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13

14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

16 REALNETWORKS, INC., et al.,
17 Plaintiffs,
18 vs.
19 DVD COPY CONTROL ASSOCIATION,
INC., et al.
20 Defendants.
21

CASE NO. C 08-4548-MHP

**NOTICE OF MOTION AND MOTION OF
STUDIO PLAINTIFFS FOR PRELIMINARY
INJUNCTION; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT
THEREOF**

Date: April 1, 2009
Time: 9:00 a.m.
Ctrm: 15 (Hon. Marilyn Hall Patel)

22 UNIVERSAL CITY STUDIOS
23 PRODUCTIONS LLLP, et al.,
24 Plaintiffs,
25 vs.
26 REALNETWORKS, INC., et al.
27 Defendants.
28

CASE NO. C 08-4719-MHP

[Filed concurrently herewith:
1) Declaration of Jonathan H. Blavin;
2) Declaration of Mark Hollar;
3) Declaration of Robert Schumann;
4) Declaration of Jeffrey S. Miller;
5) [Proposed] Order]

1 TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that on April 1, 2009, at 9:00 a.m. or as soon thereafter as
3 counsel may be heard in Courtroom 15 of the above-captioned Court, located at 450 Golden Gate
4 Avenue, San Francisco, California, Plaintiffs and Declaratory Relief Claim Defendants
5 Paramount Pictures Corporation, Twentieth Century Fox Film Corporation, Universal City
6 Studios Productions LLLP, Warner Bros. Entertainment Inc., Disney Enterprises, Inc., Sony
7 Pictures Television Inc. and Columbia Pictures Industries, Inc. (collectively, "the Studios") will
8 and hereby do move for a preliminary injunction restraining and enjoining RealNetworks, Inc.
9 and RealNetworks Home Entertainment, Inc. ("Real") and all of their officers, agents, servants,
10 employees, and attorneys, and those persons in active concert or participation or privity with any
11 of them, from developing, maintaining, supplying, promoting, trafficking or providing to any
12 person or entity, or participating in the development, maintenance, supply, promotion, trafficking
13 or provision to any person or entity of the product known as RealDVD (whether termed [REDACTED]
14 [REDACTED], or any other code name), or any substantially similar software application, or any software
15 that circumvents a technological measure that effectively controls access to or copying of the
16 Studios' copyrighted content on digital versatile discs ("DVDs").

17 Good cause exists for the foregoing order. As set forth in the accompanying Opening
18 Brief in Support of Motion for Preliminary Injunction and supporting papers filed herewith, Real
19 will continue to violate 17 U.S.C. § 1201, *et seq.*, by manufacturing, offering to the public,
20 providing, or otherwise trafficking in a program entitled "RealDVD." RealDVD is (a) designed
21 and produced, (b) marketed by Real, and (c) has no other commercially significant purpose other
22 than to circumvent the Content Scramble System, ARccOS and RipGuard technologies that
23 controls access to and/or copying of the Studios' works protected under Title 17 of the United
24 States Code when those works are encrypted onto DVDs. Unless restricted, Real's conduct will
25 cause immediate and irreparable harm to the Studios.

26 This motion is based on this Notice of Motion and Motion, the attached Opening Brief,
27 the Declarations of Jonathan H. Blavin, Robert Schumann, Mark Hollar, Jeffrey S. Miller, and
28 Michael Dunn, the pleadings on file in this action, and on such other and further matters as may

1 be presented at or before the hearing on this motion.

2

3

DATED: March 19, 2009

4

/s/

5

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Attorneys for Motion Picture Studio
Plaintiffs/Declaratory Relief Claim Defendants

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Last October, this Court enjoined RealNetworks (“Real”) from trafficking in RealDVD
4 because of “serious questions” about its legality under the Digital Millennium Copyright Act
5 (“DMCA”). Discovery has now confirmed that:

- 6 • RealDVD enables exactly what the Studios’ primary level of access and copy
7 protection for DVDs — the Content Scramble System (“CSS”) — was designed to
8 prevent: the making of permanent, playable copies of DVDs;
- 9 • RealDVD enables DVD copying in ways that unquestionably circumvent critical
10 CSS specifications in the license agreement provided by the DVD Copy Control
11 Association (“DVD CCA”) (“CSS License”);
- 12 • Real obtained these confidential CSS specifications by signing up as a CSS
13 licensee under the false pretense that it was going to make a DVD *player* when in
14 fact it really wanted the specifications so that it could create a DVD *copier*; and
- 15 • Real knew all along that obtaining a CSS License did not authorize Real to build a
16 DVD copier.

17 These facts alone demonstrate that the Studios are likely to succeed on the merits of their DMCA
18 claim. Courts repeatedly have recognized that CSS is a technological measure designed to
19 control access to and copying of DVDs under the DMCA and therefore routinely have enjoined
20 the trafficking in other similar products that enable end users to copy DVDs.¹

21 But discovery has revealed that circumvention of CSS is only part of Real’s wrongdoing.
22 In fact, we now know RealDVD was intentionally designed to defeat and circumvent two
23 additional layers of copy protection: ARccOS and RipGuard. These additional technological
24 protections are placed on many DVDs to frustrate the illegal ripping software that has been
25 unlawfully distributed to circumvent the CSS protections. Discovery has shown that Real clearly
26 understood that it could not successfully market a DVD copier without defeating the additional

27 ¹ See *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 2d 211 (S.D.N.Y. 2000) and 111 F.
28 Supp. 2d 294 (S.D.N.Y. 2000), *aff’d* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir.
2001); *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.Supp. 2d 1085 (N.D. Cal. 2004).

1 ARccOS and RipGuard protections because consumers would not pay for a DVD-copying
2 product that did not successfully rip each and every commercial DVD they wanted to copy.
3 Therefore, Real spent a significant portion of its development time figuring out how to
4 circumvent ARccOS and RipGuard ([REDACTED]). Real
5 cannot hide behind the CSS License to justify its circumvention of ARccOS and RipGuard,
6 because the CSS License has nothing to do with ARccOS or RipGuard. Real's circumvention of
7 these additional protections provides another independent ground for enjoining Real.

