

1 JAMES A. DiBOISE, State Bar No. 83296
 Email: jdiboise@wsgr.com
 2 LEO CUNNINGHAM, State Bar No. 121605
 Email: lcunningham@wsgr.com
 3 COLLEEN BAL, State Bar No. 167637
 Email: cbal@wsgr.com
 4 MICHAEL A. BERTA, State Bar No. 194650
 Email: mberta@wsgr.com
 5 TRACY TOSH LANE, State Bar No. 184666
 Email: ttosh@wsgr.com
 6 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 7 One Market St., Spear Tower, Suite 3300
 San Francisco, CA 94105
 8 Bus: (415) 947-2000
 Fax: (415) 947-2099
 9

Attorneys for Plaintiffs and Counterclaim Defendants
 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,
)

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.
)
 26)
 27)
 28)

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**DECLARATION OF LARRY
 GERBRANDT IN SUPPORT OF
 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

AND RELATED CASES

1 I, Larry Gerbrant, declare as follows:

2 1. For more than 25 years, I have worked as a media and entertainment analyst and
3 as a research and publishing executive. I am the founder and principal of Media Valuation
4 Partners, which provides valuation, market research, and litigation support. As a media and
5 entertainment executive and research analyst, I have focused on the economic and strategic
6 implications of the intersection between traditional media and emerging content delivery
7 technologies. My background includes experience in film and video production, commercial
8 photography, cable TV system operations, and magazine publishing. In 1984, I joined Kagan
9 World Media, a media research organization. As senior analyst and senior vice president of
10 Kagan's entertainment division, I oversaw more than two dozen of its newsletters and databooks
11 and led its valuation practice. In 2000, after Kagan's sale to Primedia, I became the Chief
12 Operating Officer and led Kagan's integration into Primedia's MediaCentral division. Upon
13 Kagan's subsequent sale to MCG Capital, I joined AlixPartners to lead its entertainment
14 consulting and litigation support practice. In 2005 I was recruited by The Nielsen Company to
15 become senior vice president and general manager of Nielsen Analytics, focusing on emerging
16 media technology economics and conducting primary research on consumer adoption of new
17 media platforms. I have been widely quoted as an expert on trends in and the economics of the
18 media and entertainment industries, and have served as a moderator of more than 200 industry
19 panels and conferences. I am also a graduate of Regis University with a bachelor's degree in
20 business administration.

21 2. I have served as an expert witness, including on behalf of some of the movie
22 studios who are defendants in this action, in the areas of media, entertainment, cable,
23 broadcasting, motion picture, home video, television programming, and emerging technologies
24 and have not only addressed forensic analyses of each of these sectors but revenue projections
25 for them, including estimates of the revenue potential of new entertainment technologies. I have
26 also overseen consumer surveys for use in litigation settings and designed market research
27 studies related to the adoption of new entertainment products and services. Attached as Exhibit 1
28 is my curriculum vitae and a list of my expert testimony experience.

1 3. I have been asked to address consumer behavior regarding RealDVD, the impact
2 of RealDVD on DVD sales, and the impact of RealDVD on new technologies to be introduced
3 by the Studios. In addition, I have been asked to opine about data and information that is
4 available to the Studios or is collected and maintained by the Studios. My opinions in this matter
5 are set forth below.

6 **The Features and Functions of RealDVD and Facet Demonstrate That They are**
7 **Designed and Intended to Be Used To Back Up DVDs For Personal Use**

8 4. I believe that consumers generally prefer to watch movies and television shows on
9 a television screen when they have the opportunity to do so. However, given the evolution of
10 technology, consumers have also come to desire and expect that they should be able to watch
11 movies and television shows wherever and whenever they want on a variety of mobile devices,
12 including iPods, PDAs, laptop computers and cell phones. There are many available products –
13 some authorized by the content providers and others not – that give customers the ability to
14 obtain movie and television content and transfer it to such platforms.

