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 10 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,

Case Nos. C08 04548 MHP;
 C08 04719 MHP

17 Plaintiffs,

18 v.

**DECLARATION OF TIMOTHY
 F. BRESNAHAN IN SUPPORT OF
 REALNETWORKS, INC. AND
 REALNETWORKS HOME
 ENTERTAINMENT, INC.'S
 OPPOSITION TO MOTION FOR
 PRELIMINARY INJUNCTION**

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,

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

25 Defendants.
 26

27 AND RELATED CASES
 28

1 I, Timothy F. Bresnahan, declare as follows:

2 **I. QUALIFICATIONS**

3 1. I am the Landau Professor in Technology and the Economy in the Department of
4 Economics at Stanford University, and a Senior Fellow at the Stanford Institute for Economic
5 Policy Research (SIEPR). At SIEPR, I have served as the Director of the Center for Employment
6 and Economic Growth and as the Director of the Technology and Economic Growth Program. I
7 am also a Senior Fellow at the National Bureau of Economic Research, participating in the
8 Productivity and the Industrial Organization Programs that study technical progress and
9 competition. While on leave from Stanford, I have served as Deputy Assistant Attorney General
10 for Economic Analysis in the United States Department of Justice. My areas of specialization
11 include Industrial Economics, particularly the economics of high technology industries and the
12 demand for new products. I have written books, book chapters and peer-reviewed articles on the
13 economics of technological change. I have been involved in studies of competition in a number of
14 industries and in studies of competition, innovation and user needs in high technology industries.
15 A focus of my research has been on properly measuring changing product quality, characterizing
16 competition in product-differentiated industries and analyzing the demand for high technology
17 products and services.

18 2. Since the 1980s, my research has centered on innovation and demand for computer-
19 related technologies. A substantial portion of my academic research has focused on how
20 consumers and businesses purchase and use these technologies. As part of that research effort, I
21 have closely followed the trade press and data on the pricing, products and sales of both computer
22 hardware and software. In the 1990s, I had a leadership role in the Stanford Computer Industry
23 Project, one of the industry study centers funded by the Sloan Foundation, most recently as the
24 Director. This large project involved faculty and graduate students from Stanford's engineering
25 and business schools and the Economics Department.

26 3. I have served as an expert witness and provided written and oral testimony in prior
27 matters, most of which involve claims related to new technologies. For example, I have served as
28 an expert for IBM in *SCO Group Inc v. IBM*, for Hewlett Packard in *Schultz et al. v. Hewlett*

1 *Packard*, and for Intel in *Neubauer et al. v. Intel et al.* A complete list of recent testimony appears
2 in my Curriculum Vitae attached as Appendix A.

3 **II. ASSIGNMENT AND MATERIALS CONSIDERED**

4 4. I have been retained by counsel for RealNetworks to assess the claim made by the
5 Studios that the presence of RealDVD in the market would cause harm to the plaintiffs in this
6 matter (the "Studios"). I understand that RealNetworks has an additional DVD copying
7 technology (code name "Facet") that has been added to the case. I understand that the Studios
8 may claim harm from the presence of Facet in the market, and I have also been asked to address
9 this issue.

10 5. In connection with this matter, I have reviewed various documents, including:
11 declarations and other legal filings submitted by the parties; the deposition testimony of James
12 Brennan, Elizabeth Coppinger and Michael Dunn; the expert report of Larry Gerbrandt; and
13 studies, reports and public press on RealDVD, other DVD copying technologies and new digital
14 media products.

15 **III. SUMMARY**

16 6. I understand that the Studios have claimed that the presence of RealDVD in the
17 market will lead to reduced sales and rentals of DVDs. Based on my research to date and my
18 knowledge of economics, I have reached the following conclusions:

- 19
- Distribution of the RealDVD product will not increase pirating of copyrighted materials.
 - Distribution of the RealDVD product will raise, not lower, the demand for purchased DVDs.
 - Distribution of the RealDVD product will not harm the Studios' legitimate economic interest in introducing new products.
- 23

24 7. My conclusion that the RealDVD product will not increase pirating of copyrighted
25 materials follows from an economic analysis, presented in detail below, of the demand for
26 RealDVD by different types of consumers. The RealDVD product will be used by consumers to
27 make backup or convenience copies of DVDs they have purchased. The RealDVD product will
28 not be demanded by consumers who choose to steal copyrighted materials, since those consumers

1 have access to and use cheaper and, from their unlawful perspective, better, products to unlawfully
2 obtain and distribute copyrighted material.

3 8. My conclusion that distribution of the RealDVD product will raise, not lower, the
4 demand for DVDs follows from an economic analysis of the demand for RealDVD and for DVDs
5 by consumers. In the language of economics, using RealDVD and buying DVDs are not
6 substitutes, they are complements. Using RealDVD raises the consumer's value of DVDs and
7 thus raises demand for DVDs.

