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9
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 REALNETWORKS, INC. and REALNETWORKS
 HOME ENTERTAINMENT, INC.

11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14
 15 REALNETWORKS, INC., a Washington)
 Corporation; and REALNETWORKS HOME)
 16 ENTERTAINMENT, INC., a Delaware corporation,)
)
 17 Plaintiffs,)
)
 18 v.)
)
 19 DVD COPY CONTROL ASSOCIATION, INC., a)
 Delaware nonprofit corporation, DISNEY)
 20 ENTERPRISES, INC., a Delaware corporation;)
 PARAMOUNT PICTURES CORP., a Delaware)
 21 corporation; SONY PICTURES ENTER., INC., a)
 Delaware corporation; TWENTIETH CENTURY)
 22 FOX FILM CORP., a Delaware corporation; NBC)
 UNIVERSAL, INC., a Delaware corporation;)
 23 WARNER BROS. ENTER. INC., a Delaware)
 corporation; and VIACOM, Inc., a Delaware)
 24 Corporation,)
)
 25 Defendants.)

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**REALNETWORKS, INC. AND
 REALNETWORKS HOME
 ENTERTAINMENT, INC.'S
 OPPOSITION TO MOTION FOR
 PRELIMINARY INJUNCTION**

Date: April 1, 2009
 Time: 9:00 a.m.
 Dept: 15

[PUBLIC REDACTED VERSION]

26 AND RELATED CASES
 27

28

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1 INTRODUCTION

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

8 The first challenged product, released in September 2008, is software for a Windows PC
9 called Vegas. [REDACTED]

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

15 The products increase the security of a saved movie in two ways. [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED] And second, both products absolutely prevent the distribution of a saved
19 movie. DVDs saved using the RealDVD Products:

- 20
- cannot be posted to peer-to-peer (“P2P”) networks or otherwise distributed via the Internet;
 - 21 • cannot be played if moved to any other hard drive;
 - 22 • cannot be burned to a recordable DVD; and
 - 23 • cannot be shared over a home network.

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

1 create counterfeit DVDs that are resold on the streets. That is not possible with these products
2 since they do not permit burning to a DVD.

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

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

14 To the extent “rent-rip-and-return” is even a potential problem, it is a problem the Studios
15 have always had the power to eliminate. [REDACTED]

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

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

28

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

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

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

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

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

23 The Defendants know this to be true. The DVD CCA has already made the same
24 arguments that they and the Studios are advancing in this case to a California Court applying
25 California law to this California contract. And there, Judge Nichols of Santa Clara County
26 determined that the DVD CCA was wrong. He found that the DVD CCA failed to prove that the
27 product in that case – the Kaleidescape system that also makes a copy of a DVD to a hard drive –
28 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

1 Studio Defendants and DVD CCA are resurrecting the same arguments two years later, essentially
2 asking this Court to do what the DVD CCA itself tried and failed to do – rewrite the CSS License.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Recognizing that their CSS License claims cannot withstand close scrutiny, the Studios
16 changed the nature of this case in December 2008; they now claim that the RealDVD Products
17 should be enjoined because they supposedly circumvent two third-party products called
18 “ARccOS” and “RipGuard.” But this argument fails as well. [REDACTED]

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 _____
28 ¹ All references to (“Ex. __”) are attached to the Declaration of Christopher F. Nelson, filed
herewith.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]

For all these reasons, a preliminary injunction must be denied.

FACTUAL BACKGROUND

I. REALNETWORKS

Real is not a company operating on the fringes of the Internet. During its nearly 15 year history, Real has been a leading innovator in digital entertainment. Its "RealPlayer" software has been downloaded hundreds of millions of times over the years. Real's "Rhapsody" music service is the second largest online music business next to iTunes and delivered more than 1 billion song plays in 2008. Real currently provides music and video services for many major mobile phone companies including Verizon, T-Mobile, AT&T, Vodafone and SK Telecom, and it delivers nearly 1 billion mobile messages every day for its carrier customers. In short, Real is a digital media company at the center of creating legal digital entertainment services.

II. DEVELOPMENT OF THE REALDVD PRODUCTS

The RealDVD products were the brainchild of a handful of Real's senior executives, including its CEO, Rob Glaser, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED] Since 2000, Real's major competitors released product after product designed to save, organize, and play back digital movies, music and games, by connecting a device containing a large-capacity hard drive to a TV. But none, in Glaser's view, had figured out how to make digital video "really take off." *Id.* at 10:18-11:19.