15 5. For those willing to pay for movie and television content – sometimes for the
16 second time if they have already purchased the content in a prior form (such as on a DVD) – they
17 may download the content from a download-to-own Internet site, such as Apple’s iTunes,
18 Amazon’s UnBox and download services developed by Netflix and Blockbuster. Such content is
19 playable on a range of devices depending on the applicable business rules, including iPods to
20 iPhones to Apple TVs to other portable media players and media centers from companies such as
21 Roku, LG Electronics and Archos. Similarly, consumers may also purchase a “digital copy” of a
22 movie or television show (*i.e.*, a second copy of content found on a second disc that is made
23 available with a limited number of DVDs), which can also be transferred to a computer or
24 mobile device.

25 6. Other consumers are not willing to pay for movie or television content a second
26 time, or even a first time. Those consumers who are willing to steal digital content have
27 numerous options available to them. Many download (and/or upload) content onto the Internet,
28 especially using peer-to-peer (“P2P”) file sharing networks such as BitTorrent. As discussed

1 more fully below, the overwhelming majority of movie piracy occurs in this manner on the
2 Internet. Indeed, high quality copies of blockbuster movies are commonly available on the
3 Internet before and during the “theatrical window” (the three or four month period when the
4 movies are still only available in theaters), long before they are made available for sale to
5 consumers on DVDs. High quality copies of movies have also been ripped from DVD
6 “screeners” sent out by the Studios and TV networks to members of the various motion picture
7 and television academies, often well before these titles become available to the general public.

8 7. There is also a vast array of software available to copy DVDs. Unlike RealDVD
9 and Facet, the overwhelming majority of these products (commonly called “rippers”) make
10 copies that can be freely re-copied and shared, including over the Internet, because they remove
11 the CSS encryption. These products permit consumers to play copies of digital content on
12 various platforms, including mobile devices like iPods and PDAs. There are literally hundreds
13 of software rippers. Attached hereto as Exhibit 2 is a listing of certain software rippers. Such
14 products may be found in mainstream retail outlets such as Best Buy or Costco, and are
15 commonly reviewed in mainstream magazines. Attached hereto as Exhibit 3 are examples of
16 mainstream media reviews of ripper software.

17 8. In marked contrast, the restrictions imposed by RealDVD and Facet on copies of
18 content demonstrate that those copies are intended solely as backup or convenience copies.
19 RealDVD and Facet retain CSS encryption on copied content, add additional encryption, and
20 lock the content to the particular hard drive on which it was made. The products also warn users
21 whenever they seek to save a movie that the user is only permitted to save content from a DVD
22 they own. The resulting copies cannot be copied, cannot be moved to any other hard drive other
23 than the one on which they were made, much less to iPods, PDAs or cell phones, and cannot be
24 shared over the Internet. For many consumers, these attributes would be unacceptable for
25 anything other than a backup of a DVD.

26 **The Studios’ Contention that RealDVD/Facet Will Result In Widespread Piracy Is False**

27 9. The vast majority of movie piracy occurs on P2P sites, a point which is well
28 known in the entertainment industry. In general, the challenge for persons who participate in this

1 type of movie piracy is to post the best quality copy of a popular movie as early as possible.
2 Being the first to do so is a point of pride among movie pirates.

3 10. We generally see four “spikes” in Internet activity regarding any particular movie
4 title, all before the movie is released to the public on DVD: (1) a pre-theatrical spike, (2) an
5 early theatrical spike, (3) an academy screener spike, and (4) a spike just before the movie is
6 released on DVD to the public. Because these spikes in Internet activity occur before the movie
7 is even released to the public for sale on DVDs, we know that they are not the result of casual
8 users making copies from DVDs using ripper software. To the contrary, the first three spikes
9 reflect copies from movies that are leaked by individuals with access to a movie just before or
10 just after it is shipped to movie theaters or that were recorded using a camcorder brought into a
11 movie theatre. The fourth spike probably reflects a leak from someone in the DVD retail
12 distribution channel who obtained a copy of the movie on DVD during its initial distribution to
13 retail outlets, in the weeks prior to sale to the public on DVD.

14 11. RealDVD and Facet obviously would do nothing to encourage or promote such
15 piracy. Because copies made using RealDVD and Facet are encrypted and locked to the hard
16 drive on which they were made, they are useless for Internet distribution.

