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 Counterclaim Defendants
 10 REALNETWORKS, INC. and
 REALNETWORKS HOME
 11 ENTERTAINMENT, INC.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14 REALNETWORKS, INC., a Washington
 Corporation; and REALNETWORKS HOME
 15 ENTERTAINMENT, INC., a Delaware
 corporation,

16 Plaintiffs,

17 v.

18 DVD COPY CONTROL ASSOCIATION, INC., a
 19 Delaware nonprofit corporation, DISNEY
 ENTERPRISES, INC., a Delaware corporation;
 20 PARAMOUNT PICTURES CORP., a Delaware
 corporation; SONY PICTURES ENTER., INC., a
 21 Delaware corporation; TWENTIETH CENTURY
 FOX FILM CORP., a Delaware corporation; NBC
 22 UNIVERSAL, INC., a Delaware corporation;
 WARNER BROS. ENTER. INC., a Delaware
 23 corporation; and VIACOM, Inc., a Delaware
 Corporation,

24 Defendants.

25
 26
 27 AND RELATED CASES

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**NOTICE OF MOTION AND MOTION
 TO PRECLUDE CLAIMS BASED ON
 NON-CSS TECHNOLOGIES OR,
 ALTERNATIVELY, TO CONTINUE
 THE PRELIMINARY INJUNCTION
 HEARING, AND FOR THE
 APPOINTMENT OF A DISCOVERY
 REFEREE**

**Before: Hon. Marilyn Hall Patel
 Dept: Courtroom 15
 Date: March 9, 2009
 Time: 2:00 p.m.**

28 PUBLIC REDACTED VERSION

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 Please take notice that on March 9, 2009 at 2:00 p.m., or as soon thereafter as this matter
4 may be heard, before the Honorable Marilyn H. Patel, United States Courthouse, 450 Golden
5 Gate Avenue, San Francisco, California, 94102, plaintiffs and counterclaim defendants
6 RealNetworks and RealNetworks Home Entertainment, Inc. (collectively, “RealNetworks”) will
7 move, and hereby do move, for an order precluding the defendants from asserting claims based
8 on ARccOS, RipGuard, or any other non-CSS technologies in support of their motions for a
9 preliminary injunction. In the alternative, RealNetworks will move, and hereby does move, for
10 an order continuing the preliminary injunction hearing currently scheduled for March 3 by six
11 weeks, until April 14, and simultaneously directing the defendants to comply immediately with
12 their discovery obligations. Finally, RealNetworks will move, and hereby does move, for
13 designation of a Magistrate Judge (or special master) to resolve any subsequent discovery
14 disputes that may arise prior to the preliminary injunction hearing.

15 RealNetworks is also filing a motion to shorten time on this motion, which requests that
16 this motion be heard on February 2, 2009 at 2:00 p.m., with opposition papers being due on
17 January 29, 2009 and reply papers being due on January 30, 2009.

18 This motion is based on the following Memorandum of Points and Authorities, the
19 accompanying Declaration of Tracy Tosh Lane, and the materials on file in this action.

20
21 **MEMORANDUM OF POINTS AND AUTHORITIES**

22 **I. ISSUES TO BE DECIDED (LOCAL RULE 7-4(A)(3))**

23 Should the defendants be prevented—in this preliminary injunction proceeding—from
24 asserting claims premised on non-CSS technology such as ARccOS and RipGuard because
25 RealNetworks has not been provided with timely and adequate discovery on these topics?

26 If the Court allows the defendants to raise such claims, should the preliminary injunction
27 hearing be continued for six weeks, until April 14, 2009?

28 Should the defendants be directed to comply immediately with their discovery

1 obligations and should a referee be appointed to manage the parties' discovery disputes?

2 **II. INTRODUCTION AND BACKGROUND**

3 In mid-December, just days before the parties were to complete expedited discovery, and
4 as they were set to begin final preparations for a rapidly approaching preliminary injunction
5 proceeding, the Studio Defendants sought to dramatically alter the focus of this case. (Lane
6 Dec., ¶ 2) On December 18, the day before the parties were to exchange expert reports, the
7 Studio Defendants asserted for the first time that they would seek to raise in the preliminary
8 injunction proceeding new unpleaded claims that RealDVD and Facet circumvent purported
9 "content protection" technologies known as "ARccOS" and "Ripguard." (*Id.*, Ex. A)¹ These
10 new claims were a marked departure from the defendants' original claims, which were based on,
11 and limited to, defendant DVD CCA's Content Scramble System technology ("CSS"). The new
12 claims formed no part of the Complaint filed by the Studios and no part of the earlier TRO
13 proceedings, or the temporary injunction that resulted and is still in effect.

