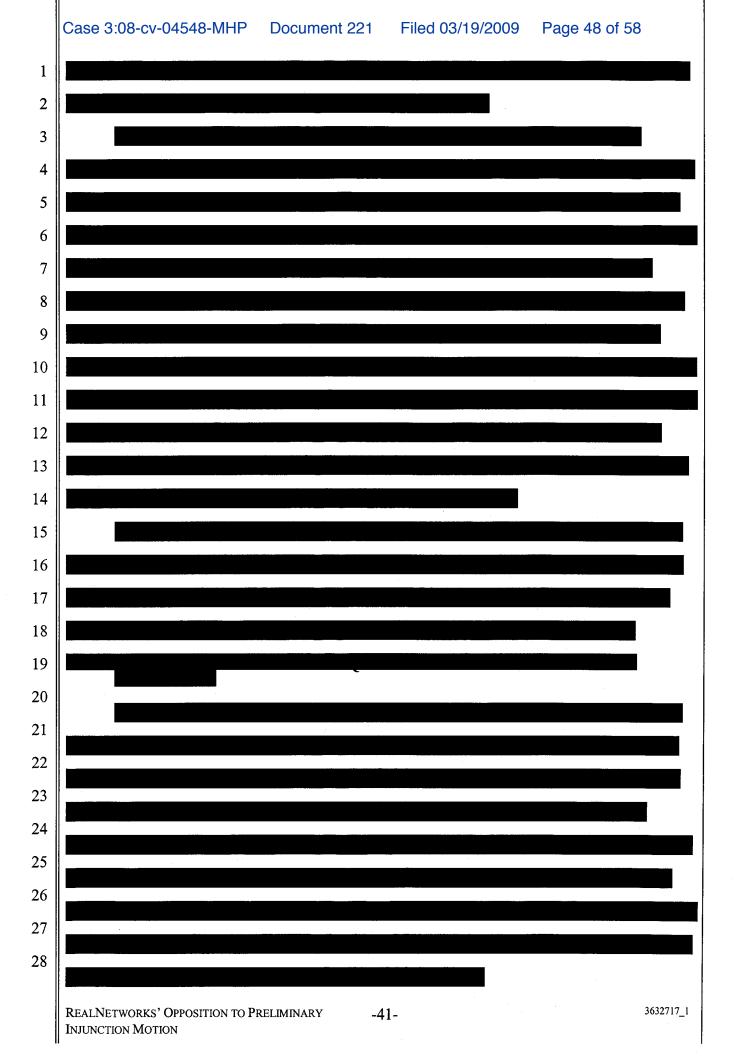


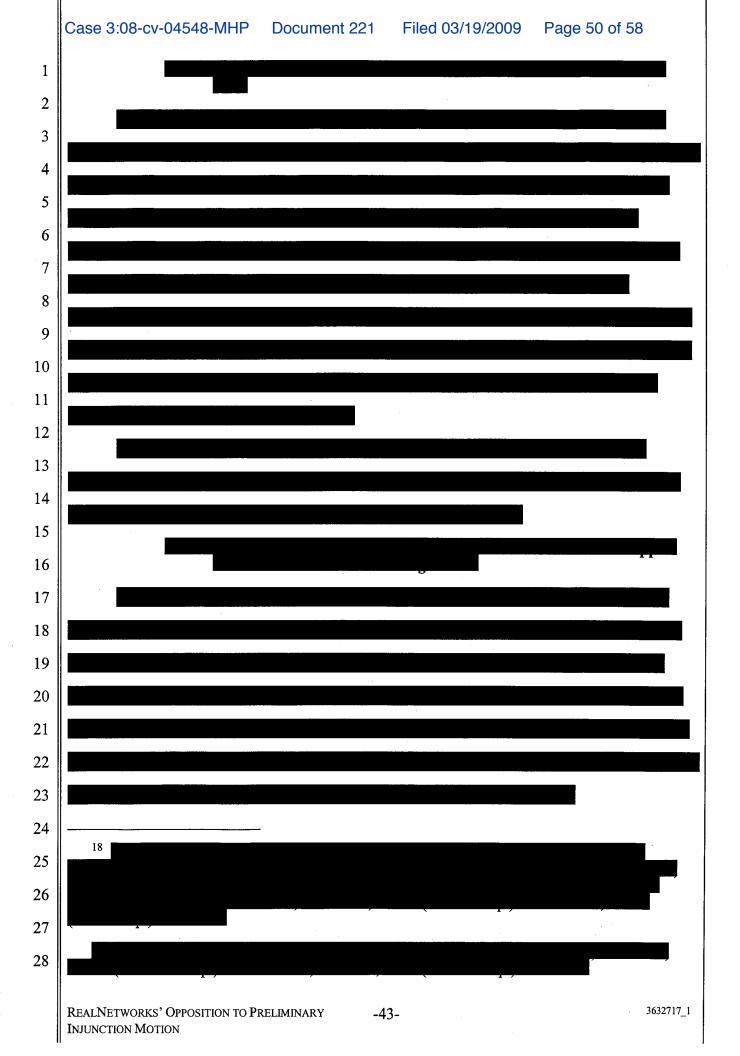


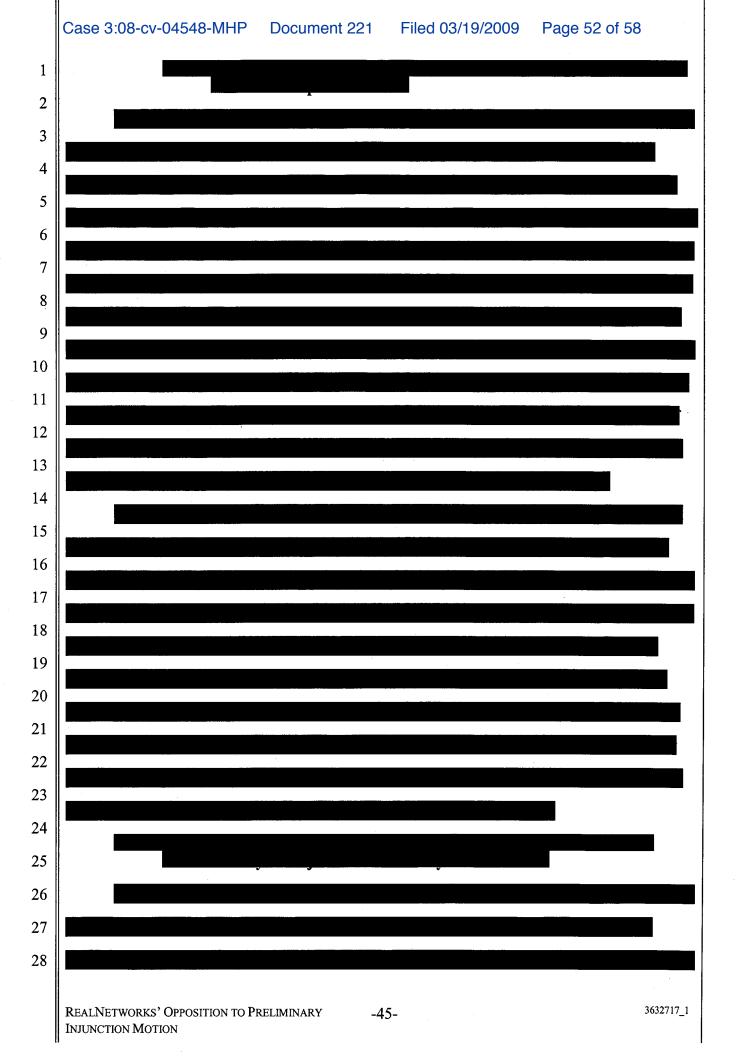


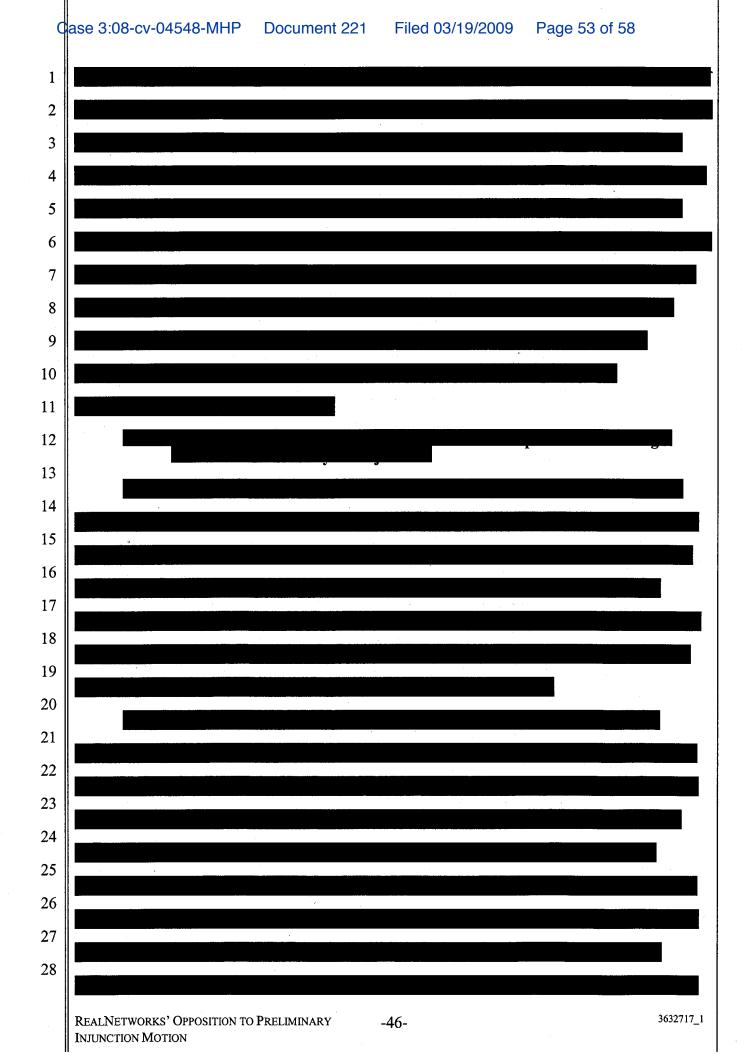


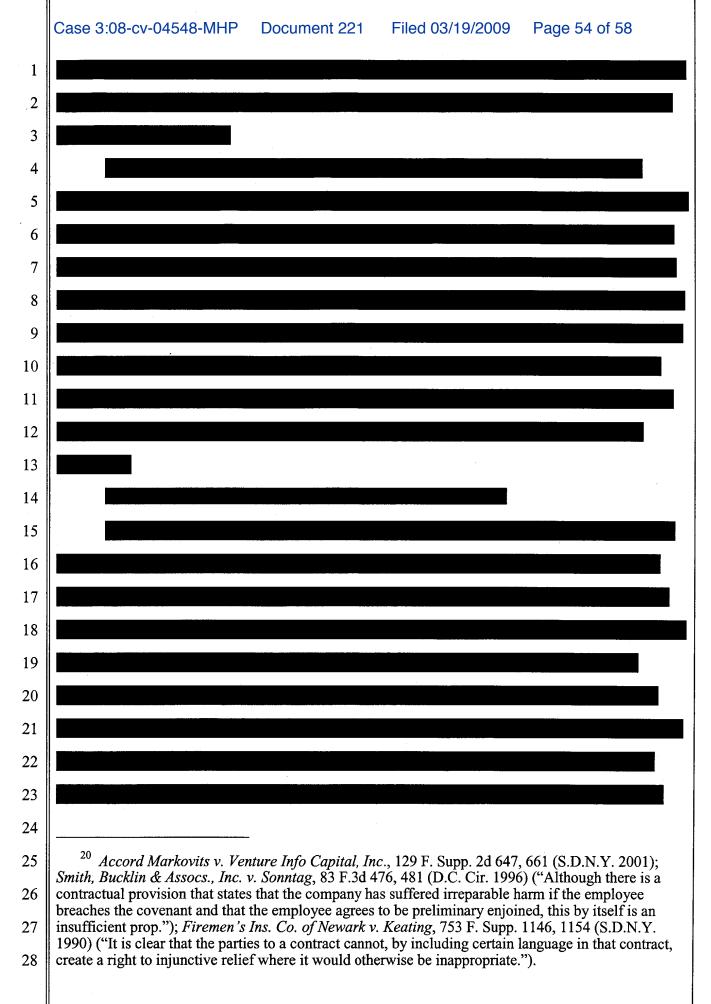


