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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN H. PATEL

REALNETWORKS, INC.,

Plaintiffs,

vs.

DVD COPY CONTROL ASSOCIATES, et
al.,

Defendant.

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)NO. C 08-4548 MHP

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)SAN FRANCISCO, CALIFORNIA

)Monday, March 23, 2009

)2:41 P.M.

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UNIVERSAL CITY STUDIOS PRODUCTIONS,

Plaintiffs,

vs.

REALNETWORKS, INC.,

Defendant.

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)NO. C 08-4719 MHP

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(HEARING ON MOTIONS)

APPEARANCES:

For RealNetworks Entities:

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BY: **MICHAEL A. BERTA, ESQ.**
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Reported by: MARGARET "MARGO" GURULE, CSR #12976
Pro Tem Court Reporter - US DISTRICT COURT

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11 **For DVD Copy Control Association, Inc.:**

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BY: **REGINALD D. STEER, ESQ.**

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1 March 23, 2009; 2:42 p.m.; Courtroom #15, 18th Floor

2 TONY BOWSER - Courtroom Deputy

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4 P R O C E E D I N G

5 THE CLERK: Calling Civil 08-4548, Civil 08-4719,
6 Realnetworks, Inc. vs. DVD Copy Control Associates, et al.

7 THE COURT: May I have your appearances, please.

8 MR. CUNNINGHAM: Leo Cunningham from Wilson, Sonsini,
9 Goodrich & Rosati on behalf of the RealNetworks entities, and I
10 have some other people to introduce, if I may.

11 THE COURT: Yes.

12 MR. CUNNINGHAM: So to my right is Robert Kimball.
13 Mr. Kimball is the Senior Vice-President and General Counsel of
14 RealNetworks. He came down from Seattle at the Court's
15 direction for this hearing.

16 THE COURT: Very good. Thank you.

17 MR. CUNNINGHAM: And also here is William Way.

18 THE COURT: You guys are going to have some
19 responsibilities when you walk out of here today. Yes.

20 MR. KIMBALL: Thank you.

21 MR. CUNNINGHAM: William Way is the Deputy General
22 Counsel from RealNetworks who also came down from Seattle for
23 the hearing.

24 THE COURT: And thank you.

25 MR. CUNNINGHAM: And to my left is new counsel

1 joining our team, Mr. Don Scott, from the Colorado Bar, who has
2 been admitted pro hac vice for this matter.

3 **MR. SCOTT:** Good afternoon, Your Honor.

4 **THE COURT:** Good afternoon.

5 **MR. CUNNINGHAM:** And I believe my partner, Mike
6 Berta, is also here.

7 **THE COURT:** Yes. Good afternoon.

8 **MR. WILLIAMS:** Good afternoon, Your Honor. Bart
9 Williams on behalf of the defendants and counter-complainants,
10 Motion Picture Studios.

11 **THE COURT:** Good afternoon.

12 **MR. STEER:** And I'm Reginald Steer on behalf of the
13 DVD Copy Control Association, Your Honor.

14 **THE COURT:** Good afternoon. Who is going to be heard
15 on the motion to dismiss?

16 **MR. CUNNINGHAM:** Your Honor, we attempted to withdraw
17 that motion on Friday.

18 **THE COURT:** Oh, really? Um-hum. Okay.

19 **MR. STEER:** And we stated to counsel that we did not
20 oppose the withdrawal of their motion.

21 **THE COURT:** Well, I would assume that if they're
22 going to withdraw it, you don't have any opposition. Is that
23 right, Counsel? And excuse me. Well, that makes it easy,
24 because you probably would have lost that one anyway. And
25 maybe you saw the handwriting on the wall on that one. But I

1 don't know about how you can decide, you know, whether it's a
2 contract of adhesion or not on a motion to dismiss. You need a
3 few facts.

4 **MR. CUNNINGHAM:** I thought that might be the case,
5 Your Honor, and I'm sorry we put you through the effort of
6 figuring that out.

7 **THE COURT:** Well, we might just issue the order
8 anyway, but we'll see.

9 **MR. STEER:** We would not object to that, Your Honor.

10 **THE COURT:** We will weigh that one over, having gone
11 through it. So then what we're in here about is both, I guess,
12 setting a new date for the preliminary injunction motion, which
13 at this point seems like we should be up to the permanent
14 injunction motion. And then the discovery that goes -- you
15 know, the issues, I guess, that go along with that. Is that
16 correct? And then, of course, the spoliation issue.

17 **MR. CUNNINGHAM:** I believe those are the issues, Your
18 Honor.

19 **MR. WILLIAMS:** That's right, Your Honor.

20 **THE COURT:** That's correct. Well, maybe what we
21 ought to do is work from this. We are going to need a new
22 date. I understand a whole slew of papers came in, and I don't
23 know what your briefing schedule is or if the briefing is
24 completed on the preliminary injunction.

25 But as you know, I'm not available on the 1st. And

1 that's awfully short after this. And I thought you'd probably
2 need some time in between. In addition, I'm not sure if all
3 the discovery is done for the preliminary injunction motions.

4 **MR. SINGLA:** Your Honor, this is Rohit Singla,
5 Munger, Tolles and Olson. I think I forgot to make an
6 appearance.

7 **THE COURT:** You didn't make an appearance.

8 **MR. SINGLA:** I apologize, Your Honor. I believe the
9 discovery is done, substantive discovery, on the motion. But I
10 understand the Court -- we understand the Court is not
11 available, and we've been speaking to RealNetworks, the Wilson
12 Sonsini firm, about a new date.

13 And I think we have, at least from the defendant's
14 perspective, a date to propose. We would propose a date at the
15 end of April, we believe April 27th, which I understand is
16 available on the Court's calendar. I believe that the defense
17 counsel and the witnesses are generally available during that
18 period.

19 **THE COURT:** What date? That's a Monday.