14 The new claims also put RealNetworks at an immediate and significant informational
15 disadvantage, contrary to the spirit and purpose of the Federal discovery rules. At the time the
16 claims were raised, RealNetworks knew next to nothing about these technologies – and the
17 Studio Defendants had yet to produce a single document regarding either ARccOS and
18 RipGuard.² (Lane Dec., ¶ 3.) This was not for lack of information on the part of the Studio
19 Defendants, which have deep experience with, and expertise in, both ARccOS and RipGuard.
20 Indeed, one of the Studio Defendants (Sony, apparently through a corporate affiliate or
21 subsidiary) purportedly invented the ARccOS technology, and RipGuard has been used by some
22 or all of Studio Defendants since at least 2004. (Lane Dec., ¶ 13.)

23 RealNetworks, by contrast, has no expertise with, or substantive knowledge of these
24 technologies. RealNetworks does not know how they work, or even how RealDVD and Facet
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26 ¹ All references to "Ex. ___" are to the exhibits attached to the accompanying Declaration of
27 Tracy Tosh Lane ("Lane Dec.").

28 ² RealNetworks, by contrast, produced documents relating to its Facet product in November
2008, before it formally asked to include that product in these proceedings. (Lane Dec., ¶ 8.)

1 are said to circumvent them. Real’s informational disadvantage was starkly apparent during the
2 defendants’ depositions of RealNetworks’ employees—depositions that were supposed to be
3 limited to the CSS technology that formed the basis of the defendants’ original claims. During
4 these depositions the Studio Defendants’ lawyers repeatedly asked, over strenuous objection and
5 in an argumentative fashion, seemingly irrelevant questions about “ARccOS” and “RipGuard.

6 The deponents testified similarly:

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 Within a few days of first learning about these new claims, on December 22,
22 RealNetworks also learned that the Court would allow them.³ The Court provided that as a
23 condition of this ruling, however, that the parties should produce any additional relevant
24 documents by January 9, 2009 to allow each side to prepare adequately for the preliminary
25 injunction hearing, which was continued (from late January) to March 3. (Dec. 22, 2008 Tr. at
26 80, Ex. B.) After this ruling, the parties conferred regarding—among other things—the

27 _____
28 ³ The Court also ruled on RealNetworks motion to amend its complaint to include its Facet product and to add the Facet product to the preliminary injunction proceedings.

1 document production deadline and discussed a short extension by which to complete production.
2 (Lane Dec., ¶ 4.)

3 Thereafter, RealNetworks immediately collected, reviewed, and produced in timely
4 fashion (as it has done for each prior production) over 11,000 additional pages of documents
5 relating to its Facet product.⁴ (Lane Dec., ¶ 7.) In total, to date, RealNetworks has completed
6 the production of (1) documents regarding the development of Facet and RealDVD; (2) the
7 source code for RealDVD and current and historical versions of the Facet source code; (3)
8 multiple witnesses for depositions on the development and operation of both Facet and
9 RealDVD, including the managers who lead the projects, and the principal engineers who wrote
10 and designed the projects; and (4) executable copies of the RealDVD software and a prototype of
11 the Facet product (for inspection). (*Id.*, ¶ 8.)

12 By contrast, in the wake of the December 22 ruling, RealNetworks has been deprived of
13 even the most basic information about ARccOS and RipGuard. (Lane Dec., ¶¶ 6 and 9.)
14 RealNetworks requires and has requested, among other things, (i) the technical specifications for
15 each version and implementation of the technologies known as ARccOS, RipGuard DVD, and
16 any other technologies that the defendants claim RealDVD or Facet circumvents; (ii) documents
17 sufficient to show all DVD titles that have used any implementation or version of ARccOS
18 and/or RipGuard, including documents showing why the Studios implemented ARccOS or
19 RipGuard on some DVD titles but not others; and (iii) internal correspondence discussing either
20 ARccOS or RipGuard, including their merits and shortcomings as alleged “content protection”
21 mechanisms. (Lane Dec., ¶ 5.)

22 Initially, the Studio Defendants refused to produce any of this documentation for a
23 variety of reasons, including relevance objections, and also claimed that the ARccOS and
24 RipGuard technologies were a “black box” to them, even though Sony had purportedly invented
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26

27 ⁴ Real had previously produced thousands of pages of Facet-related documents, including
28 producing the Facet source code and technical documents, in early November when
RealNetworks filed its motion to amend regarding Facet. (Lane Dec., ¶ 7.)