8 The Studios are likely to succeed on the merits of their DMCA claim twice over, due to
9 Real's circumvention of (1) CSS; and (2) ARccos and RipGuard. Therefore, irreparable injury
10 may be presumed as a matter of law under the DMCA. But even without this presumption, the
11 record shows that distribution of RealDVD will irreparably harm the Studios. The illegal copies
12 that RealDVD makes will supplant demand for the Studios' legitimately distributed products in
13 existing as well as emerging markets. To cite but one example, the Studios currently offer a
14 "Digital Copy" product that allows consumers to transfer legally a digital copy of a movie to their
15 computer hard drives — just as RealDVD does. With RealDVD, Real seeks to illegally and
16 unfairly appropriate for itself the value that consumers place on obtaining copies of the Studios'
17 copyrighted works; instead, this value legitimately belongs to the copyright owners who invested
18 in and created the works. Real's campaign to try and convince consumers that DVD copying is
19 "legal" and "100% legit" threatens to affect consumer perceptions (and thus behavior), which
20 threatens the viability of the DVD market and the Studios' ability to obtain a return on their
21 investment in the creative works embodied in the DVD product. The slew of putative "expert"
22 reports Real has thrown into the record do nothing to rebut the Studios' showing of harm.

23 For all of the reasons discussed below, the Court should enter a preliminary injunction
24 barring Real from manufacturing and distributing RealDVD.

25 **II. BACKGROUND**

26 **A. The Technological Measures Safeguarding The Studios' Copyrighted Content**

27 The advent of digital media and the resulting ease of making and disseminating perfect
28 digital copies of copyrighted content have enabled rampant piracy. *See Corley*, 273 F.3d at 436.

1 The Studios and other content owners rely on multiple layers of technological protections —
2 backed up by the DMCA — to protect their works from copying.

3 **1. CSS — The Content Scramble System**

4 The primary layer of access- and copy-control protections on DVDs is “CSS.” CSS is the
5 result of a cross-industry effort over many years by the (i) consumer electronics, (ii) computer
6 software and hardware (“IT”), and (iii) motion picture industries to create a secure system for the
7 dissemination and playback of copyrighted content on DVDs. *Id.*

8 The importance of CSS to the commercialization of DVDs cannot be overstated. Marsha
9 King, a former Studio executive present at the creation of CSS and the CSS License, testified that

10 the Studios “

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[REDACTED]

[REDACTED] *accord Corley*, 273 F.3d at 436. Andrew

Parsons, a Senior Vice President at Pioneer Electronics representing the consumer electronics

industry in the drafting of the CSS License, also testified that the goal of CSS was “

[REDACTED]”

[REDACTED]

CSS licensees (such as Real) could not possibly be confused about the overriding anti-

copying goal of CSS. The Specifications repeatedly explain that CSS’s purpose is to “

[REDACTED]” *See, e.g.*, Blavin Decl., Ex. 15 at

§ 1.1. As courts recognize, CSS implements an integrated system of locks-upon-locks so

“appropriately configured hardware . . . [can] decrypt, unscramble and play back, *but not copy*”

DVDs. *Reimerdes*, 111 F. Supp. 2d at 308 (emphasis added). The CSS License itself states at the

outset that CSS was “developed . . . to provide reasonable security for content on DVD Discs and

. . . provide protection for such copyrighted content against unauthorized consumer copying.”

Blavin Decl., Ex. 21 at Recital A. The CSS License is for “DVD Products,” such as DVD

Players, DVD Drives, and DVD Discs, but notably not “DVD copiers.” *Id.* § 1.15.

The technical details of CSS are explicated in detail in the brief filed by the DVD CCA,

and in the declaration of the Studios’ technical expert, Robert Schumann. The critical features of

1 CSS at issue in this case include the following:

2 (1) **Content Encryption.**

3 [REDACTED]
4 Declaration of Robert Schumann ("Schumann Decl."), Ex. A at ¶ 26; *Corley*, 273 F.3d at
5 437-38.

6 (2) **Drive Locking.**

7 [REDACTED]
8 Schumann Decl., Ex. A at ¶¶ 25, 28-30.

9 (3) **Protection of Decryption Keys.**

10 [REDACTED]
11 [REDACTED]
12 *Id.* ¶ 27.

13 (4) **Authentication.**

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 *Id.* ¶¶ 28-30.