20 **MR. SINGLA:** I'm sorry. Starting on the 28th, then.

21 **THE COURT:** Starting the 28th. I don't know. Have
22 you checked with Mr. Bowser on that?

23 **MR. SINGLA:** We did check with Mr. Bowser.

24 **THE COURT:** What did he say?

25 **MR. SINGLA:** I believe Mr. Bowser said on Friday,

1 Thursday, that those dates were available. We do have one
2 witness from the defense side, Ms. Marsha King, we are trying
3 to track down and confirm. We believe she will be available
4 during that week, but that's one small caveat from our side.

5 I understand from opposing counsel, Mr. Cunningham,
6 that they are available that day except for their new
7 co-counsel. But we have struggled very mightily over the
8 weekend with Mr. Cunningham to try to find dates that worked
9 for everybody and all the witnesses, and that seems, from our
10 perspective at least, to be the least problematic dates.

11 **MR. STEER:** Your Honor, if I may add -- it's Reg
12 Steer speaking on behalf of the DVD CCA. Our expert,
13 Dr. Kelly, is in trial that week. We think we can work to
14 schedule him so that he can handle both matters. Nevertheless,
15 our acquiescence is subject to his availability.

16 **MR. CUNNINGHAM:** Your Honor, that week is problematic
17 for us --

18 **THE COURT:** Oh, it is?

19 **MR. CUNNINGHAM:** Yes, it is, because of Mr. Scott's
20 unavailability. Although he's new to the case, he had arranged
21 his schedule in light of the prior scheduling decisions that
22 had been made, and therefore had to make commitments in at
23 least another court around that week.

24 So I know that he does not have the entirety of that
25 week available. I don't know whether he can press anything to

1 get some aspect of it available. So I think you're going to
2 hear that we probably need to do a little bit more conferring.
3 I will note that I think that we had initially been opposed to
4 doing a piecemeal hearing and had requested that the days be
5 continuous or contiguous. We no longer have any objection to
6 picking days as we can in order to make it a little easier to
7 work with so many lawyers and witness's schedules.

8 **THE COURT:** Well, what we need to do instead of
9 increasing the number of lawyers is decreasing the number of
10 lawyers, and that might also assist in the objective.

11 But Tony, what does that week, in fact, look like?
12 Can I see the calendar?

13 **THE CLERK:** Sure.

14 **THE COURT:** That's the 27th?

15 **THE CLERK:** That's the 29th.

16 **THE COURT:** Um-hum. 29th. Um-hum. Well, can you --
17 so Tuesday, Wednesday, Thursday are available. We might be
18 able to do Friday. I'm not suggesting we're going to take all
19 of those days, but how many days do you think we need?

20 **MR. SINGLA:** Your Honor, we believe we need two days.
21 The Court had indicated, I believe back in October, that the
22 issues in which the Court was interested in hearing live
23 testimony was the technology, our DVD function. There is a
24 dispute among the lawyers at least at that time about how it
25 functioned, and also the license and some questions about the

1 license. And we think both sides can put forward one or two
2 experts and a couple of fact witnesses to deal with that in two
3 days.

4 **THE COURT:** Now, is this also going to include the
5 Facet technology, as well?

6 **MR. SINGLA:** Yes, Your Honor. It's based on your
7 rulings on December 22nd, the last hearing. We are prepared to
8 discuss and address the Facet issue also.

9 **THE COURT:** How different is that technology from the
10 Real DVD technology?

11 **MR. SINGLA:** There are differences. There are
12 specific differences, for example, on how we believe it
13 circumvents *ARccOS* and *RipGuard*. But fundamentally they do
14 pretty much the same thing. And so we think they can be
15 addressed together in one hearing.

16 **THE COURT:** What do you think?

17 **MR. CUNNINGHAM:** We have no doubt they can be
18 addressed together in one hearing and should be. I'm skeptical
19 that we can complete it in two days. I would have said three
20 and maybe a little bit more. I'm assuming three full days of
21 evidence when I say a three-day hearing, and assuming there
22 would need to be some additional time before and after for
23 opening and argument.

24 None of the parties have ever worked through, nor
25 have we invited the Court to direct us as to how you feel about

1 openings, closings and further briefing.

2 **THE COURT:** Openings, we don't need. You know, we
3 know what this case is about. Let's just get to the evidence.

4 Closings, I'll give you -- you know, I think it would
5 be helpful probably.

6 **MR. CUNNINGHAM:** Okay.

7 **MR. SINGLA:** Your Honor, in terms of the timing and
8 the length of the hearing, from our perspective, we continue to
9 believe this can be done in two days easily. We put on two
10 experts and a couple of fact witnesses to talk about the
11 technology and the license, maybe some videotapes of some of
12 the witnesses.

13 Now, RealNetworks has identified about 16 or 17
14 witnesses designated for the hearing, 6 experts and something
15 like 9 or 10 fact witnesses. And very frankly, from our
16 perspective, a lot of that seems very duplicative. And given
17 that there is extensive briefing, declarations from the various
18 witnesses, depo excerpts, it doesn't seem to us the Court needs
19 three or four days of witnesses coming in and telling the
20 Court -- fundamentally, we believe that, on the technology,
21 there's actually not a lot of room between the experts and the
22 witnesses.

23 I believe the Court will see that there is a lot of
24 agreement about what Real DVD does, some disagreement about how
25 you apply the law to those facts.

1 **MR. CUNNINGHAM:** Your Honor, I believe that the
2 actual number of witnesses we're likely to call is about a
3 quarter of the 16 or so that we've disclosed. So
4 realistically, I think it's going to be far fewer than that. I
5 still think it would be a mistake for people to plan their
6 lives as if it will only take two days.

7 **THE COURT:** Well, what days that week, if any -- I'm
8 sorry, is it Mr. Scott -- yes, you -- are you available?