1 ARccOS.⁵ (Lane Dec., ¶¶ 13-14.) After the January 9 deadline had come and gone, the Studio
2 Defendants reconsidered and agreed to produce some documents, but only after RealNetworks
3 insisted that a Magistrate Judge was necessary to resolve discovery disputes. (Lane Dec., ¶ 6.)
4 At the same time, however, the Studios asserted as a justification for further delay that the
5 documents were subject to third-party confidentiality, and informed RealNetworks that they had
6 yet to seek the necessary permissions to produce the documents. (*Id.*)

7 It was not until late in the evening on January 22 that the defendants made their first
8 production of documents purportedly containing information relevant to ARccOS and RipGuard.
9 (Lane Dec., ¶ 9; Jan. 22, 2009 Letter, Ex. C.) Although this initial production comprised over
10 28,000 pages of material (which RealNetworks is currently struggling to review), the Studio
11 Defendants have admitted that the production is not yet complete, and also that they do not know
12 when it might be. (*Id.*, ¶¶ 9-10.)⁶ Nor have the Studio Defendants stated whether their
13 production will actually contain the specific technical specifications for ARccOS and RipGuard
14 that RealNetworks requires in order to defend itself. (*Id.*)

15 In addition to the delay in document production, the Studio Defendants have prejudiced
16 RealNetworks' ability to prepare for the preliminary injunction hearing in two additional
17 respects. First, as of Friday, January 23, the defendants had not offered any dates for the three
18 Rule 30(b)(6) depositions that RealNetworks had requested from the Studios, a topic that was
19 expressly discussed and ruled upon at the December 22 hearing. (Lane Dec., ¶ 15.) It was not
20 until after RealNetworks approached the Court for assistance on this issue on January 23 by
21

22 ⁵ In reliance on the claim that the Studios did not know anything about the technologies that
23 underlie their new claims, RealNetworks also sought technical information directly from a
24 company called Macrovision, which allegedly created RipGuard, and also from the Sony affiliate
25 that currently markets ARccOS technology. In the course of these efforts, RealNetworks learned
26 that the Studios' claims that the technologies were a "black box," and that they had no
27 knowledge of them, was inaccurate. (Lane Dec., ¶ 14.)

28 ⁶ On the morning of January 26, as RealNetworks was preparing to file this motion, counsel
for the Studio Defendants indicated that an additional, yet still incomplete, production had been
delivered by messenger. (Lane Dec., ¶ 17.) Counsel also stated that additional production(s)
would be made later in the week. (*Id.*) RealNetworks has not, of course, had time to review
these new materials, which were only produced after RealNetworks signaled its intention to file
this motion.

1 filing a letter brief that the Studio Defendants offered, late in the day, to make 30(b)(6)
2 deponents available, albeit under strict conditions. (*Id.*, ¶ 15, Ex. I.)⁷ That offer, unfortunately,
3 was and still is unacceptable. Among other things, the Studio Defendants have refused to
4 provide witnesses on several topics, have designated multiple witnesses to cover the same topics,
5 and have split topics in such a way as to seek to force Real to forego much of the testimony it has
6 sought by way of 30(b)(6) depositions. (*Id.*)

7 Second, it appears that although the Studio Defendants have begun to produce documents
8 relating to ARccOS and RipGuard – only a few days before the parties had contemplated
9 exchanging expert reports – they have attempted to prevent RealNetworks from any meaningful
10 understanding of their contents. All documents produced to date have been marked “Highly
11 Confidential” or “Attorneys’ Eyes Only” under the provisional protective order, which prevents
12 RealNetworks from showing the documents to their employees—even to the employees who
13 designed and built the RealDVD and Facet products that are at issue here. (Lane Dec., ¶ 10.)
14 The Studio Defendants have also asserted (on January 22, the same night they began late
15 production of documents) that Real’s previously approved technical experts should not be
16 allowed to look at any ARccOS or RipGuard documents at all. (Lane Dec., ¶ 11, Ex. D.) The
17 net result of these maneuvers, if allowed, would be that none of RealNetworks’ technical
18 employees or experts can look at the recently produced ARccOS and RipGuard documents.
19 These tactics have RealNetworks stymied. It is simply not possible to understand the Studio
20 Defendants’ claims under these circumstances, which of course means that it is impossible to
21 fairly defend against them.