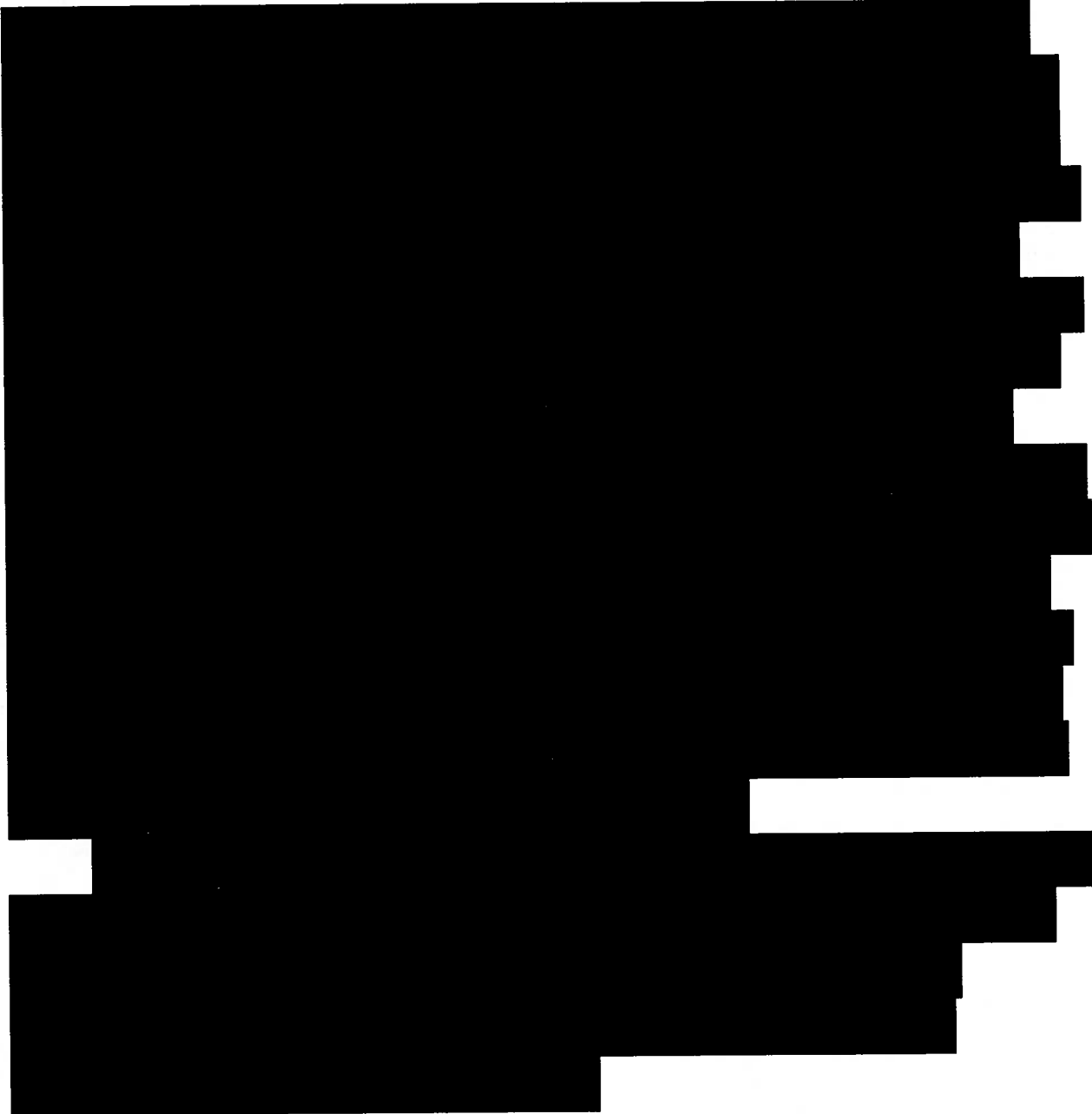
18 (5) **Bus Encryption.**

19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 *Id.* ¶¶ 31-33.

23 **2. ARccOS and RipGuard**

24 To supplement the protections of CSS, various Studios utilize two other technological
25 measures to guard against copying: "ARccOS," released by Sony DADC and "RipGuard,"
26 released by Macrovision. [REDACTED]

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B. Real's Circumvention Products: RealDVD

1. "RealDVD" — Real's Illicit Gamble



permits unlimited copying of a single DVD to an unlimited number of computer hard drives, USB thumb drives, or other external storage drives. Real currently allows each one of those copies to

1 be played back on up to five computers registered to the same RealDVD account. (Ironically,
2 Real charges consumers a separate fee for each copy of its copyrighted software on these five
3 computers registered to a single account, even though it allows consumers to make free copies of
4 the Studios' copyrighted works on these computers).

5 Although many of Real's witnesses tried to deny that RealDVD "rips" or copies movies,
6 Real's documents tell a different story. The copying engine for RealDVD, for example, [REDACTED]

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

17 **2.** [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 **3. Real Obtains A CSS License To Try To Exploit A [REDACTED]**
26 As a purported cover for its planned circumvention devices, Real began monitoring a case
27 pending in state court in Santa Clara County, *DVD Copy Control Association, Inc. v.*
28 *Kaleidescape, Inc.*, Case No. 1-04-CV 031829, a breach of contract action between the DVD

1 CCA and a CSS licensee that had used the licensed CSS technology to build a high-end (starting
2 price \$10,000) device to copy DVDs. In a confidential internal email, [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 Unlike Kaleidescape, at the time Real obtained its CSS License from the DVD CCA, Real
9 unquestionably knew the DVD CCA's position on the CSS license. Real knew, for example, that
10 the overriding objective of CSS was to prevent copying of DVD content, that the DVD CCA
11 believed the license expressly prohibited making playable copies of DVDs, and that the DVD
12 CCA vigorously disagreed with the state trial court's erroneous reading of the CSS License.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] Real nonetheless signed
17 up for a CSS License, concealing that its true intention was to obtain access to the secret CSS
18 technology needed to finalize the design of RealDVD.

19 Although Real wishfully referred to Kaleidescape's position as a [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 **4. Real Seeks to Evade ARccOS/RipGuard**

28 CSS was not the only copy protection technology standing between Real and its goals.

1 we discourage you from doing it, *but we're not your nanny.*" *Id.*, Ex. 67 (emphasis added).

2 Real released RealDVD on September 30, 2008, the same day these actions were filed.

3 On October 3, this Court enjoined Real from [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED] The Court extended its order on October 7. For the
7 reasons discussed below, the TRO should be converted to a preliminary injunction.

8 **III. ARGUMENT**

9 The Court may issue a preliminary injunction on a showing of "(1) a likelihood of success
10 on the merits and the possibility of irreparable injury or (2) the existence of serious questions
11 going to the merits and the balance of hardships tipping in [the moving party's] favor." *Nike, Inc.*
12 *v. McCarthy*, 379 F.3d 576, 580 (9th Cir. 2004) (quotations omitted). "These two alternatives
13 represent extremes of a single continuum, rather than two separate tests." *Id.*

14 **A. The Studios Are Likely To Succeed On Their DMCA Claim**

15 RealDVD is primarily designed and has been (and without further relief, will be)
16 marketed by Real for use in unlawfully circumventing (1) CSS and (2) ARccOS and RipGuard,
17 both of which effectively control access to and protect the content of DVDs. As to each
18 technology, Real violates one or both of the DMCA's prohibitions regarding trafficking in access-
19 control, 17 U.S.C. § 1201(a)(2), or copy-control, *id.* § 1201(b)(1), devices.²

20 **1. RealDVD Circumvents CSS's Access- And Copy-Control Measures In**
21 **Violation Of Sections 1201(a)(2) And 1201(b)(1)**

22 **a. CSS Is A "Technological Measure" That Both "Effectively**
23 **Controls Access" To Copyrighted Works And "Effectively**
24 **Protects A Right Of A Copyright Owner"**

25 It is well settled that CSS is an effective technological access- and copy-control measure.
26 *See 321 Studios*, 307 F. Supp. 2d at 1095; *Reimerdes*, 111 F. Supp. 2d at 317-18. [REDACTED]

27 [REDACTED]

28 ² The complete text of 17 U.S.C. § 1201 is set forth in an appendix to this brief.