9 **MR. SCOTT:** Your Honor, I had a hearing at a court in
10 Delaware set for April 1st and 2nd. And my request, that Court
11 moved it to -- I'm sorry -- yes, March 30th and April 1st were
12 the dates that the Court gave me.

13 **THE COURT:** Well, we're talking about the week of
14 April the 27th.

15 **MR. SCOTT:** My -- I'm sorry. April 30th and May 1st.
16 I don't have a calendar in front of me. April 30th and
17 May 1st, whatever days of the week those fall upon.

18 **THE COURT:** That would be Thursday and Friday, I
19 believe. Is that correct, Tony?

20 **MR. SCOTT:** I thought so.

21 **THE CLERK:** That's correct, Your Honor.

22 **MR. SCOTT:** I could participate earlier in the week.

23 **THE COURT:** Tuesday and Wednesday? Monday, we do fun
24 things like this. But Tuesday and Wednesday of that week,
25 which would be the 28th and the 29th. And what's the following

1 week like if we didn't quite finish? I would like to do it as
2 contiguously, consecutively as possible.

3 **MR. WILLIAMS:** Your Honor, Bart Williams on behalf of
4 the defendants. I have a trial starting on May 4th, Monday,
5 May 4th in Los Angeles.

6 **THE COURT:** Is it going to go?

7 **MR. WILLIAMS:** I think so.

8 **THE COURT:** May I look at your calendar, Bart?

9 **MR. WILLIAMS:** Sure.

10 **THE COURT:** If we back up and -- April 30th.

11 **MR. CUNNINGHAM:** Your Honor, while you're looking, my
12 understanding was that the prior week, the reason it was
13 problematic for certain of the parties was the unavailability
14 of a particular expert witness. It may be more than that, and
15 I don't mean to belittle anyone's schedule.

16 So that made me invite the consideration that if we
17 could stagger the days, perhaps we could even move things up a
18 little bit, go without the witness who I understood is an
19 expert named Tollar, I think with an A-R, and then perhaps pick
20 up that week of the 27th.

21 **THE COURT:** Well, that's what we were just looking to
22 see, if we could put it on some Thursday or Friday?

23 **THE CLERK:** Thursday we have a hearing at 2:30.

24 **THE COURT:** That's in the afternoon?

25 **MR. SINGLA:** Your Honor, perhaps we could --

1 **THE COURT:** Could we do Friday and then Tuesday and
2 Wednesday of the following week?

3 **MR. SCOTT:** Yes.

4 **MR. CUNNINGHAM:** Yes.

5 **THE COURT:** Would that work?

6 **MR. WILLIAMS:** That would work for us, Your Honor.

7 **THE COURT:** Then why don't we plan that? So it will
8 be Friday the 24th and then Tuesday and Wednesday, the 28th and
9 29th. Okay?

10 **MR. STEER:** Again, Your Honor, those dates are all
11 difficult for our expert, Dr. Kelly. And so subject to his
12 availability, what I would like to have, you know, is a
13 representation of some flexibility among the parties that we
14 may need to put him on out of order in order to accommodate
15 him.

16 **MR. CUNNINGHAM:** No problem.

17 **THE COURT:** Well, that's fine. It's a bench hearing.

18 **MR. STEER:** Of course.

19 **THE COURT:** But tell him to be available one of those
20 days, whichever one it is, I don't care.

21 **MR. SINGLA:** Would the Court expect the schedule to
22 be 8:00 to 1:00 or 9:00 to 2:00 or something like that on those
23 days?

24 **THE COURT:** We might just do it most of the day, you
25 know, because it's -- you know, I do that -- I have that

1 practice with respect to jury trials for the convenience of the
2 jurors. So I would rather just get through this rather than
3 use that other schedule. So probably it would be 8:30 or 9:00
4 to 4:00, 4:30 or 5:00, whatever.

5 **MR. SINGLA:** Your Honor, then one last issue before
6 we turn to the spoliation issues, just one procedural issue
7 that we'd like to raise. If it's true that RealNetworks would
8 really only be having four or so witnesses out of the sixteen
9 or so they've designated, we'd like to get those names so that
10 we can start preparing, we can decide which witnesses we need
11 to bring, start getting all those schedules done.

12 And we haven't been able to get to an agreement with
13 the other side about disclosure and exchange of witness names
14 for live testimony. So I would ask the Court if there is a way
15 to have an agreement that those names be disclosed in the next
16 day or two so that we can start planning.

17 **THE COURT:** Well, we can set some dates by which
18 those things need to be accomplished --

19 **MR. SINGLA:** Thank you, Your Honor.

20 **THE COURT:** -- and also the briefing schedule. But
21 before doing that, I understood there were some issues with
22 respect to this -- the nonCSS technologies and whether there
23 was still some remaining discovery with regard to -- was it
24 ARccOS and -- the other name is escaping me.

25 **MR. CUNNINGHAM:** RipGuard.

1 **THE COURT:** RipGuard. How could I forget that? But
2 wasn't there some discovery issues with regard to getting that
3 done before the preliminary injunction?

4 **MR. SINGLA:** I believe the discovery about ARccOS and
5 RipGuard has been completed. We've had expert reports
6 exchanged. We have had expert witnesses deposed. I know that
7 both sides have complaints. You know, we wanted to depose some
8 of their people. They may want to -- I don't know -- maybe
9 depose some of our people some more. But we were all prepared,
10 both sides, to go forward next week. We've filed opening
11 papers --

12 **THE COURT:** Okay, fine. Is that correct?

13 **MR. CUNNINGHAM:** It is, Your Honor. We think that we
14 haven't been provided with certain kinds of particulars about
15 those technologies that we would have expected. But that may
16 be an argument that is going more to the merits than to the
17 status of discovery. So everyone who has been identified by
18 any party has now been deposed in the documents such as they
19 are -- have been provided and exchanged.