17 **RealDVD and Facet Will Be Used Primarily To Make Backup Copies of Purchased DVDs**

18 12. I understand that the movie studios contend in this lawsuit that RealDVD and
19 Facet will encourage people to steal movies. I disagree. Given the restrictions on copies made
20 using these products – including that they provide no flexibility regarding the device on which
21 the consumer can watch the movie; do not allow the user to share the movie over the Internet;
22 and do not allow a copy of the copy to be made – I do not believe that they will appeal to persons
23 interested in stealing movies or engaging in movie piracy. Generally, those interested in
24 stealing/distributing movie content seek to eliminate all forms of digital rights management
25 (“DRM”) and other protection schemes in order to upload and share the movies. They also want
26 to freely burn new discs, move files to portable media players (such as iPods), and upload
27 movies and television shows to various P2P file-sharing networks.

28

1 13. Given the array of alternatives already available to consumers to obtain, transfer
2 and distribute digital content, I believe that the only people who are likely to use RealDVD and
3 Facet are those who care about legality and actively avoid stealing movie and television content.
4 To anyone else, the restrictions imposed by RealDVD and Facet are likely to be unacceptable.
5 Indeed, following RealDVD's initial release on September 30, 2008, there were numerous public
6 postings regarding the product's perceived "inferior" capabilities. An example of one such
7 article is attached hereto as Exhibit 4. Dedicated rippers and collectors have already decided
8 what programs to use and have no reason to switch to RealDVD.

9 14. I understand that the movie studios contend that RealDVD and Facet will cause
10 honest people to steal movies. Again, I disagree. Notwithstanding the widespread availability of
11 products which permit illegal sharing or copying of movies, there is a huge legal market for sell
12 through DVDs. In the United States alone, it is approximately \$10 billion/year. The vast
13 majority of people in this country do not behave illegally when acquiring movie content. While
14 consumers may not be able to draw fine lines about the limits of legality or fair use, they can be
15 fairly certain about what clearly falls into the illegal category, like copying movies they don't
16 own or obtaining commercial movies off BitTorrent. This is reflected, for example, in the Smith
17 Geiger study which was commissioned by RealNetworks prior to launch of RealDVD, a copy of
18 which is attached here to as Exhibit 5. I have reviewed the results of the study as well as the
19 underlying methodology, and find them sound. The study found that a large percentage of
20 respondents are interested in a product that they know will not violate copyright restrictions.

21 15. Furthermore, even with all the tools available to illegally copy movie content,
22 only a minority of consumers do so. According to a forensic analysis published by PC Pitstop,
23 only 15% of the computers in the sample have ripping software on them. I have reviewed the
24 results of the analysis as well as the underlying methodology, and find them sound. The 15%
25 figure serves as an upper-bound estimate to DVD copying because it is likely that not all of
26 consumers who have ripping software on their computers copy movies they do not own. I expect
27 that the self-selected individuals whose computers were analyzed as part of the PC Pitstop
28 analysis would be more likely to have ripper software than the general population of computer

1 owners. Other consumer surveys support the observation that DVD ripping is an activity
2 pursued by a small minority of PC owners. For example, an NPD Group study of 12,000
3 Americans reported in the New York Times found only 1.5% had DVD ripping software on their
4 computers and only two-thirds of them had used it in the quarter prior to the 2007 survey. A
5 copy of the PC Pitstop results is attached hereto as Exhibit 6. A copy of the New York Times
6 article is attached hereto as Exhibit 7.

7 16. I understand that the movie studios contend that RealDVD and Facet will
8 encourage rent/rip/return behavior. Again, I disagree. First, that argument relies on the
9 assumption that a digital copy of a movie on a hard drive is interchangeable with owning a
10 movie on a DVD disc. I believe that is a faulty assumption. In my experience, people purchase
11 movies (as opposed to renting them) because they want to own the physical copy of the disc in
12 the case with the packaging to keep in their collection. Indeed, this is one of the often-cited
13 reasons why the electronic sell through market for movie content has historically been relatively
14 small. Another reason consumers have historically not built large libraries of movies in
15 electronic format is the physical size limitations of hard drives, especially on laptops and
16 notebooks, where keeping a significant number of stored movies is simply not practical.

17 17. Second, I have found that the decision to buy or rent a movie depends in large
18 part on whether the consumer wishes to own the physical copy of the DVD. Thus, it is the
19 renting decision itself that displaces any purchase or subsequent purchase of the DVD, not the
20 theoretical ability to copy the rented movie onto a hard drive.