[REDACTED]

b. RealDVD Circumvents Both The Access-Control And Copy-Control Technological Measures Of CSS

“Circumvention” under the DMCA includes “avoid[ing], bypass[ing], remov[ing], deactivat[ing],” or otherwise “impair[ing]” the technological measure that provides the control. 17 U.S.C. §§ 1201(a)(3)(A), 1201(b)(2)(A). Discovery has shown that the way in which RealDVD operates with respect to CSS is not in dispute, and that undisputed evidence establishes that RealDVD circumvents CSS in at least three ways.

First, RealDVD’s

The purpose of the CSS access-control is to “

.” See, e.g., Blavin Decl., Ex. 15 at § 1.1. Yet

All of these acts constitute circumvention. See *321 Studios*, 307 F. Supp. 2d at 1098 (unauthorized use of valid CSS keys is circumvention). Were misuse of these items not circumvention, any ripping company could simply pay a license fee to DVD CCA and sell all the DVD copying software it wanted.

Second,

This is the

1 quintessence of circumvention under the DMCA, *i.e.*, “removing,” “deactivating,” and “otherwise
2 impairing” the technological measures implemented by CSS.

3 Third, [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 See Schuman Decl., Ex. A ¶¶ 72-75.

8 **c. RealDVD’s Circumvention Is Without Authorization**

9 **(1) RealDVD Circumvents “Without The Authority Of The
10 Copyright Owner,” In Violation Of Section 1201(a)(2)**

11 The DMCA defines “circumvention” for purposes of Section 1201(a)(2) (access control)
12 as conduct effected “without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A).
13 There is no evidence that any Studio has authorized *any* user of RealDVD (or anyone else) to
14 circumvent CSS for the purpose of copying the Studios’ copyrighted content. The opposite is
15 true: the Studios have consistently and explicitly *forbidden* users of DVDs to make permanent,
16 playable copies of CSS-protected DVDs. Anyone who has ever watched a DVD has seen the FBI
17 warning that it is illegal to copy a DVD. The packaging of the Studios’ DVDs likewise makes
18 clear that copying is strictly prohibited. See Blavin Decl., Ex. 69 (“Unless expressly authorized in
19 writing by the copyright owner, *any copying . . .* of this product or any part of it is strictly
20 prohibited.” (emphasis added)); see also *321 Studios*, 307 F. Supp. 2d at 1096 (“the purchase of a
21 DVD does not give to the purchaser the authority of the copyright holder to decrypt CSS”).

22 Further, as discussed at the TRO hearing, commercial movie DVDs [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]

27 ³ [REDACTED]

28 ⁴ The final transcript for Mr. Dixon’s deposition was not available at the time of this filing. It will be submitted with the Studios’ responsive papers next week.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED] The *absence* of any “authority of the copyright owner” to circumvent CSS-protected
5 Studio DVDs could not be clearer.

6 (2) **Real Cannot Find Authorization In The CSS License**

7 Real’s primary defense, relying entirely on the *Kaleidescape* ruling, is that enabling
8 consumers to copy DVDs is not expressly “*proscribed* by the CSS license” and that this purported
9 “loophole” immunizes Real from DMCA liability. Opp. to TRO at 1 (emphasis added). First, as
10 discussed in detail in the DVD CCA’s separate brief, the CSS License in fact bars Real’s conduct
11 in multiple respects. See DVD CCA Brief at 17-20; see also *321 Studios*, 307 F.Supp at 1097
12 (“Licensed DVD players . . . must adhere to strict prohibitions on copying”). Moreover, whether
13 or not the *Kaleidescape* trial court correctly construed the CSS License as to Kaleidescape (and
14 that construction was wrong), when *Real* entered into the License in August 2007, Real knew full
15 well that the DVD CCA understood the agreement to forbid *exactly* what RealDVD does. As the
16 DVD CCA brief explains, Real is bound by its understanding of the DVD CCA’s interpretation of
17 the License as a matter of contract law, given that Real knowingly hid from the DVD CCA its
18 contrary intention. See DVD CCA Brief at 15-17.

19 But even if Real’s “loophole” argument were correct — and it is not — there is nothing in
20 the CSS License that could give Real the right to produce and traffic in RealDVD. As discussed,
21 the Studios have not authorized the users of RealDVD to access copyrighted DVD content to
22 make permanent, playable copies. Real’s argument apparently boils down to the claim that if the
23 CSS License does not somehow expressly prohibit devices that copy DVDs, then the manufacture
24 and use of Real’s products to access and copy DVDs is impliedly authorized by the Studios. For
25 Real to interpret *silence* in the CSS License — to which the Studios are not licensors, either to
26 Real or the users of RealDVD — as somehow overriding or superseding that lack of authorization
27 is nonsensical. It also is exactly contrary to controlling federal law: authorization under the CSS
28

1 license must be *affirmatively granted*; it cannot be inferred from the absence of *proscription*.⁵

2 This rule is clear from the Ninth Circuit's decision in *S.O.S. Inc. v. Payday, Inc.*, 886 F.2d
 3 1081 (9th Cir. 1989). There, the district court held that the defendant's "license to use" a
 4 software program implicitly authorized it to copy and modify the program. Just like the
 5 *Kaleidescape* decision and Real's position here, the district court had reasoned that "the burden"
 6 under California law was on the copyright holder, as the drafter of the license, "explicitly to
 7 restrict" licensees "from making modifications," and that "absent" a "restriction in the contract,"
 8 the defendant "acquired the unrestricted right to adopt and utilize the program." *Id.* at 1087. In
 9 reversing, the Ninth Circuit emphasized that the "license to use" the software implicated "federal
 10 copyright policy," and thus "must be construed in accordance with the purposes underlying
 11 federal copyright law," chief among which "is the protection of the author's rights." *Id.* at 1088.
 12 The Ninth Circuit held that the district court's reasoning that S.O.S. granted "any right which it
 13 did not expressly retain" was "*contrary to federal copyright policy: copyright licenses are*
 14 *assumed to prohibit any use not authorized*" and the legality of Payday's conduct would need to
 15 be determined "unshielded by any license." *Id.* at 1089 (emphasis added). *Accord LGS*
 16 *Architects, Inc. v. Concordia Homes of Nevada*, 434 F.3d 1150, 1156-57 (9th Cir. 2006).⁶