20 **THE COURT:** Well, maybe we can do this also. First
21 of all, what is the briefing situation? Is all the briefing
22 done now?

23 **MR. SINGLA:** Opening papers have been filed, Your
24 Honor. The parties had agreed -- I believe the Court has
25 ordered that a mutual exchange of opening papers and then a

1 mutual exchange of responsive papers. So the responsive papers
2 have not yet been filed. We held off when we found out that
3 the April 1st hearing was being moved. We do need a date for
4 exchange of those.

5 **THE COURT:** Okay. Well, when can those be filed?

6 **MR. SINGLA:** I believe, Your Honor, from our
7 perspective, it's really up to when the Court would like them.
8 If the hearing is on the 24th, perhaps the 17th or earlier that
9 week, just as much time as the Court needs to review the
10 papers.

11 **THE COURT:** Well, give us a little more than that.

12 **MR. SINGLA:** Okay.

13 **THE COURT:** Usually we have two weeks.

14 **MR. SINGLA:** Okay. Well, we can certainly do it by
15 the 10th.

16 **THE COURT:** I think for a full-blown hearing, it
17 would be helpful.

18 **MR. SINGLA:** How about the 10th, Your Honor?

19 **THE COURT:** The 10th?

20 **MR. CUNNINGHAM:** That's fine for us.

21 **THE COURT:** Do you think that's adequate?

22 **MR. CUNNINGHAM:** That's fine.

23 **THE COURT:** Okay.

24 **MR. CUNNINGHAM:** That's fine. Thank you, Your Honor.

25 **MR. SINGLA:** Thank you, Your Honor.

1 **THE COURT:** The person who's got the first crack at
2 them, you know, has to have the time, you know. Tell me what I
3 don't need to look at. "It's a waste." "This is important."

4 Now, how soon can each of you prepare the list of
5 witnesses that you intend to call at the hearing and a brief,
6 you know, synopsis statement of what they're going to testify
7 to?

8 **MR. SINGLA:** Your Honor, we could do that within a
9 couple of days.

10 **THE COURT:** And how about for you?

11 **MR. CUNNINGHAM:** I would like until next week to do
12 that.

13 **THE COURT:** You want to respond first, since you're
14 the ones who are seeking the preliminary injunction, and do it
15 in a couple of days? So, by Wednesday, Thursday of this week?
16 Give me a day.

17 **MR. SINGLA:** That's fine. Thursday, Your Honor.

18 **THE COURT:** Thursday? And then by Tuesday of next
19 week?

20 **MR. CUNNINGHAM:** Yes.

21 **THE COURT:** Okay. Now, and the briefs, you know,
22 just a brief summary of what they're going to testify to, just
23 generally. I don't want, you know, paragraphs and paragraphs
24 and pages.

25 **MR. SINGLA:** You want those filed with the Court,

1 Your Honor?

2 **THE COURT:** Yes, and filed with the Court. And then
3 I think what you can do is, to the extent there may be some
4 issue with regard to RipGuard and ARccOS, you would take a look
5 and see whether you have what you need, and if there are going
6 to be any witnesses on that list that are going to shed any
7 light on it and whether you need to take the depositions. But
8 I presume that the witnesses you're calling, you will have
9 taken their deposition. Somebody will have deposed them.

10 **MR. CUNNINGHAM:** That's right. I will be shocked if
11 there are further depositions to be taken.

12 **THE COURT:** Yeah. Okay. But I was going to say, if
13 you have to, you can squeeze one in between now and then, and
14 the hearing, if there is somebody that shows up on the list
15 that you haven't deposed. You can work that out, I presume,
16 without a discovery battle.

17 **MR. CUNNINGHAM:** We could.

18 **THE COURT:** You will work that out without a
19 discovery battle.

20 **MR. CUNNINGHAM:** Thank you, Your Honor.

21 **THE COURT:** Would that be the better way to say it?

22 **MR. SINGLA:** Yes.

23 **THE COURT:** Okay. All right. Now, anything else we
24 need to worry about in terms of that hearing?

25 **MR. SINGLA:** I don't think so, Your Honor.

1 **MR. CUNNINGHAM:** No.

2 **THE COURT:** And at the hearing, is there enough in
3 the depositions if all these people have been deposed to use
4 their depositions to put them on the stand with or to have a
5 declaration or something like that --

6 **MR. WILLIAMS:** Your Honor --

7 **THE COURT:** -- to put them on the stand with and then
8 make them available for cross-examination, and then, of course,
9 you'll have at them as far as redirect and then re-cross.

10 **MR. WILLIAMS:** Right. Your Honor, what we had
11 thought might be helpful -- I realize that the Court has
12 indicated that you aren't inclined to allow openings. But
13 since there a number of witnesses who we think will appear only
14 in the form of their deposition testimony, we thought that a
15 very short opening statement to put in context who you are
16 going to be hearing from and what it means, 20 minutes,
17 something like that, would be helpful, because at least in our
18 presentation -- and we're the moving party -- that's what we
19 anticipated doing, putting a number of witnesses in front of
20 Your Honor, via the deposition testimony, then calling a few
21 live witnesses and then allowing some of the experts. We could
22 do some of that, I think, by affidavit, and some by live
23 testimony.

24 **THE COURT:** Were these depositions videoed?

25 **MR. SINGLA:** Yes, Your Honor.

1 **MR. STEER:** Yes, Your Honor, all of them were.

2 **THE COURT:** Well, I don't even need you here if I
3 have the depositions, do I? I'll just watch them.

4 **MR. WILLIAMS:** It would take a long time.

5 **THE COURT:** So you would rather that I spend it with
6 you and the deponent rather than just by myself and the
7 deponent. Is that it?

8 **MR. WILLIAMS:** No. We think we can cut them down.

9 **THE COURT:** You think you can shorten it?