[REDACTED]
[REDACTED]
[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]²

24 **III. CSS TECHNOLOGY AND ITS ROLE IN THE REALDVD PRODUCTS**

25 The Studios use the Content Scramble System (“CSS”) to protect DVD content. In order
26 to manufacture DVDs or make consumer electronic devices or computer software that interact

27 _____
28 ² Vegas was released to the public and referred to internally as “RealDVD,” and as such, much of the evidentiary record in this case uses “RealDVD” interchangeably with “Vegas.”

1 with DVDs, manufacturers must obtain a license to use CSS technology, which is licensed by the
2 DVD CCA.³ [REDACTED]

3 [REDACTED]. Real is one of them.

4 **A. Description of CSS Technology**

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]:



17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED].⁴ The document explaining how to protect the Keys and video content
21 from unauthorized interception is known as the Procedural Specifications. Together, the
22
23

24 ³ [REDACTED]

25 ⁴ [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 Technical and Procedural Specifications set forth a long and detailed set of requirements,
2 including but not limited to the steps required to:

- 3 • Unlock a DVD that is inserted into a drive;
- 4 • Pass the Keys and scrambled content to a licensed device;
- 5 • Protect the Keys and content once in the device; and
- 6 • Secure the unscrambled content as it is sent to the display.

7 The RealDVD Products comply with each of these steps at all times, whether they are playing or
8 saving a DVD, despite the fact that the Technical Specifications do not form part of the contract
9 between Real and the DVD CCA. [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 **B. Real Executed the DVD CCA Standard Form CSS Agreement**

14 The CSS Agreement is a non-negotiable form agreement [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] The Technical and General Specifications – which the
19 DVD CCA contends Real has violated – were not disclosed to Real until after Real executed the
20 contract and paid the DVD CCA over \$30,000. *Id.*; Ex. 8.

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED] With only
26 limited information regarding the contents of the specifications documents and no power to
27 negotiate the terms of the license agreement, Real executed the CSS License Agreement in August
28

1 2007 so that it could move forward with developing the RealDVD Products. [REDACTED]

2 [REDACTED]

3 **C. Real Developed the RealDVD Products to Comply With The CSS Agreement**

4 The RealDVD Products were developed to be fully compliant with Real's DVD CCA
5 license and the related CSS technical specifications. Real did not even begin to seriously
6 consider developing the RealDVD Products until after the California court first resolved the
7 DVD CCA's challenge to the legality of the Kaleidescape system in Kaleidescape's favor in
8 March 2007. [REDACTED]

9 Thereafter, each of the engineers responsible for writing code for the RealDVD Products
10 was instructed to follow the CSS specifications promulgated by the DVD CCA. [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 Real employed 23 software designers, full time, to write the code for both RealDVD
25 Products from scratch so that it would comply with the CSS specifications. When the CSS
26 specification or DVD CCA license presented some ambiguity, both the Vegas and Facet teams
27 were instructed to, and did, consult with James Burger, one of the primary drafters and negotiators
28 of the CSS License.

1 While the RealDVD Products strictly comply with the license, [REDACTED]
 2 [REDACTED]
 3 [REDACTED]. In 1999, the “DeCSS”
 4 computer program, which permits the playing of a CSS encrypted DVD, was posted on the
 5 Internet. The California Court of Appeal denied the DVD CCA a preliminary injunction against
 6 the “DeCSS” program based on the finding that CSS had, *even as of nearly ten years ago*, likely
 7 lost any trade secret status.⁵ [REDACTED]

8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]
 11 [REDACTED]
 12 [REDACTED]

13 **IV. REALDVD PRODUCTS: FUNCTIONALITY AND BUILT-IN PROTECTIONS**
 14 **AGAINST PIRACY**

15 Real has no interest in making anything but legitimate, legal products.⁶ [REDACTED]
 16 [REDACTED] When Real began developing the RealDVD Products, the Internet was replete
 17 with free unlicensed products to copy DVDs (“rippers”). By contrast, the RealDVD Products are
 18 designed and marketed to customers only to make a copy of *the customers’ own DVDs*.
 19

20 ⁵ See *DVD Copy Control Assoc’n, Inc. v. Bunner*, 116 Cal. App. 4th 241, 253 (2004) (“[T]he
 21 evidence demonstrates that in this case, the initial publication was quickly and widely
 22 republished to an eager audience so that DeCSS and the trade secrets it contained rapidly became
 23 available to anyone interested in obtaining them.”).

