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12 Attorneys for Defendant and Counterclaimant
 DVD COPY CONTROL ASSOCIATION, INC.

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA

16 REALNETWORKS, INC., a Washington
 Corporation; and REALNETWORKS HOME
 17 ENTERTAINMENT, INC., a Delaware
 corporation,

18 Plaintiffs,

19 v.

20 DVD COPY CONTROL ASSOCIATION, INC., a
 21 Delaware nonprofit corporation, et al.

22 Defendants.

23 And Related Counterclaims.

24
 25 AND RELATED CASES
 26

Case No. C08 04548 MHP;
 C08 04719 MHP

PUBLIC REDACTED VERSION:
NOTICE OF JOINDER AND JOINDER
OF DVD COPY CONTROL
ASSOCIATION, INC. IN MOTION FOR
SANCTIONS FOR SPOILIATION OF
EVIDENCE

NOTICE OF JOINDER

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendant and Counterclaimant DVD Copy Control Association, Inc. (“DVD CCA”) hereby joins in the Motion of Defendants Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Paramount Pictures Corp., Sony Pictures Entertainment, Inc., Sony Pictures Television Inc., Twentieth Century Fox Film Corp., NBC Universal, Inc., Walt Disney Pictures, Warner Bros. Entertainment, Inc., Universal City Studios Productions LLP, Universal City Studios LLP, and Viacom, Inc. (collectively, “the Studios”) for Sanctions for Spoliation of Evidence (Dkt. No. 129).

DVD CCA joins in the Studios’ request for relief and, additionally, specifically requests that the Court issue sanctions for spoliation that include an order barring Plaintiffs from introducing testimony to contradict the testimony of Nicole Hamilton on the following points:

[REDACTED]

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JOINDER

Although DVD CCA joins in the arguments set forth in support of the Motion for Sanctions for Spoliation of Evidence, it notes specifically that the issues presented in the Motion are of exceptional seriousness. This is not a case of misplaced or accidentally discarded material – it is a matter of purposeful destruction designed to eliminate unfavorable documents.

[REDACTED]

The Court need not find bad faith by the offending party before issuing sanctions for destruction of evidence; willfulness or fault can suffice. *See Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006); *Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368 n.2 (9th Cir. 1992) (*citing Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988)). There is no question that the destruction here was willful, but truly, it was also done in bad faith.

[REDACTED]

Sanctions are necessary to prevent Real's improper conduct from tainting the proceedings.

[REDACTED]

Thus, if it is allowed to rebut Ms. Hamilton's testimony with

1 other testimony – and create the proverbial “swearing contest” – Real will have directly benefited from
2 its own improper conduct.

3 To prevent that result, DVD CCA respectfully requests that the Court enter an order precluding
4 Real from offering contrary testimony in response to the following facts established by Ms. Hamilton
5 or other testimony.¹

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]

26 _____
27 ¹ [REDACTED]
28 [REDACTED]



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The exclusion of witness testimony is a well-recognized sanction for spoliation. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 368-69 (9th Cir. 1992). It is particularly appropriate here, where the evidence demonstrates that Real purposefully destroyed evidence to distort the evidence available through discovery. *See Toste v. Lewis Controls, Inc.*, 1996 U.S. Dist. LEXIS 2359, 1996 WL 101189, *2 (N.D. Cal. Feb. 27, 1996) (“[A] party's motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.”).

For the foregoing reasons, DVD CCA respectfully request that the Court grant this motion and award the remedies set forth above and the moving papers previously filed the Studios.

Dated: March 2, 2009

Respectfully submitted,
AKIN GUMP STRAUSS HAUER & FELD LLP
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By _____ /s/

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