17 This principle applies here. The express objective of the CSS License is to "provide
 18 protection" for "copyrighted content" on DVDs "against unauthorized consumer copying." CSS
 19 License, Recital A. And the claim here arises under the DMCA, which is intended to "protect
 20 copyrights and intellectual property rights." *321 Studios*, 307 F. Supp. 2d at 1101. Hence,
 21 authorization to circumvent CSS and enable copying of the Studios' content cannot be inferred;

22 _____
 23 ⁵ *Kaleidescape* has no bearing on federal copyright or DMCA law, and not just because it is a
 24 state trial court decision and on appeal. The court there emphasized that it was not "tiptoeing"
 into federal intellectual property law and that its judgment was "framed" solely by "classic state
 law issues." Blavin Decl., Ex. 70 at 72:18-73:13.

25 ⁶ This same rule applies under federal patent law: "Any right not specifically granted by the
 26 licensor remains with the licensor, and the rights granted in the license cannot expand beyond the
 27 boundaries delineated in the agreement." *Cook Inc. v. Boston Scientific Corp.*, 208 F. Supp. 2d
 874, 879 (N.D. Ill. 2002); *see also In re CFLC, Inc.*, 89 F.3d 673, 677 (9th Cir. 1996) (state law
 28 does not govern "construction of a patent license . . . where state law 'would be inconsistent with
 the aims of federal patent policy'"). The CSS License itself includes patent licenses, *see* Blavin
 Decl., Ex. 21 (at §§ 2.2, 2.3), providing an additional reason why this rule should apply here.

1 Real must demonstrate express authorization to do so. Real does not and cannot do this. *Nothing*
2 in the CSS License affirmatively authorizes what RealDVD is doing. Real's discovery responses
3 [REDACTED]
4 [REDACTED] See Blavin Decl., Ex. 64. And
5 Real's own senior executives [REDACTED]
6 [REDACTED]
7 [REDACTED] *Id.* at Ex. 24 (at REAL078281) (emphases
8 added).

9 **d. Real's Other Defenses Are Meritless**

10 Real has argued in marketing materials and pleadings that RealDVD is not used to
11 "circumvent" CSS, because RealDVD (1) retains the content encryption on the audiovisual data
12 copied to the hard drive; (2) uses keys and CSS algorithms obtained from the DVD CCA; and
13 (3) limits use of each DVD copy made to five registered computers (each of which must pay for a
14 copy of the RealDVD software). These arguments are specious.

15 As to the first argument, although RealDVD maintains the CSS content encryption on the
16 hard drive copy, RealDVD [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED] Saving one layer of protection and evading all the others does not
20 magically convert circumvention into lawful conduct.

21 Real's second argument — that RealDVD cannot circumvent because Real obtained keys
22 and algorithms from the DVD CCA — is also wrong as a matter of law because, as noted, Real
23 can point to nothing in the CSS License that authorizes it to use the secret information provided
24 by the DVD CCA to make DVD-copying machines. In *321 Studios*, for example, it was
25 undisputed that 321 Studios used valid CSS keys. Judge Illston nonetheless squarely rejected
26 321's argument (echoed in Real's argument here) that the software did not "circumvent" CSS
27 because it "simply uses the authorized key to unlock the encryption." *321 Studios*, 307 F. Supp.
28 2d at 1098. Judge Illston held that because 321 Studios "does not have authority to use this key,"

1 it “therefore avoids and bypasses CSS.” *Id.*; *Accord Microsoft Corp. v. EEE Business Inc.*, 555 F.
2 Supp. 2d 1051, 1059 (N.D. Cal. 2008).⁷

3 Finally, that Real has *currently* chosen to restrict playback of movies copied to thumb or
4 external hard drives to five computers is irrelevant. Nothing in the CSS License or the DMCA
5 turns on the number of people who can use the copies RealDVD makes. Real has, moreover,
6 reserved the right to change that number to 50 or 5000 or to remove the limit altogether. Under
7 Real’s theory, if it has the right to traffic in a product that can copy one DVD, it has the right to
8 make an unlimited number of copies. Real’s own expert

[REDACTED]

9
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11 Blavin Decl., Ex. 13 (Felten Depo.) at 141:10-20. If correct, there would be no
12 protection for the content on DVDs, an absurd result.

13 **2. RealDVD Circumvents ARccOS And Ripguard In Further Violation**
14 **Of Section 1201(b)**

15 **a. ARccOS And Ripguard Are “Technological Measures” That**
16 **“Effectively Protect A Right Of A Copyright Owner”**

17 [REDACTED] ARccOS and RipGuard are copy
18 protection measures. *See id.*,
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 Real has argued that ARccOS/RipGuard are not “effective” under the DMCA. The

24 ⁷ Real relies on *I.M.S. Inquiry Management Systems, Ltd. v. Berkshire Information Systems, Inc.*,
25 307 F. Supp. 2d 521 (S.D.N.Y. 2004) and *Egilman v. Keller & Heckman, LLP*, 401 F. Supp. 2d
26 105 (D.D.C. 2005). But those cases involved the simple misuse of passwords. CSS involves
27 encryption and encryption-based authentication, not passwords. While using someone else’s
28 password may not involve “evading” a technological measure, RealDVD removes or impairs
numerous layers of the CSS system in the copies it makes. The *I.M.S.* court itself recognized that
the technologies were inapposite and distinguished the CSS cases because, unlike use of a simple
website password, “decryption” is a “form[] of circumvention.” *I.M.S.*, 307 F. Supp. 2d at 532-33.

1 DMCA defines a technological measure as “effective” if it “in the ordinary course of its
2 operation, *prevents, restricts, or otherwise limits* the exercise of a right of a copyright owner
3 under this title,” including, at issue here, the right of reproduction. § 1201(b)(2)(b) (emphasis
4 added). A technical measure need not be impervious to sophisticated counter-attacks in order to
5 be “effective” under this standard, and indeed, the effectiveness of ARccOS and RipGuard are
6 best demonstrated

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]

24 Real argues that these technologies are not “effective” because illegal rippers have been
25 able, eventually, to find ways around them.