24 ⁶ Real is not alone in its understanding that the CSS License permits making secure, CSS-
 25 scrambled back-up copies of DVD content. Since at least 2004, other companies have offered
 26 CSS-licensed products with this functionality. For instance, AMX Corporation provides CSS-
 27 compliant software and hardware products that allow back-up copies of movies. [REDACTED]

28 [REDACTED] Drive-In is a CSS-licensed product offered by a company called Telestream for backing
 up CSS-scrambled DVDs on Apple computers. Ex. 18. It is promoted for sale on Apple’s
 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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A
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:

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- [REDACTED]
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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.** [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

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 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
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 11 [REDACTED]
 12 [REDACTED]

13 [REDACTED] When a movie is saved to the internal hard
 14 drive of a laptop, for example, it is locked there and can only be played from that hard drive, on
 15 that computer. Buzzard Decl., ¶¶ 4, 10. The Vegas software, however, also offers the ability to
 16 save the movies to an *external* hard drive. The hard drive containing the movies may then be
 17 removed from the first computer and attached to a different computer *licensed to the same*
 18 *RealDVD account* (with a maximum of five licensed computers in total) for playback only. *Id.*
 19 This enables users to play their movies on both their home PC and on the road with their laptop.

20 With Vegas, while the external hard drive may be moved, the digital copy of a saved
 21 movie remains locked on the single hard drive where it was originally saved, and thus, it can only
 22 be used with *one* computer at a time. Buzzard Decl., ¶¶ 4, 10. This is like a DVD, which can be
 23 carried from DVD player to DVD player. If the movie is moved or copied to another hard drive,
 24 it will not play. If it is sent over the Internet or a home network, it will not play. *Id.* Nor can the
 25 copy be further copied and played back.

26 [REDACTED]
 27 [REDACTED]
 28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 **C. Unlicensed “Ripper” Products Do Not Implement These Protections Against**
Unauthorized Copying

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

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

15

| 16 Feature | RealDVD Products | DVD “Rippers” |
|---|------------------|---------------|
| 17 Can share playable copy over the Internet | NO | YES |
| 18 Can play saved copy on more than one 19 computer simultaneously | NO | YES |
| 20 Can transmit playable copy to another computer, hard drive or thumb drive | NO | YES |
| 21 Permits playback on unlimited number of 22 computers | NO | YES |
| 23 Can save to a shared network of computers | NO | YES |
| 24 Can save to a portable device (e.g., iPod) | NO | YES |
| 25 Can make a playable copy of a copy | NO | YES |
| Maintains CSS encryption | YES | NO |

26

27 Given the availability of rippers and the restrictions imposed by the RealDVD Products,
 28 the RealDVD Products are unlikely to appeal to any persons interested in stealing DVD content.

Bresnahan Decl., ¶ 18; Gerbrandt Decl., ¶¶ 7-8, 13.

1 **V. THE STUDIOS CHANGED THEIR CIRCUMVENTION THEORIES** [REDACTED]

2 Months after the Studios obtained a TRO, recognizing the weakness in their CSS claims,
3 the Studios sought to dramatically alter the focus of their circumvention claims. In mid-
4 December, just as fact discovery was originally set to close, the Studios indicated their intent to
5 contend that [REDACTED]

6 [REDACTED] Ex. 23. The new
7 theories formed no part of the Complaint filed by the Studios, no part of the TRO proceedings,
8 and no part of the temporary injunction that resulted and is still in effect. In late December, the
9 Court allowed the new ARccOS and RipGuard claims [REDACTED]
10 [REDACTED] but also extended discovery to allow the parties to prepare.

11 **A. Real's Knowledge Of ARccOS and RipGuard**

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[REDACTED]

DVD player and DVD software product manufacturers use the DVD Video Specifications to understand how to build products that can access DVDs. Ex. 28 at ¶¶ 32-34. [REDACTED]

[REDACTED]

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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

Before it launched Vegas, Real contacted the Studios [REDACTED]

[REDACTED]

(...continued from previous page)

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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,

¹⁰ 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.

1 1135 (N.D. Cal. 2002), a case involving “ebooks” (digital books to be read on computers), the
2 court noted: “Courts have been receptive to the making of an archival copy of electronic media in
3 order to safeguard against mechanical or electronic failure.” The *Elcom* court wrote: “Making a
4 back-up copy of an ebook, for personal noncommercial use would likely be upheld as a non-
5 infringing fair use.” *Id.* at 1135.

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

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

16 “SonyBMG wants music to be easily transferable to any device that supports secure
17 music. Currently, music from our protected CDs may be transferred to hundreds of
18 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.”

19 Ex. 37.

20 Even with movie content, the Studios have created an atmosphere in which consumers
21 believe that back-up copying, as well as space and timing shifting, are authorized. The Studios
22 provide movie and television content in partnership with cable and satellite companies to
23 consumers, and that content is freely copyable and storable forever using Tivos or other home
24 digital video recorders (DVRs). Gerbrandt Decl., ¶ 32. Consumers can also transfer that content
25 to DVD discs or to their computers. The movie and television content copied in this manner is
26 often *identical* to the content the same consumer might otherwise purchase on a DVD. *Id.* The
27 Studios also provide movie and television content on such services as iTunes at the same price as
28 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

1 devices. *Id.*, ¶ 5. Again, that content is often *identical* to the content the same consumer might
2 otherwise purchase on a DVD. Given this behavior, the Studios are not in a position to claim that
3 copying of this content for time-shifting or space-shifting is not fair use.