8 9. My conclusion that distribution of the RealDVD product will not harm plaintiffs'
9 legitimate economic interests in introducing new products is based on an economic analysis of the
10 markets in which the new products compete and of the distinct market in which RealDVD
11 competes. The new products described by the Studios are new ways to distribute, or new features
12 associated with the distribution of, movies. RealDVD is not a new way to distribute movies but
13 instead it is a complement to movies purchased on DVD by the user. However, I do agree with
14 the Studios that to the extent that the Studios' new products also include second-copy
15 functionality, that functionality is a substitute for RealDVD.

16 10. Finally, my three main conclusions about the impact of RealDVD apply equally to
17 Facet, namely: distribution of the Facet product will not increase pirating of copyrighted
18 materials; distribution of Facet will raise, not lower, the demand for purchased DVDs; and
19 distribution of Facet will not harm the Studios' legitimate economic interest in introducing new
20 products.

21 **IV. THE REALDVD PRODUCT AND DVD COPYING TECHNOLOGY**

22 11. Based on my personal experience, having reviewed the declarations of Dr. Edward
23 F. Felten and others in this case, and an examination of product reviews in the public press, I see
24 that there are many technologies currently available that copy DVDs. Unlike RealDVD, many of
25 these technologies make copies that can be freely recopied and shared because they remove the
26 CSS encryption. Unlike RealDVD, many of these technologies permit consumers to play copies
27 on various platforms, including mobile devices like Apple iPods and Sony PSPs (PlayStation
28

1 Portable consoles).¹ In contrast, RealDVD creates an encrypted copy that can be played only from
 2 the hard drive on which it was initially copied and then solely by the RealDVD software licensed
 3 to the RealDVD account holder. Furthermore, many of the technologies that are available and
 4 used to make DVD copies are available at no cost.² RealDVD, in contrast, must be purchased.

5 **V. THE DEMAND FOR REALDVD VS THE DEMAND FOR UNLAWFUL RIPPING**

6 12. The economy contains both consumers who abide by the law with regard to
 7 copyrighted materials and other consumers who steal copyrighted materials, sometimes through
 8 networks of thieves. As an economist, I think of products as a bundle of attributes that are
 9 assessed by potential purchasers. These attributes include the price of the product and its
 10 technological and aesthetic characteristics, for example. One product attribute is whether the
 11 service provided by the product is lawful. Consumers have different tastes, tastes that lead them
 12 to place different values on a product's attributes. Just as consumers differ in how they value
 13 color, portability or ease of use, they differ in how they value a product's compliance with the law.

14 13. Many consumers choose to purchase and/or rent copyrighted DVDs and refrain
 15 from making unlawful copies even though the technology to do so is readily available on the
 16 market. For example, a 2008 survey on "Consumer Home Piracy" sponsored by Macrovision, a
 17 company which offers anti-copying technology and therefore might be expected to emphasize the
 18 prevalence of copying, estimated that 75% of U.S. consumers do not copy DVDs.³ Further, many
 19 of the survey respondents who copied DVDs may have been making legal copies. The presence of
 20 another technology, RealDVD, that enables them to play DVDs without the disc present, is

21 _____
 22 ¹ Monson, Kyle, "7 Tools for Ripping Your DVDs," 9/11/08, PC Magazine, accessed
 23 9/25/08, http://www.pcmag.com/print_article2/0,1217,a%253D231870,00.asp;
 24 SoftPowerReviews, "Best 5 DVD Ripper Reviews" (Free Press Release: August 27, 2008). Last
 25 accessed on October 1, 2008 at <http://www.free-press-release.com/news/print-1219816969.html>;
 26 Downloadatoz.com, "Top 10 DVD Ripper Reviews" (Global Press Release Distribution: May
 27 15, 2008) available at <http://www.prlog.org/10071977-top-10-dvd-ripper-reviews.html>.

28 ² Monson, Kyle, "7 Tools for Ripping Your DVDs," 9/11/08, PC Magazine, accessed
 9/25/08, http://www.pcmag.com/print_article2/0,1217,a%253D231870,00.asp.

³ Macrovision, "Consumer Piracy Study, Results for US and UK, DVD Copying – Studios,"
 June 12, 2008, MPAA-FOX-0002786–2829. See MPAA-FOX-0002829.

1 unlikely to change their taste for respecting copyrights. Instead, some of these consumers may
2 choose to purchase RealDVD because this software offers them a number of benefits for their own
3 content.

4 14. For example, some consumers would value making copies of their libraries of
5 existing DVDs for which digital copies are not available from the Studios. In addition, travelers
6 value convenience uses, families with children value backup and videophiles value the ability to
7 “peruse their collection.”