26 [REDACTED]

27 This turns the DMCA on its head. No system is perfect, and hackers such as
28 those employed by Real can, with effort, circumvent any copy protection technology. As the

1 district court held in *Reimerdes*,

2 [i]f a technological means of access control is circumvented, it is, in common
3 parlance, ineffective. Yet defendants' construction, if adopted, would limit the
4 application of the statute to access control measures that thwart circumvention,
5 but withhold protection for those measures that can be circumvented. In other
6 words, *defendants would have the Court construe the statute to offer protection
7 where none is needed but to withhold protection precisely where protection is
8 essential.*

6 *Reimerdes*, 111 F. Supp. 2d at 318 (emphasis added); *see also* House Comm. on Judiciary,
7 Section-by-Section Analysis of H.R.2281 at 10 (Comm. Print 1998) (technological measure
8 "effectively controls access" to a copyrighted work if its "function" is to control access).

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED] They are effective measures under the DMCA.

15 **b. RealDVD Circumvents ARccOS And Ripguard**

16 That RealDVD circumvents ARccOS and RipGuard can be seen by the simple fact that

17 [REDACTED]
18 [REDACTED] Real's defense appears to be that [REDACTED]
19 [REDACTED] That argument
20 is contrary to all the evidence. [REDACTED]

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

25 ⁸ There is little evidence, in fact, that scratches or dirt hamper playback of DVDs. The Register
26 of Copyrights has stated that it is "not persuaded" that "DVDs are so susceptible to damage and
27 deterioration that a convincing case could be made that the practice of making preventive backup
28 copies of audiovisual works on DVDs should be noninfringing." Recommendation of the
Register of Copyrights in RM 2002-4 at 106, available at
<http://www.copyright.gov/1201/docs/registers-recommendation.pdf>

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Finally, even if Real’s purpose were not specifically to circumvent ARccOS and Ripguard — an unbelievable assertion given the extensive evidence to the contrary — subjective intent is irrelevant under the DMCA. As the *Reimerdes* court explained, the motivation of the DeCSS authors was “immaterial to the question whether the defendants now before the Court violated the anti-trafficking provision of the DMCA.” *Reimerdes*, 111 F. Supp. 2d at 319. “The offering or provision of the program is the prohibited conduct — and it is prohibited irrespective of why the program was written.” *Id.*

3. Real’s Appeal To “Fair Use” Is Irrelevant Under The DMCA

Real cannot rely on the alleged “fair use” defense that consumers can make copies of DVDs to avoid liability for trafficking in a circumvention product. *See, e.g., 321 Studios*, 307 F.

1 Supp. 2d at 1097-98 (“downstream uses of the software by the customers of 321, whether legal
2 or illegal, are not relevant to” DCMA claim); *United States v. Elcom Ltd.*, 203 F. Supp. 2d. 1111,
3 1120 (N.D. Cal. 2002) (same); *Macrovision v. Sima Products Corp.*, No. 05 CIV 5587 (RO),
4 2006 WL 1063284, at *2 (S.D.N.Y. 2006) (same). As the Second Circuit held, the plain language
5 of the “DMCA targets the circumvention of digital walls guarding copyrighted material (and
6 trafficking in circumvention tools), but does not concern itself with the use of those materials
7 after circumvention has occurred.” *Corley*, 273 F.3d at 443.

8 Real is no stranger to this principle, having argued and won the same point in
9 *RealNetworks, Inc. v. Streambox, Inc.*, 2:99 CV2078, 2000 WL 127311 (W.D. Wash. 2000): the
10 “DMCA does not have a ‘fair use’ exception.”⁹ Blavin Decl., Ex. 74 (at 3.)

11 For all of the foregoing reasons, the Studios are overwhelmingly likely to prevail on their
12 DMCA claim.

13 **B. The Studios Will Suffer Irreparable Injury Absent An Injunction**

14 **1. Irreparable Injury Is Presumed Based On The Studios’ Showing Of 15 Likely Success On The Merits**

16 Irreparable injury to the Studios is presumed for two independent reasons. First, in a
17 DMCA case, irreparable injury for a preliminary injunction is presumed once the plaintiff shows
18 likely success on the merits. *Jacobsen v. Katzer*, 535 F.3d 1373, 1378 (Fed. Cir. 2008); *Lexmark
19 Intern., Inc. v. Static Control Components, Inc.*, 387 F.3d 522, 532-33 (6th Cir. 2004); *Reimerdes*,
20 82 F. Supp. 2d at 215.¹⁰ This remains true even after *eBay Inc. v. MercExchange*, 547 U.S. 388

21 ⁹ Even if it were not legally irrelevant, Real’s appeal to end-users’ claimed “fair uses” is
22 erroneous. There is no support for Real’s proposition that making extra free copies of DVD
23 content meets the legal test for the fair use defense. See *Macrovision*, 2006 WL 1063284 at *2
24 (defendant “cites no authority, and this Court is aware of none, for the proposition that ‘fair use’
25 includes the making of a backup [DVD] copy”). The Register of Copyrights has rejected the
26 claim that users have the fair use right to make additional copies of DVDs. See, e.g., Copyright
27 Office Recommendation of the Register of Copyrights in RM 2002-4 at 108,
<http://www.copyright.gov/1201/docs/registers-recommendation.pdf> (“Register is aware of no
28 authority that” additional DVD copies “are noninfringing”); cf. Recommendation of the Register
of Copyrights in RM 2005-11 at 60,
http://www.copyright.gov/1201/docs/1201_recommendation.pdf (noting that “there is no case
that remotely reaches” a “holding” that “space shifting” constitutes “fair use” and “Register is
skeptical that such conduct would be considered fair use”).