4 **B.** [REDACTED]

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12 **1. The CSS Agreement Is A Contract of Adhesion That Must Be**
13 **Construed According to Real’s Reasonable Interpretation**

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

27 The CSS Agreement is a ‘take-it-or-leave-it’ contract. [REDACTED]
28 [REDACTED]

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

5 Because it is a contract of adhesion, it must be interpreted consistent with Real’s
6 reasonable expectations of its terms. *Acorn v. Household Int’l, Inc.*, 211 F. Supp. 2d 1160, 1173
7 (N.D. Cal. 2002) (adhesive agreement will be interpreted according to the reasonable
8 interpretation of the adhering party); *State Farm Fire & Cas. Co. v. Keenan*, 171 Cal. App. 3d 1,
9 14 (1985) (contract of adhesion interpreted in light of the reasonable expectations of the *adhering*
10 parties, and not “from the subjective intent of the people who drew up those policies of
11 adhesion”). Any ambiguities must be interpreted against the DVD CCA. *Acorn*, 211 F. Supp. 2d
12 at 1173; Cal. Civ. Code §1654. The undisclosed subjective intent of the DVD CCA and Studios is
13 irrelevant. *Founding Members of the Newport Beach Country Club v. Newport Beach Country*
14 *Club, Inc.*, 109 Cal. App. 4th 944, 956 (2003); *Oritani Sav. & Loan Ass’n v. Fidelity & Deposit*
15 *Co. of Md.*, 744 F. Supp. 1311, 1315 (D. N.J. 1990) (“[T]he subjective intent of a person drafting
16 a contract is not, by any means, determinative as to the meaning of the contract especially where,
17 as here, the contract is one of adhesion.”).

18 **2. Real’s Interpretation of the CSS Agreement Is Reasonable**

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3. The RealDVD Products Comply with the CSS Agreement

[REDACTED]

a. The RealDVD Products Implement The Required Steps and Comply With The Restrictions Of The CSS Documentation

[REDACTED]

¹¹ To incorporate by reference, four requirements must be met: (1) the reference to incorporation must be clear and unequivocal, (2) the reference must be called to the attention of the other party, (3) the other party must consent to the incorporation, and (4) the terms of the incorporated document must be known or easily available to the contracting parties. *Chan v. Drexel Burnham Lambert Inc.*, 178 Cal. App. 3d 632, 641 (1986) quoting *Williams Constr. Co. v. Standard Pac. Corp.*, 254 Cal. App. 2d 442 (1967); *Cariaga v. Local No. 1184 Laborers Int'l. Union of N. Am.*, 154 F.3d 1072, 1074 (9th Cir. 1998) (same). Both the General and Technical Specifications fail to meet these requirements. As the *Kaleidescape* court found after trial on the merits, the General Specifications are not incorporated by reference into the CSS Agreement. Ex. 5 at 875. The General Specifications do not meet any of the four *Chan* requirements:

[REDACTED]

Thus, the Technical Specifications are also not incorporated into the agreement between Real and the DVD CCA. *Chan*, 178 Cal. App. 3d at 641; *Baker v. Osborne Dev. Corp.*, 159 Cal. App. 4th 884, 896 (2008).

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b. The CSS Agreement Permits The Functionality of Storing Encrypted, Secure Content to A Hard Drive

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25 ²⁰ *Accord Markovits v. Venture Info Capital, Inc.*, 129 F. Supp. 2d 647, 661 (S.D.N.Y. 2001);
 26 *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996) (“Although there is a
 27 contractual provision that states that the company has suffered irreparable harm if the employee
 28 breaches the covenant and that the employee agrees to be preliminary enjoined, this by itself is an
 insufficient prop.”); *Firemen’s Ins. Co. of Newark v. Keating*, 753 F. Supp. 1146, 1154 (S.D.N.Y.
 1990) (“It is clear that the parties to a contract cannot, by including certain language in that contract,
 create a right to injunctive relief where it would otherwise be inappropriate.”).

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²¹ As the court noted in *DVD Copy Control Ass'n*, 116 Cal. App. 4th at 255, “hundreds” of Web sites had, by 1999 – ten years ago – *already* posted a DVD copying product called DeCSS, “enabling untold numbers of persons to download it and to use it.”

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