21 18. Third, the movie studios' argument ignores the fact that hard drive space is
22 limited, expensive and requires a significant up-front expenditure. To many, these
23 considerations, among others, would outweigh any perceived "benefits" of renting and copying a
24 DVD, rather than simply purchasing it.

25 **RealDVD and Facet Will Encourage DVD Sales**

26 19. RealDVD and Facet will enhance the value of DVDs to their purchasers. Among
27 other things, they help to keep discs safe, provide convenience and organization, and allow for
28

1 parental controls. Because RealDVD and Facet will make DVDs more valuable to consumers,
2 they are likely to encourage their owners to purchase more DVDs.

3
4 **Data and Information Collected and Maintained by Studios**

5 20. Information regarding piracy, actual and forecasted sales and revenue for existing
6 and emerging technologies and markets, as well as cost data is available to the Studios.

7 21. Data and information regarding movie piracy can be estimated through various
8 means including, but not limited to, consumer behavior studies and market surveys. Indeed, the
9 MPAA reports data of this type to Congress as part of the MPAA's lobbying activities, and the
10 movie studios rely on it the regular course of their business. For example, I believe that a
11 consumer survey could be developed to accurately estimate the displacement of sales of DVDs
12 or other studio products caused by use of RealDVD and/or Facet, if any.

13 22. I am also aware that revenue and price forecast data is available. There are
14 numerous companies that track existing entertainment technology and markets, as well as
15 provide forecasts for emerging entertainment technologies and markets. These companies
16 include, but are not limited to: PricewaterhouseCoopers, Veronis Suhler, SNL Kagan, Adams
17 Media Research, Jupiter, Forrester, Yankee Group, eMarketer, Parks Associates, ABI, and The
18 Diffusion Group. In addition, the major Wall Street firms release reports that contain forecasts
19 for emerging entertainment markets.

20 23. The Studios also prepare "Ultimates" in the ordinary course of business.
21 "Ultimates" are projections done on a per-title, per-ancillary-market basis and may include units,
22 revenue, and market penetration. It is customary for "Ultimates" to include existing and
23 expected ancillary markets. I have personally utilized "Ultimates" to appraise film libraries.
24 Studios also receive forecasts of demand for products and services from technology vendors and
25 suppliers.

26 24. In addition, as publicly traded companies, the Studios are required to comply with
27 Generally Accepted Accounting Principles ("GAAP") and Statement of Position 00-2 ("SOP 00-
28 2"). Under SOP 00-2, Studios must amortize costs using the "individual-film-forecast-

1 computation-method.” This method requires that studios accrue costs in the same ratio as actual
2 revenue is recognized over ultimate estimated revenue. In order to comply with GAAP
3 requirements for cost recognition, I understand that it is necessary for firms to project revenue
4 for the life of each individual film.

5 25. With respect to new products and technologies, it is customary for the Studios
6 and/or third parties to prepare forecasts of revenue and cost data. I am personally familiar with
7 forecasts for new products and technologies such as the pre-DVD launch consumer surveys and
8 studies conducted by Studios which predicted, among other things, the number of DVDs to be
9 purchased per year. Further, I have prepared forecasts in Kagan reports that included units,
10 price, and market penetration for a wide range of emerging media technologies that were
11 purchased by studios.

12 26. The Studios also have detailed knowledge of what they sell of existing products
13 such as DVDs. I am personally familiar with sources of sales and revenue data such as
14 VideoScan, which is a Nielsen product, and Rentrak which generally reports box office, DVD
15 sales (except Wal-Mart) and DVD rentals. In my experience, it is customary for movie studios
16 to subscribe to these sources of data. Further, as members of the MPAA, studios report their
17 worldwide revenue for all release windows and markets to the MPAA. The MPAA then
18 aggregates the proprietary studio data. The MPAA releases an abstract of top-line data to the
19 press and analysts; however more granular data is available internally to studio members. In
20 connection with prior assignments, I have reviewed this type of detailed data acquired from the
21 MPAA members.