¹⁰ Courts repeatedly have granted preliminary injunctions to enjoin the sale and distribution of
products that violate the DMCA’s anti-circumvention provisions. See *RealNetworks*, 2000 WL

1 (2006), which dealt with the standard for *permanent* injunctions in patent cases.¹¹

2 Second, because the injunction here “prevent[s] the violation of a federal statute” that
 3 “specifically authorizes a district court to grant injunctive relief to prevent a violation,” the
 4 “standard requirements for equitable relief need not be satisfied.” *Trailer Train Co. v. State Bd.*
 5 *of Equalization*, 697 F.2d 860, 869 (9th Cir. 1983). See 17 U.S.C. § 1203(b)(1) (authorizing
 6 Court to grant injunctive relief to “prevent or restrain a violation” of DMCA). “When the
 7 evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices
 8 prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable
 9 harm to the plaintiffs need not be shown.” *Burlington Northern R.R. Co. v. Department of*
 10 *Revenue of State of Wash.*, 934 F.2d 1064, 1074 (9th Cir. 1991).¹²

11 **2. The Studios Have Shown That Real’s Manufacturing And Trafficking**
 12 **In RealDVD Will Cause Irreparable Harm**

13 Even if irreparable injury needed to be shown and were not presumed, the Studios have
 14 shown it. The harm to the Studios was established at the TRO stage through the declaration of
 15 Michael Dunn, President of Twentieth Century Fox Home Entertainment LLC, who has more
 16 than two decades of real-world experience providing consumers the means to access
 17 entertainment content. Mr. Dunn makes the self-evident and (as discussed below) un-rebutted
 18 points that Real’s unrestrained dissemination of RealDVD will harm the Studios in at least three
 19 major respects; and that money damages cannot and will not compensate for them.

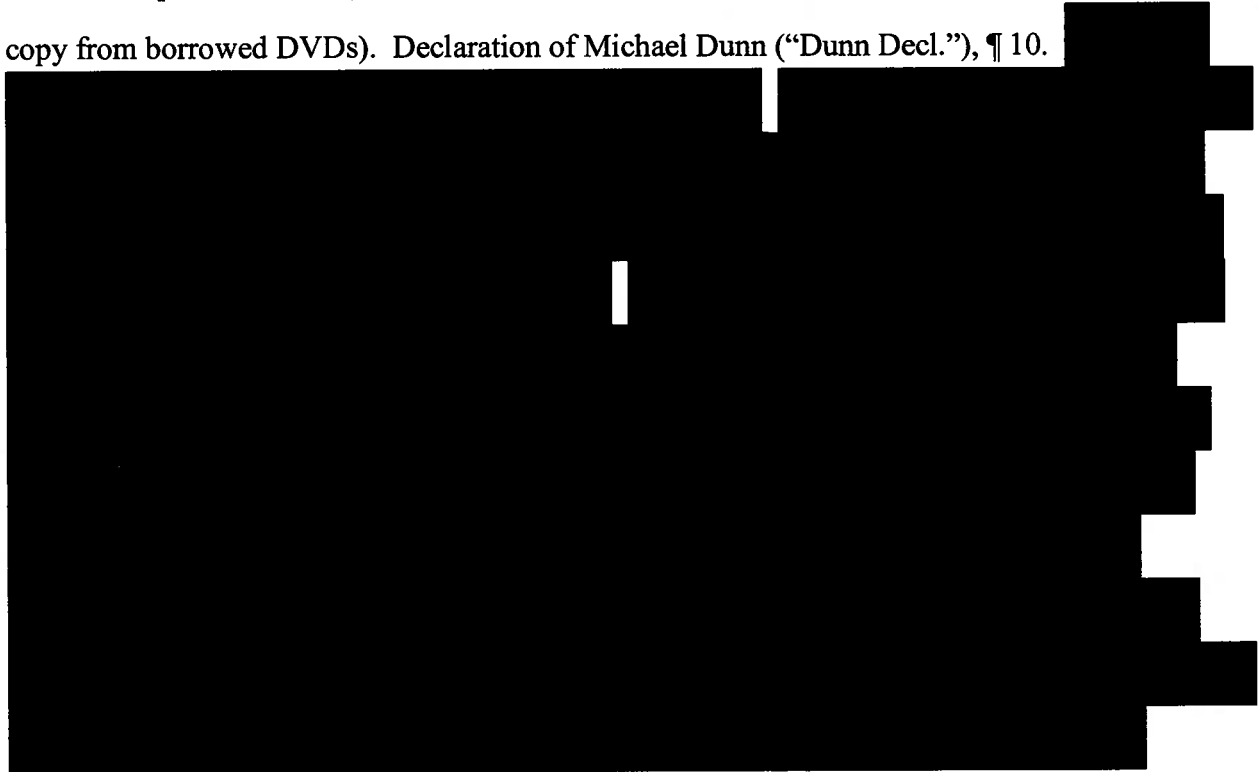
20 First, it is apparent that RealDVD materially changes the value of the Studios’ product

21 127311, at *1; *Ticketmaster L.L.C. v. RMG Technologies, Inc.*, 507 F. Supp. 2d 1096, 1111 (C.D.
 22 Cal. 2007); *Macrovision*, 2006 WL 1063284, at *3 (DVD copier); *Paramount Pictures Corp. v.*
 23 *321 Studios*, 2004 WL 402756 (S.D.N.Y. Mar. 3, 2004) (DVD copier); *Reimerdes*, 82 F. Supp. 2d
 211 (DVD copier); *Sony Computer Entertainment America, Inc. v. Gamemasters*, 87 F. Supp. 2d
 976 (N.D. Cal. 1999).

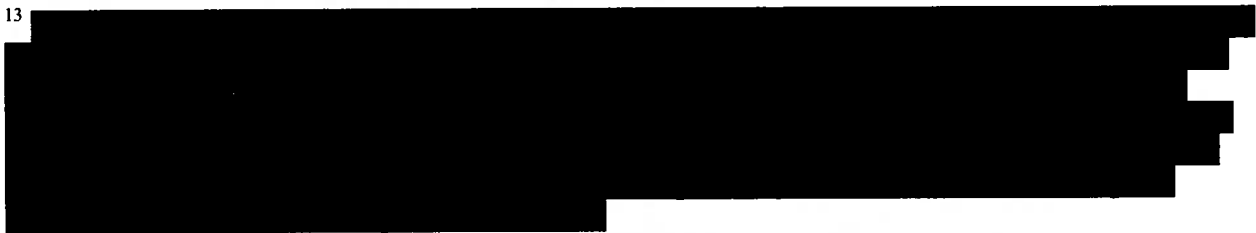
24 ¹¹ *Nat’l League of Junior Cotillions, Inc. v. Porter*, 2007 WL 2316823, *5 (W.D.N.C. 2007)
 25 (“[T]he only Court of Appeals opinion to explicitly address the [eBay] decision suggests that, at
 the preliminary injunction stage, the presumption based on likelihood of success survives *eBay*.”).