22 Due to the significant prejudice that has been caused to RealNetworks, the defendants
23 should be precluded from raising either ARccOS or RipGuard at the PI hearing. In the
24 alternative, the hearing should be continued until April 14 and the defendants should be ordered
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27 ⁷ On January 23 RealNetworks filed a letter brief with the Court pursuant to its instruction
28 during the TRO hearing to raise disputes in that fashion. (Lane Dec., ¶ 16, Ex. J.) That letter
brief requested identical relief as does this motion—it was simply converted into this motion
over the weekend to comply with the Court’s instruction to that effect. (*Id.*)

1 to immediately comply with their discovery obligations. In either case, a magistrate should be
2 appointed to monitor these discovery proceedings.

3 **III. ARGUMENT**

4 **A. The Defendants Should Be Precluded from Asserting ARccOS and 5 RipGuard Claims at the Preliminary Injunction Hearing**

6 This Court has the inherent authority to enforce its discovery and case management
7 orders, and to impose sanctions when those orders are not complied with, up to and including
8 striking all or portions of a case or pleading. *United States v. W.R. Grace*, 526 F.3d 499, 515-
9 516 (9th Cir. 2008) (en banc) (“[T]he district court here is well within its authority to manage its
10 docket in enforcing a valid pretrial discovery order.”); *Anheuser-Busch, Inc. v. Natural Beverage*
11 *Distrib.*, 69 F.3d 337, 348 (9th Cir. 1995) (recognizing inherent power to dismiss counterclaim
12 for concealing discovery documents). Rule 37 of the Federal Rules of Civil Procedure likewise
13 authorizes “a wide range of sanctions” for a party’s failure to comply with discovery rules or
14 court orders enforcing them, *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir.
15 1983), including penalizing a party “for dilatory conduct during discovery proceedings.” *Bollow*
16 *v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1102 (9th Cir.1981) (citing Fed. R. Civ.
17 P. 37(a)(4)). Rules 16 and 41(b) afford similar relief in other contexts. *See* Fed. R. Civ. P. 16,
18 41(b).

19 Here, RealNetworks is requesting far less than dismissal of the defendants’ claims.
20 Rather, RealNetworks is merely seeking to level the playing field at the impending preliminary
21 injunction proceeding. That field cannot and will not be level if the defendants are allowed to
22 argue, as they apparently intend to, that ARccOS and RipGuard constitute effective
23 “technological measures” pursuant to 17 U.S.C. §§ 1201(a), (b), while at the same time
24 RealNetworks and its experts have been blocked from timely receiving and analyzing even the
25 most basic information about these measures.

26 Indeed, to even begin to understand the defendants’ new allegation would require that
27 RealNetworks know far more than it currently does—which is next to nothing—about ARccOS
28 and RipGuard. RealNetworks must be allowed to obtain and analyze documents reflecting not
only what ARccOS and RipGuard actually are and how they work—it also must be permitted

1 access to documents that bear upon the defendants' claim that ARccOS and RipGuard are
2 "effective" content protection schemes under § 1201. Among other things, this will require that
3 RealNetworks obtain access to, as it has requested, (i) detailed and comprehensive technical
4 specifications for both technologies; (ii) internal correspondence discussing the merits and
5 drawbacks of the technologies; and (iii) information sufficient to determine how widely, and by
6 whom, these technologies are employed.

7 RealNetworks cannot take depositions, cannot prepare its experts, and certainly cannot
8 draft its opposition papers or prepare for the preliminary injunction hearing until the defendants'
9 production of this material is both complete and adequate. To date, it is neither. As noted above,
10 RealNetworks received a first and incomplete production of ARccOS and RipGuard materials—
11 comprising approximately 28,000 pages of material—on the evening of January 22. (Lane Dec.,
12 ¶ 9.) RealNetworks has had just three days to consider this material, and an unknown quantity is
13 yet to come. The defendants, by contrast, are in possession of RealNetworks' completed
14 production of thousands of documents and source code relating to the Facet and RealDVD
15 products. And they and their experts have had this material for weeks, and in some cases
16 months. The playing field is, in short, anything but level.

17 It is no answer that the Studio Defendants have begun production, or have encountered
18 purported obstacles to production. "Late tender is," as the Ninth Circuit has noted, "no excuse"
19 for the prejudice caused by inadequate or dilatory discovery. *In re Phenylpropanolamine (PPA)*
20 *Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006); *Fair Housing of Marin v. Combs*, 285
21 F.3d 899, 906 (9th Cir. 2002) ("Last-minute tender of documents does not cure the prejudice to
22 opponents. . . ."); *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S.Ct.
23 2778, 49 L.Ed.2d 747 (1976) (per curiam) ("[b]elated compliance with discovery orders does not
24 preclude the imposition of sanctions."); *F.T.C. v. Foster*, No. CIV07-00352 JB/ACT, 2007 WL
25 1827099, at *4-5 (D.N.M. Jun. 11, 2007) (applying Fed. R. Civ. P. 37 and precluding defendant
26 from introducing at the preliminary-injunction hearing, without separate approval, documents or
27 expert testimony based on documents that defendant failed to timely produce as required by
28 preliminary-injunction discovery).