10 **MR. WILLIAMS:** Yes.

11 **THE COURT:** Well, we'll see. I'll give you 15
12 minutes opening, okay, each of you.

13 **MR. WILLIAMS:** Okay.

14 **THE COURT:** Now, where does that put Mr. DVD here --
15 I'm sorry.

16 **MR. STEER:** Steer.

17 **THE COURT:** -- Steer?

18 **MR. SINGLA:** Although we do call him "Mr. DVD."

19 **MR. STEER:** I'm flattered to be called "Mr. DVD,"
20 Your Honor.

21 I would like to have part of that opening, as well.
22 I don't think it will be imposing on the Court if we each, each
23 of the three parties, has 15 minutes. I'll do my best to make
24 it even shorter than that.

25 **THE COURT:** Well, how significantly different are

1 your arguments going to be from the Studios'?

2 **MR. STEER:** The Studios, Your Honor, have additional
3 issues that they need to cover in some depth. Our argument has
4 to do with the license agreement and the law that applies to
5 it.

6 **THE COURT:** I'll give you ten minutes. How's that?

7 **MR. STEER:** Ten minutes will do. Thank you.

8 **THE COURT:** That's all you need. That's all you're
9 getting.

10 Okay. Now, anything else we need to do as far as
11 that hearing is concerned right now?

12 **MR. CUNNINGHAM:** I think that does it.

13 **THE COURT:** Okay. And I think since this is a bench
14 trial, let's just do it at 9:00. So you show up at 9:00 on
15 Friday the 24th, I guess it is, and we will plan to go through
16 the day. You know, we will take a break for lunch and come
17 back -- I don't know, recess around 4:30, 5:00, something like
18 that. Okay? So maybe we can get through with it in a shorter
19 time than certainly when I use my trial schedule, jury trial
20 schedule.

21 So then we're to the issue of spoliation, right?

22 **MR. WILLIAMS:** Yes, Your Honor.

23 **THE COURT:** Now, as I understand it, an actual order
24 with respect, internally, with respect to preservation took
25 place for the first time on October 6, 2008, correct?

1 **MR. CUNNINGHAM:** That's right, Your Honor.

2 **THE COURT:** And these lawsuits were being filed when,
3 in September?

4 **MR. CUNNINGHAM:** September 30th.

5 **THE COURT:** And when was -- when was your lawsuit
6 filed? This was -- your suit was filed in Central District,
7 right, and then transferred up here?

8 **MR. WILLIAMS:** It was the same day.

9 **THE COURT:** So the same day?

10 **MR. WILLIAMS:** Yes.

11 **THE COURT:** Um-hum. In the proverbial race to the
12 courthouse?

13 **MR. WILLIAMS:** That's right.

14 **THE COURT:** Okay. You had different targets, I
15 guess, but in any event, there is some discussion in your
16 papers about, you know, there -- for example, among, I guess
17 employees and there was testimony by at least one of the
18 employees and perhaps others that there had been discussions
19 about a fear of litigation, right, just sort of talking
20 about -- but a generalized fear is not the same thing as a
21 specific threat of litigation.

22 **MR. WILLIAMS:** That's true, Your Honor.

23 **THE COURT:** So when would this obligation to preserve
24 have arisen?

25 **MR. WILLIAMS:** The obligation arose, Your Honor, when

1 the litigation was anticipated and when that anticipated
2 litigation threat was real. And here the evidence is pretty
3 clear that, from the very beginning, the planning stages for
4 this product that Real DVD anticipated litigation, they
5 anticipated litigation with regard to this specific product,
6 litigation with the motion pictures studios, the content
7 holders of this protected material.

8 So this was not some theoretical possibility, but
9 rather part of the business plan. And indeed, the business
10 plan documents that have been produced by Real evidence that
11 anticipation of litigation. And I can point the Court to
12 specific documents that speak to that and make it far different
13 from speculation, but rather part of the actual business plan,
14 if I may, if the Court is interested in hearing those or having
15 me focus on those.

16 **THE COURT:** No, we have those.

17 **MR. WILLIAMS:** Um-hum.

18 **THE COURT:** But still, my question is: You know,
19 aren't those really more of a -- yes, they know who would be
20 suing them, I guess, because the nature of what -- you know, if
21 there was going to be any litigation, they would have a sense
22 of who it would be because of the nature of the equipment
23 that's at issue, right? I mean, we're not talking -- you know,
24 we're not talking about copying shoes here. We're talking
25 about copying movies and whether or not movies can be copied,

1 you know, once for fair use or whether this was essentially a
2 copying that will allow a much more wholesale kind of
3 distribution system, correct?

4 **MR. WILLIAMS:** Well, a couple of points, Your Honor.
5 First, Ms. Nichole Hamilton, who was one of the project
6 managers for the Facet Program --

7 **THE COURT:** How disgruntled is she?

8 **MR. WILLIAMS:** I think it's fair to say she's pretty
9 angry at the company. I think that's fair to say. But the key
10 components, though, of her testimony, at least as far as we are
11 concerned, are corroborated by documents that existed at the
12 time.

13 For example, Ms. Hamilton says that, from the very
14 beginning of the project, she was told, in no uncertain terms,
15 there is going to be litigation here. It's almost certain.
16 Her testimony was that she was told that by Mr. Barrett, who is
17 the person who was running the so-called Facet Program.

18 There is a document that was produced in discovery
19 that was actually written by Ms. Hamilton. It's Exhibit A to
20 our reply brief and the declaration of Mr. Katz from our firm.
21 And there is a sentence I would like to read that puts in
22 perspective exactly what the anticipated litigation would be.