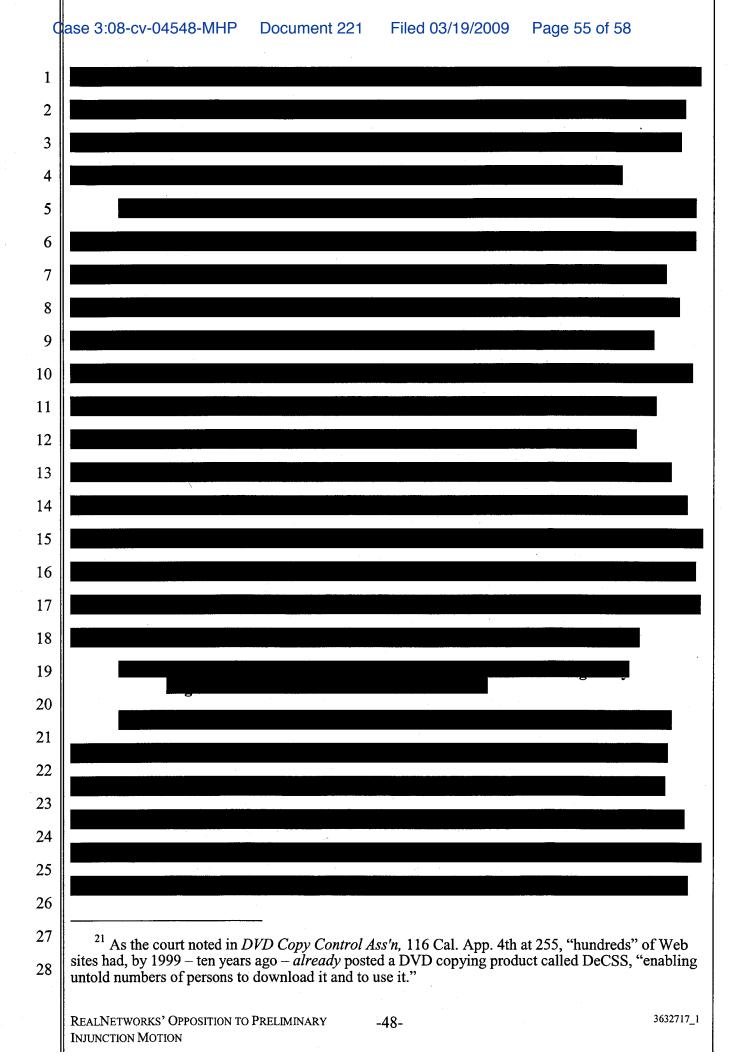


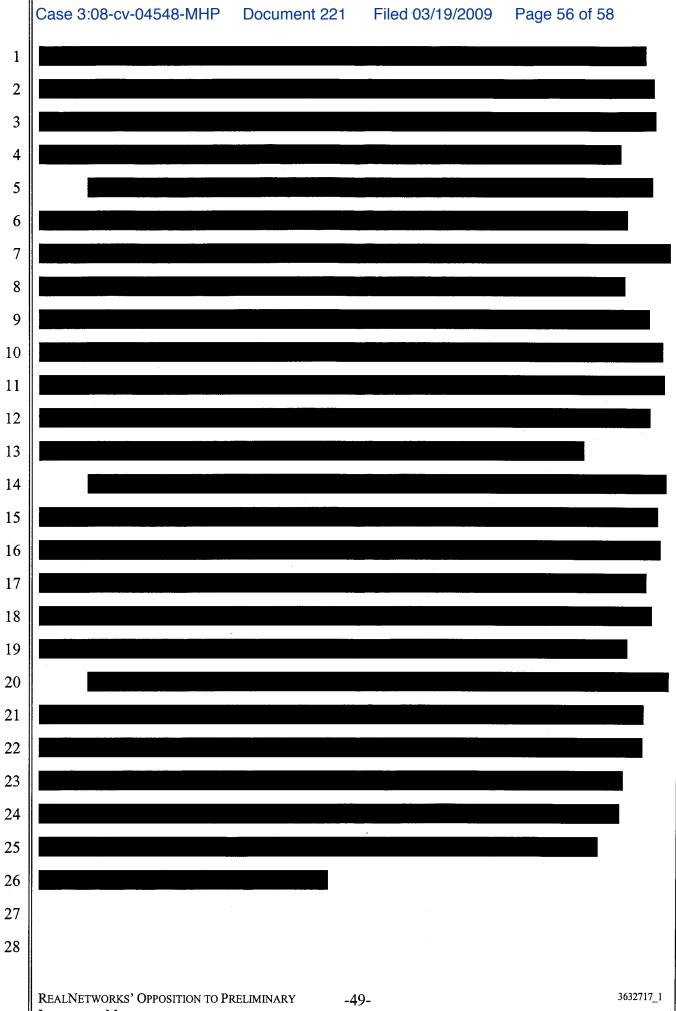












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17	Permitting the Studios to appropriate fair use and sell it back to customers would be an
18	improper extension of the copyright rights. It has long been recognized that such an extension of
19	the intellectual property grant harms the public interest and is contrary to public policy. See,
20	e.g., Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970, 976 (4th Cir. 1990).
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	CONCLUSION
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