1 The Studio Defendants late and inadequate production should result in preclusion at the
2 preliminary injunction proceeding.

3 **B. If the Defendants' Are Allowed to Assert Claims Premised on ARccOS and**
4 **RipGuard, the Hearing Should be Continued until April 14, 2009**

5 RealNetworks is at present subject to a temporary restraining order which, RealNetworks
6 expects, will be dissolved after the preliminary injunction hearing. If the Court declines to
7 preclude the defendants from premising their preliminary injunction motion on ARccOS and
8 RipGuard, RealNetworks is nevertheless willing to have the TRO further extended so that the
9 hearing can be continued until April 14. *Rohan ex rel. Gates v. Woodford*, 334 F.3d 803, 817
10 (9th Cir. 2003) (district courts have inherent authority to stay or adjourn proceedings before
11 them) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 (1936)); *Rivers v. Walt Disney*
12 *Co.*, 980 F.Supp. 1358, 1360 (C.D. Cal. 1997). This puts RealNetworks in the extraordinary
13 position of seeking a continuance of a hearing that it believes will result in relief from a pending
14 injunction, because the cost of not obtaining this short continuance, and of being forced to
15 proceed on March 3 while almost totally in the dark about the heart of the defendants' case, is
16 potentially irreparable.

17 Again, it is simply no answer that the Studio Defendants have begun to comply with their
18 obligations. Even if the Studio Defendants were to produce all relevant documents immediately,
19 RealNetworks cannot conduct fact or expert depositions until it has had adequate time to review
20 and carefully analyze the complete set of ARccOS and RipGuard materials. Similarly,
21 RealNetworks cannot hope to prepare its expert reports without providing its experts with access
22 to these materials, and to the related testimony of fact witnesses. To complicate matters further,
23 the defendants now contend that RealNetworks' long-approved technical expert should not be
24 permitted access to any ARccOS or RipGuard related documents. (Lane Dec., ¶ 11.) Under
25 these circumstances, RealNetworks is simply unable to prepare for and execute two rounds of
26 substantive briefing, followed closely by a preliminary injunction hearing, as the case schedule
27 currently stands.

28 RealNetworks therefore proposes the following modified schedule, and requests that it be

1 entered as an Order of the Court:

ACTION	DATE
Production of all additional documents	Feb. 2, 2009
Identify additional witnesses to testify (live or by declaration) at hearing	Feb. 9, 2009
Depositions of fact witnesses	Completed by February 18, 2009
Exchange expert reports	Feb. 20 and Feb 27 (rebuttal), 2009 (5 pm)
Expert depositions	March 2 – March 10 , 2009
Opening briefs	March 17, 2009 (5 pm)
Responsive briefs	March 31, 2009 (5 pm)
Exchange names of trial witnesses and depo designations	April 1, 2009
Exchange counter designations; exchange demonstratives	April 8, 2009
Hearing	Begins April 14, 2009

15 **C. A Magistrate Judge Should be Appointed to Provide Expedited Review of**
 16 **Any Discovery Disputes before the Preliminary Injunction Hearing**

17 The course of discovery in this action has been more difficult, and has resulted in more
 18 disputes, than either party expected. To remedy this, and given that the present dispute is
 19 anything but an isolated incident, RealNetworks formally requests that a discovery magistrate be
 20 appointed to monitor these proceedings. Rule 16 authorizes a court to manage cases so that
 21 wasteful pretrial activities are discouraged, the quality of the trial is improved, and settlement is
 22 facilitated. It recognizes “the need for adopting special procedures for managing potentially
 23 difficult or protracted actions that may involve complex issues, multiple parties, difficult legal
 24 questions, or unusual proof problems.” Fed. R. Civ. P. 16(c)(2)(L). Although there is clearly
 25 such a need here, the Studio Defendants have refused to agree to this request. That refusal
 26 suggests that the disparity in information regarding the technologies to be litigated—a disparity
 27 arising from the Studios’ unfair discovery tactics—benefits the Studios to the detriment of
 28 RealNetworks.

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CONCLUSION

For the foregoing reasons, this motion should be granted.

Dated: January 26, 2009

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: _____ /s/
Michael A. Berta

Attorneys for Plaintiffs
REALNETWORKS, INC. AND
REALNETWORKS HOME
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