23 It says, under the heading "Competition" -- and
24 again, this is Ms. Hamilton writing for the Facet Program --
25 "What is likely keeping these other larger entrants" -- that

1 is, other larger companies that could make a product similar to
2 Real DVD -- "what's likely keeping these other larger entrants
3 at bay is the threat of a lawsuit. Risk of damaging business
4 relationships with content providers and/or desire to avoid
5 doing anything that might breathe new life into
6 current-generation DVDs, slowing the shift to blue ray or
7 HD/DVD. Facet is intended to be the first to market with a
8 modest cost-consumer device while the political landscape is
9 still unsettled before any of the other larger competitors
10 enter the market." In other words, it was specifically part of
11 the business plan that what they were going to try to do at
12 Real was to get ahead of the other competitor companies,
13 knowing --

14 **THE COURT:** Isn't that what companies do all the
15 time?

16 **MR. WILLIAMS:** No, Your Honor. They don't enter
17 markets where they know that the other side's position is that
18 you are stealing their content, anticipating that the
19 litigation is going to be there, and developing their product
20 for a year and a half, with all of the e-mails, the engineering
21 documents that are produced as part of that, and then not start
22 a litigation hold until they, in fact, file their lawsuit, or
23 rather until after they file their lawsuit.

24 Clearly, Your Honor, the record is replete with
25 evidence that this was much more than the possibility that

1 there was going to be litigation. In fact, there was
2 discussion about it. There were plans about how to speak,
3 what language to use in e-mails that were written during that
4 time. And a totally separate point is the fact that when they
5 finally did put in the litigation hold in October of 2008, a
6 year and a half after the project began, they made it
7 retroactive, Your Honor, back to July of 2007.

8 No real reason for July 2007, but they made it
9 retroactive, meaning that they recognized that there was prior
10 documentation that would have been developed in that
11 year-and-a-half period. They recognized that by virtue of the
12 date that they chose for the litigation hold, but that doesn't
13 have any principal basis either because the program started in
14 January of 2007, and there are documents from back in that time
15 period that they were tracking the Kaleidescape litigation,
16 that they had tracked the fact that there had been a decision
17 Kaleidescape.

18 And so you have to go way back before the actual
19 lawsuit was filed in order to determine when this particular
20 plaintiff, on these particular facts, in fact, anticipated the
21 litigation, knew it was going to happen, with whom, and over
22 what. Because the whole idea for this --

23 **THE COURT:** Okay. I got it.

24 **MR. WILLIAMS:** You think you get it, Your Honor?

25 Thank you.

1 **THE COURT:** Mr. Cunningham.

2 **MR. CUNNINGHAM:** If I may, because Mr. Williams' use
3 of the term "business plan," I think, directs us right to the
4 key case which our San Jose's Judge White has published the
5 Hynix vs. Rambus decision. And I think it would be helpful, if
6 I may, if I could hand the Court a chronology.

7 **THE COURT:** I'm just glad he had that litigation, not
8 me. What a task that was.

9 **MR. CUNNINGHAM:** Your Honor, in the *Hynix* case, we
10 had a situation where there wasn't just a company with a
11 business plan to bring litigation. We had a company that was
12 there to litigate. It was going to enforce a patent portfolio.
13 So the record in that case was replete with discussions about a
14 litigation strategy.

15 The issue was whether or not a document retention
16 policy that resulted in something called "Shred Days" at the
17 company, all of which were, under advice of counsel, plainly
18 happened and were part of anticipating some kind of litigation,
19 whether or not that constituted spoliation. And what Judge
20 White rightly recognized is you can talk about and think about
21 litigation all you want. It can be part of your business plan,
22 part of your strategy, like it was in Rambus.

23 But you've got to get down -- to make a -- to trigger
24 the document-preservation obligation and to define what
25 probable or reasonably foreseeable is under the spoliation

1 standard, you have to have eliminated critical contingencies
2 that might prevent, avoid or resolve the litigation short of it
3 happening.

4 And so if we look at our chronology, one of the
5 factors that Judge White keyed in on in the *Hynix v. Rambus*
6 litigation was: When did *Rambus* have a litigation budget. And
7 in our case, we didn't have a litigation budget.

8 And Mr. Kimball is a for-real, honest-to-God general
9 counsel. He's held accountable for his budgets. He has to
10 budget. He doesn't get to just ignore it. He didn't have a
11 budget for litigation in this case until after the lawsuits
12 were filed and until after the document preservation notices
13 went out.

14 Your Honor, it is the case that litigation counsel in
15 this case, my firm, we didn't get involved in this case until
16 September 7th. And the reason, even though there was all sorts
17 of talk about the fact that the studios might well sue in this
18 case, the reason we didn't know -- we didn't think litigation
19 was probable, or that the company didn't, was because they knew
20 that, at the right point, there was going to be a negotiation
21 with the studios. And that began in August, in August of 2008.
22 And quite frankly, it started off on a pretty good foot.

23 And at one point, there was a deal in principal with
24 Viacom. So this whole mess might well have been avoided. The
25 parties entered into a standstill agreement, and that was

1 reflected on September 9th. Negotiations continued. They
2 broke down.

3 The Munger Tolles lawyers wrote the threatening
4 letter on September 25th. And that's the day, September 25th,
5 that is unambiguously the day that our duty to preserve should
6 have begun. And we were a little late, but it won't matter
7 here. It's that September 25th date. And I think if you were
8 to go back --

9 **THE COURT:** Why wouldn't it matter? Because nothing
10 was destroyed?

11 **MR. CUNNINGHAM:** Because nothing was destroyed in the
12 subsequent period. The alleged -- if I may, the alleged
13 destruction by Basche and deleting emails by Hamilton, all of
14 that had to have been long before June, June of 2008. And on
15 my very fancy graphic here, I've tried to put events of
16 destruction, purported destruction on one side, and the events
17 in the litigation on the other side.

18 So I really think that the *Hynix* decision is a
19 perfect roadmap for how this Court should resolve this case.
20 And the answer is we don't have -- you know, this
21 foreseeability of litigation is like a proximate cause
22 standard. You have to bounce it around for policy
23 considerations. It's unworkable to have every company being
24 developed preserving documents from whenever.