8 15. The consumer benefits of RealDVD, as indicated on the RealDVD website
9 (<http://www.realdvd.com/features>), include:

- 10 • Go anywhere: Play any of your DVDs straight from your authorized laptop or portable
11 hard drive.
- 12 • Protect your discs: Using RealDVD keeps your discs safe — no more scratches, skips,
13 blips, or lost titles.
- 14 • Watch everything: Save your entire DVD collection to your PC or portable hard drive,
15 then play them back without the discs.
- 16 • Become a film buff: Dig deeper into your movies with detailed plot synopses and cast
17 lists. Plus get more info and photos via links to Film.com.
- 18 • Never lose your place: RealDVD remembers where you are, so you can stop, shut
19 down and come back later without losing your spot in the movie.
- 20 • Save Battery Power: RealDVD saves up to 12% of your battery power versus
21 watching a movie that's spinning in your laptop.
- 22 • Let your kids play: Parental Controls allow you to control the types of movies children
23 can access.

24 16. Benefits from using RealDVD include having a backup of the DVD and
25 convenience. These benefits increase the value of purchased DVDs to the consumer. Because
26 RealDVD will make purchased DVDs more valuable, it will increase the demand for purchased
27 DVDs.

28 17. Other consumers place little value on respecting copyright protection. For these
consumers, RealDVD offers no benefit that is not already available to them from the products
already on the market.

1 18. Survey data from the Macrovision-sponsored study show that some people use
2 existing DVD copying technologies to do illegal things. This behavior will be unaffected by
3 RealDVD. In particular, those people would not use RealDVD because it lacks the features they
4 want and need to engage in those activities. The same survey shows that some people use existing
5 DVD copying technologies may be engaged in legal, fair use copying. RealDVD would be a good
6 economic substitute for those consumers because it has the features they desire.

7 19. The Studios claim that RealDVD should be blocked from the market because it will
8 lead to an increase in piracy. As I have pointed out, the flaw in this argument is that there are
9 technologies already on the market that enable piracy and do so much more effectively than
10 RealDVD can. In addition, the Studios are introducing technologies that enable copying. If the
11 introduction of additional technologies of this type inevitably leads to an increase in piracy, as
12 they claim, the Studios would have no incentive to supply these technologies. The Studios'
13 decision to supply these technologies is yet another piece of evidence that RealDVD will not
14 increase the amount of piracy that occurs.

15 **VI. DISTRIBUTION OF THE REALDVD PRODUCT WILL NOT HARM THE**
16 **STUDIOS' LEGITIMATE ECONOMIC INTEREST IN INTRODUCING NEW**
17 **PRODUCTS**

18 20. The Studios have described a number of new digital media products, such as
19 movies distributed on a disc with a "Digital Copy version," movies distributed online with a
20 "Burn-to-DVD feature," movies distributed on Blu-ray discs and potentially on DVDs with a
21 "Managed Copy" capability, and movies distributed on flash media.⁴ The Studios assert that the
22 distribution of RealDVD will undercut their legitimate economic interest in selling these products.

23 ⁴ For additional descriptions of "Digital Copy" and "Managed Copy" see also: NPD Group,
24 "The NPD Group: Digital Copy Feature on DVDs and Blu-ray Discs Resonates with U.S.
25 Consumers," December 10, 2008; Chiarella, Chris, "Digital Copy, Blu-ray, DVD and DRM:
26 What's Up With That?," Big Picture Big Sound (July 7, 2008)
27 http://www.bigpicturebigsound.com/printer_digital-copy-dvd-drm-blu-ray-1603.shtml (Accessed
28 December 16, 2008); Lacey, Gord, "Hands-On with Digital Copy." TV Guide (January 25,
2008). <http://www.tvguide.com/dvd-news/Hands-On-Digital-Copy-9008.aspx> (Accessed
December 16, 2008); "Digital Copy: New DVDs and Blu-ray Discs Bundled With iPod-Friendly
Files," Washington Post,
http://voices.washingtonpost.com/posttech/2008/04/digital_copy_new_dvds_and_blur.html
(Accessed December 16, 2008).


1 Indeed, they characterize RealNetworks as making an “attempt to usurp for itself the value of the
2 growing digital marketplace.” The Studios’ claims in this regard are incorrect.

3 21. To the extent the new products described by the Studios are new ways to distribute,
4 or new features associated with the distribution of, movies, RealDVD does not compete with those
5 products. RealDVD is not a new way to distribute movies but instead it is a complement to
6 movies purchased on DVD by the user. What RealDVD does is enable the consumer to exercise
7 what I assume is her legitimate “fair use” right to make a backup or a convenience copy of movies
8 she has purchased. Enabling the consumer to exercise her legal rights may be inconvenient for the
9 Studios, particularly in those instances in which the products that the Studios are introducing
10 include the same second-copy functionality as RealDVD, but it does not harm their legitimate
11 economic interest in introducing new products.

12 22. Finally, there is considerable consumer demand for RealDVD and products like it,
13 which allow consumers to make lawful backup copies of DVDs that they own. The Studios’
14 attempt to keep RealDVD out of the marketplace thus harms consumers by withholding an
15 innovative and inexpensive product that satisfies this demand.

16
17 I declare under penalty of perjury under the laws of the state of California that the
18 foregoing is true and correct.

19 Executed this 18th day of March, 2009 in Menlo Park, California.

20
21 
22 Timothy F. Bresnahan

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