26 ¹² See also, e.g. *United States v. Estate Preservation Servs.*, 202 F.3d 1093, 1098 (9th Cir. 2000)
 27 (“The traditional requirements for equitable relief need not be satisfied [when a statute] expressly
 28 authorizes the issuance of an injunction”); *Star Fuel Marts, LLC v. Sam’s East, Inc.*, 362 F.3d
 639, 651 (10th Cir. 2004) (same); *Landesman v. Keys Condominium Owners Ass’n*, No. C04-
 2685 PJH, 2004 WL 2370638 at *5 (N.D. Cal. 2004) (same); *Susanville Indian Rancheria v.*
Leavitt, No. 2:07-cv-259 GEB DAD, 2008 WL 58951 at *11 (E.D. Cal. 2008) (same).

1 offerings to consumers. The average price of a DVD today is \$18.50. RealDVD effectively
2 reduces the price to \$3.25 (for consumers who copy from rented DVDs) or zero (for those who
3 copy from borrowed DVDs). Declaration of Michael Dunn (“Dunn Decl.”), ¶ 10.



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15 Second, it is clear that RealDVD will harm nascent and developing legitimate markets for
16 video content. Such markets include, among others, (i) Internet download services (through
17 iTunes, Amazon and others); (ii) “digital copy,” *i.e.*, DVDs sold — at a higher price — with a
18 second copy that the consumer can move to their hard drive; and (iii) video-on-demand and pay-



26 ¹⁵ Of course, RealDVD threatens not only the existing market for DVD sales, but also other
27 markets for viewing movies at different stages of their release, from video to pay television and
28 ultimately over-the-air broadcast. Each of these opportunities to view content presents the
customer with a different value proposition. RealDVD harms these markets by allowing
consumers for the low price of renting a movie (or no price at all, in the case of borrowed DVDs)
to retain a permanent, playable copy.

1 per-view services. Dunn Decl., ¶¶ 13-20 [REDACTED] the Studios’
2 “digital copy” functionality in particular offers a virtually identical product — a digital version of
3 the content on a DVD savable to a computer hard drive — that RealDVD enables users to obtain
4 for free. [REDACTED]

5 [REDACTED]
6 RealDVD threatens to harm these markets in their infancy by adding to every DVD —
7 whether borrowed, rented, or purchased — unlimited copying functionality where each copy may
8 be played back on up to 5 RealDVD-enabled machines. Dunn Decl., ¶¶ 13-20, 24-26. Courts
9 repeatedly have held that this threat of destroying opportunities in emerging markets constitutes
10 irreparable injury justifying injunctive relief. *See, e.g., Tivo, Inc. v. Echostar Communications*
11 *Corp.*, 446 F. Supp. 2d 664, 669 (E.D. Tex. 2006) (“Loss of market share in this nascent market is
12 a key consideration in finding that Plaintiff suffers irreparable harm”), *rev’d on other grounds*,
13 516 F.3d 1290 (Fed. Cir. 2008); *Atlanta Attachment Co. v. Leggett & Platt, Inc.*, No. 1:05-cv-
14 1071-ODE, 2007 WL 5011980, at *6-7 (N.D. Ga. Feb. 23, 2007).

15 Third, the presence in the market of RealDVD pending a trial threatens to change
16 ingrained consumer perceptions about what is lawful behavior. [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 ¹⁶ [REDACTED]
22 [REDACTED]
23 [REDACTED]

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[REDACTED]

The threat of Real

changing forever marketplace norms about what is lawful and what is not is irreparable harm in and of itself, as is attested to by the experience of the music industry over the last decade. *See A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 910 (N.D. Cal. 2000) (“[Napster] has contributed to a new attitude that digitally-downloaded songs ought to be free — an attitude that creates formidable hurdles for the establishment of a commercial downloading market”); *MGM v. Grokster, Ltd.*, 545 U.S. 913, 929 (2005) (“the indications are that the ease of copying songs or movies using software like Grokster’s and Napster’s is fostering disdain for copyright protection”).

3. Real’s Attempts To Wave Off Irreparable Injury Are Unavailing

Real attempts to dismiss these obvious, common-sense threats with a stable of “experts.” When limited to their areas of expertise, their opinions do nothing to rebut or undermine the Studios’ showing of irreparable harm.

Real points first to opinions offered by Gordon Klein, who teaches accounting and taxation classes at UCLA.

[REDACTED]

[REDACTED]

18 [REDACTED]

19 [REDACTED]

28 [REDACTED]

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[REDACTED]

Real also relies on reports from Prof. Timothy Bresnahan (an economics professor) and Larry Gerbrandt (a professional expert who has held a hodge-podge of entertainment jobs) to

assert that

[REDACTED]

²⁰ [REDACTED]

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[REDACTED]

Hence, there are some categories of serious harm to the Studios that even Real’s experts concede.

For all of the foregoing reasons, the threat of irreparable harm to the Studios is palpable and supports a continued preliminary injunction.

C. The Balance Of Hardships Decidedly Favors The Studios

The statutory injunction sought by the Studios does not require a balance of hardships analysis. *See Trailer*, 697 F.2d at 869; *Burlington*, 934 F.2d at 1074. Nonetheless, the threat of harm to the Studios, as demonstrated above, is substantial. The hardship to Real, by contrast, is non-existent.

[REDACTED]

Finally, Real’s claims of harm are belied by the facts that Real continuously has pushed back the hearing date on the preliminary injunction motion and does not even have a concrete timeline for the launch of Facet.

IV. CONCLUSION

For all the foregoing reasons, the Studios respectfully request the Court enter the proposed injunction.

1 DATED: March 19, 2009

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