25 Mr. Williams thinks that it's probative that we

1 selected that July date in our document preservation notice.
2 All you do is you go back a reasonable amount of time. That
3 doesn't mean anything. That doesn't mean that you should
4 always start preserving at the time that your subsequent notice
5 says, "Might include relevant evidence." It's got nothing to
6 do with it.

7 Anyway, I would direct Your Honor to a reading of the
8 *Hynix Rambus* case.

9 **THE COURT:** When did the negotiations of the studios
10 break down?

11 **MR. CUNNINGHAM:** They really broke down after the
12 9th. I think it was about the 24th, 25th of September. There
13 was a lot of intense negotiation going on, and I could be off
14 by a few days. But it was --

15 **THE COURT:** Were there discussions about litigation
16 during those negotiations?

17 **MR. CUNNINGHAM:** Well, there was enough of a
18 discussion that there was a standstill and forbearance
19 agreement entered into among all of the studios and
20 RealNetworks. That happened on September 9th.

21 **THE COURT:** And did that also include anything about
22 preservation?

23 **MR. CUNNINGHAM:** That was not included, Your Honor.

24 **THE COURT:** And that was September --

25 **MR. CUNNINGHAM:** 9th.

1 **THE COURT:** -- 9th? And do you know, were any
2 documents destroyed between September 9th and October 6th, I
3 guess it is?

4 **MR. CUNNINGHAM:** I believe that none were, Your
5 Honor, and I believe that not just because I'm optimistic, but
6 because, as we've been pressed to provide declarations
7 regarding relevant persons' document maintenance habits, it
8 turns out we have a number of pack-rats at the RealNetworks in
9 Seattle. So I think it's very unlikely that anything was
10 destroyed, and there has certainly been no indication that
11 anything was destroyed.

12 **THE COURT:** Now, with respect to Ms. Hamilton's
13 notebooks, the ones that are missing --

14 **MR. CUNNINGHAM:** Yes.

15 **THE COURT:** -- anything further on that?

16 **MR. CUNNINGHAM:** If I could speak to the notebooks, I
17 would like to. So we know about one notebook for sure. That
18 was a book that Ms. Hamilton tendered to the HR person whose
19 name is Dewitt and is a declarant and her then current boss
20 whose name is Ricci Matthews.

21 Ms. Hamilton had been off the relevant projects for
22 three months. So she left. She was part of the Facet team.
23 That's the hardware product team. She had left on June 18th in
24 a blowup with her management, and she went to a project called
25 Helix. Helix has nothing to do with Real DVD, Facet or Vegas.

1 So for 90 days, she was working on Helix. She gets
2 terminated on September 24th, and she brings with her to the
3 meeting where she's terminated her then current notebook, and
4 that's the -- that notebook hasn't been found.

5 There is no reason to think that that notebook had
6 anything to do with Real DVD, be it Facet or Vegas, not just
7 because 90 days have passed, but for the further reason that
8 Ms. Hamilton was asked by her former boss to give him
9 everything related to Facet at a particular point in time, and
10 it was about --

11 **THE COURT:** Was this before her reassignment, or at
12 about that time?

13 **MR. CUNNINGHAM:** It was actually six weeks after her
14 reassignment. Her boss thought that he would find a
15 replacement and that she could give her stuff to the
16 replacement. He didn't find the replacement. So he eventually
17 said, "Give it to me." And he says in his declaration, and
18 it's Mr. Woods who is the declarant on this, he says in his
19 declaration, That was about six weeks after her termination on
20 June 18th, which puts it right at the beginning of August.

21 So there is no reason to think that the one notebook
22 that we know about had anything to do with anything that might
23 conceivably be at issue in this case.

24 **THE COURT:** Does she indicate otherwise,
25 Mr. Williams, in her deposition --

1 **MR. WILLIAMS:** Yes, she does, Your Honor.

2 **THE COURT:** -- with regard to the contents of that
3 missing notebook.

4 **MR. WILLIAMS:** Well, what she testified to, I
5 believe, and Mr. Singla is the one who took the deposition, but
6 I believe that she testified that she had a total of three
7 notebooks that she believed related to this project. She
8 believe that had she had one of them on her last day, and we
9 don't know whether she had the same notebook for the Facet
10 Program and then used the same notebook when she moved on to
11 the new program to which she had been reassigned. But totally
12 separate and apart from that single notebook which she tendered
13 on that date that she was terminated is that fact that she had
14 two other notebooks that relate to the Facet project that were
15 in her office that have not been produced. And she testified
16 clearly that it had all, in chronological fashion, all of the
17 dates of meetings, determinations about what would be done and
18 what would not be done.

19 **THE COURT:** Well, that's what I'm talking about, are
20 the ones that are missing that were believed to have something
21 related to the Real DVD and Facet. What about those?

22 **MR. WILLIAMS:** Her testimony is that all three of the
23 notebooks, the one that she tendered on her last day, and the
24 other two that she had prepared over the course of her time
25 with the company, that all of them would have information

1 relating to Facet.

2 That is what she testified to, and I know Mr. Singla
3 will correct me if I'm wrong. But the critical thing is that
4 there are at least these two notebooks that were in her office
5 when she was escorted out of her building on the date in
6 question. But those notebooks have not been produced. There
7 has been no explanation at all for why we don't have them.

8 And one other point about that. You know, Real has
9 taken to attacking Ms. Hamilton and selectively waiving any
10 sort of privilege that she might have and putting before the
11 Courts the parts of her personnel file that they want to put in
12 front of the Court. But I would ask the Court to recognize
13 this fact: At the time that Ms. Hamilton testified at her
14 deposition, she expected those notebooks to appear. She
15 described what was in them, and she had no knowledge that Real
16 was going to represent to the Court that they couldn't find
17 them. That wasn't the point at the time. They were not
18 alleging at the time that they couldn't find them. There was
19 no representation, in other words, that was made to the studios
20 about the status of those notebooks at the time that she
21 testified. So --

22 **THE COURT:** Well, what about the explanations for
23 their nonexistence?