22 27. As for other existing products, such as download-to-own, video-on-demand, and
23 pay-per-view, the studios have access to detailed sales and revenue information. Because studios
24 are part of profit-participation and/or revenue-sharing arrangements for these technologies and
25 markets, they receive reports from licensees (e.g., Apple iTunes, CinemaNow, Amazon,
26 Blockbuster, etc.). In addition, for video-on-demand and pay-per-view services both Rentrak
27 and Nielsen collect this information and studios receive pay-per-view and video-on-demand
28 sales reports directly from cable and satellite operators and from aggregators such as iN Demand.

1 28. In addition to sales and revenue data, cost data is available for existing and
2 emerging entertainment technologies and markets such as Digital Copy. During his deposition,
3 Michael Dunn testified, "We would look at the cost of the digital copy in a P&L that includes
4 both the regular version and the digital copy version."¹ Further, it is my experience that cost data
5 is tracked for DVD sales on a per-title basis so that the movie studios can comply with profit-
6 participation agreements. This data is also needed for other purposes such as royalty audits, slate
7 financing, and insurance.

8 29. With respect to DVD rentals, download-to-own, video-on-demand, and pay-per-
9 view technologies and markets, the movie studios have access to detailed cost data. Because
10 studios are part of profit-participation and/or revenue-sharing arrangements, they receive reports
11 from licensees (*e.g.*, Apple, CinemaNow, Netflix, Blockbuster, etc.).

12 30. As for emerging entertainment technologies and markets such as Digital Copy, it
13 is my experience that Studios customarily prepare forecasts for other new products and these
14 include cost projections and also obtain estimates and forecasts from entertainment technology
15 vendors.

16 **The Availability of RealDVD and Facet Will Not Change Consumer Attitudes**
17 **About the Legality of Copying DVDs**

18 31. I understand that the movie studios claim that the availability of RealDVD and
19 Facet in the market will alter consumer attitudes concerning the legality of copying DVDs, and
20 in particular, cause them to believe that it is permissible to copy DVDs they do not own. I
21 disagree.

22 32. First, I believe that consumers already generally believe that it is permissible to
23 make backup and convenience copies of content that they legally obtain. For instance,
24 consumers long ago became accustomed to the legality of videotaping broadcast television on
25 their video cassette recorders (VCRs) for later viewing. Similarly, consumers today are
26 accustomed to copying movie and television content using their home digital video recorders

27 _____
28 ¹ Deposition of Michael Dunn (December 12, 2008) at 112:9-11.

1 (DVRs) for later viewing. Indeed, movies or television shows that a consumer would copy from
2 cable television using a DVR may be *identical* to content that they might otherwise purchase on
3 a DVD. There is no particular reason why a consumer would believe that copying identical
4 content would be permissible in the first instance and not in the second, simply because the
5 digital content in the second instance was distributed on a DVD. As another example,
6 consumers have become accustomed to buying music online or on compact discs, and in each
7 instance, being able to copy and transfer that music to various mobile and other devices so they
8 can listen to it where ever and whenever they chose.

9 33. The corollary to the expectation that one can permissibly make backups of
10 purchased digital content for their personal convenience and enjoyment is that one cannot
11 permissibly make copies of content that one did not purchase. I believe that consumers already
12 generally believe that they cannot permissibly make copies of content that they did not purchase.
13 For all the reasons described previously regarding the attributes and features of RealDVD and
14 Facet, including the warning message displayed to users that they should not save a copy of a
15 DVD unless they own it, these products reinforce these existing expectations.

16 34. Second, the Studios have produced in this case many marketing surveys
17 concerning customer behavior. Without access to the methodologies and underlying data for
18 those studies, I approach these surveys with caution and generally would not be comfortable
19 relying on them. However, I would note that all of the studies which address the issue recognize
20 that there currently exists a level of consumer DVD copying in the United States and that a
21 significant percentage of that copying is reported to be for purposes of backing up purchased
22 DVDs. This supports the view that consumers already believe they have an existing right to
23 make copies of purchased content for their personal use.

24
25 ///

26 ///

27 ///

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

35. Third, DVD copying products such as rippers (that remove CSS protection) and other products such as Kaleidescape, DriveIn, and AMX (that do not) are well known and discussed and available in mainstream outlets. The existence of additional products with similar copying capability is unlikely to cause consumers to have a more liberal attitude toward copying, particularly given the well-documented restrictions imposed by RealDVD and Facet.

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

Executed this 18th day of March, 2009 in Los Angeles, California.



Larry Gerbrandt