24 **MR. CUNNINGHAM:** Let me tell you what we know,
25 because it's a mystery. And it doesn't require casting

1 aspersions on Ms. Hamilton on this occasion. The fact is that,
2 on the day of her termination -- and her testimony was that the
3 Studios' briefs vary from what the actual testimony was on
4 that. She said she gave one notebook over. We've talked about
5 that. The other two were in her desk drawer. Two people
6 looked in her office that day, her then current manager,
7 Mr. Matthews and the HR representative, Mr. Dewitt. Neither of
8 them recall seeing the notebooks in the office. So we don't
9 think they were there on the day she was terminated. Bear in
10 mind, she was supposed to have and purported to have turned
11 over everything relating to Facet in early August at her boss's
12 direction. And parenthetically, what the company got from
13 Ms. Hamilton when she did provide that material, it was given
14 over to legal and has been preserved. So there has been no
15 spoliation of any Hamilton notebooks. It just hasn't happened.

16 **THE COURT:** Well, but the notebooks have not been
17 found, right?

18 **MR. CUNNINGHAM:** The notebooks have not been found.

19 **THE COURT:** And it was -- she was asked to turn them
20 in when she left?

21 **MR. CUNNINGHAM:** She was actually asked to turn those
22 notebooks in, in early August.

23 **THE COURT:** Earlier than that?

24 **MR. CUNNINGHAM:** Yes.

25 **THE COURT:** And has there been enough of a -- do we

1 have really a strong declaration from somebody who has recently
2 gone through the files and the offices and whatever else and
3 talked with everybody they need to talk with to find out what
4 happened to those notebooks?

5 **MR. CUNNINGHAM:** I think we have, because Your Honor,
6 when you get a spoliation motion, you're motivated to find what
7 you've allegedly spoliated. So we've looked and we haven't
8 found it. Now, I think the quality of our declarations on that
9 point is sufficient with respect to what Mr. Woods tells us,
10 what Mr. Matthews and Mr. Dewitt tell us, that we don't have the
11 the notebooks; we don't believe they were there; and we don't
12 know where else to look.

13 **THE COURT:** Are they the only persons who would know?

14 **MR. CUNNINGHAM:** I believe that they are because of
15 this funny transition and the key event where she -- where
16 Mr. Woods says to her, "Give me the stuff that relates to
17 Facet."

18 **MR. SINGLA:** Your Honor, one thing I think on this is
19 very interesting is they've put in numerous affidavits from
20 Ms. Hamilton's including many affidavits from Ms. Hamilton's
21 colleagues on the Facet Project. And none of them deny,
22 although they had every intention to, none of them deny that
23 she had notebooks; that she took notes at these meetings.
24 There was no suggestion in the record that her testimony at
25 this point, disgruntled or not, is the absolute truth that she

1 kept comprehensive notebooks about all of her work and the
2 team's decision-making on Facet. That's just not disputed in
3 the record. Mr. Barrett put in a declaration saying it's not
4 true. He didn't do that. All of her colleagues say those
5 notebooks existed.

6 Second, she was let go literally days before they
7 sued us. So even Mr. Cunningham, although we disagree with
8 this, but even Mr. Cunningham agrees that, at the very least,
9 they had an obligation to preserve evidence as of September
10 25th. She was let go on September 24th. There is no reason to
11 think that her testimony, that her notebooks, with all of the
12 information about Facet, were sitting in her office on
13 September 24th. There is no reason to think that's not true.
14 And RealNetworks focuses, Mr. Cunningham, on Mr. Dewitt, the HR
15 manager. But the obligation to preserve this evidence was not
16 just Mr. Dewitt's.

17 Ms. Hamilton's former boss, all of her colleagues,
18 they knew that she had these notebooks in every meeting. And
19 when they were asked by the lawyers to produce all the evidence
20 relating to Facet, they had an obligation to say, "Oh, yeah.
21 Ms. Hamilton, she had those notebooks, where are they," and to
22 produce those notebooks. The testimony and the -- from the
23 declarations say that the notebooks were destroyed sometime in
24 December or January, it looks like. They say that her office
25 was locked in September -- on September 24th. So where are the

1 notebooks? They were in the office. They were locked on
2 September 24th. They sat there, apparently, for three or four
3 months, according to Real's declarations, until the office was
4 cleaned out.

5 Now, whether they were thrown away negligently or
6 however they're missing, they are missing and they went missing
7 during this case, while we're litigating, while we're taking
8 discovery.

9 **MR. CUNNINGHAM:** Respectfully, there is a dispute in
10 the evidence regarding what Mr. Singla just said. I'll remind
11 you, I said that we have declarations that say on the day she
12 was fired, the people who looked in her office didn't see those
13 notebooks. So what was destroyed later on in December were the
14 content of the office.

15 There is no proof that when those contents were
16 destroyed, they included the notebooks. There is evidence to
17 the contrary.

18 **THE COURT:** Well, I think we're not going to get it
19 resolved here, either. How many of these people may be called
20 to testify at the motion on the preliminary injunction; do you
21 know? I'm not going to hear from any of them?

22 **MR. CUNNINGHAM:** You wouldn't hear from Mr. Dewitt or
23 her then -- her boss at the time, no, you wouldn't hear from
24 either of them.

25 **THE COURT:** Any of them? Okay. I mean, we have to

1 move on. I haven't another -- just a few other matters on the
2 calendar.

3 With respect to this whole question of then the order
4 on October the 6th. That did not include Facet at that time,
5 correct?

6 **MR. CUNNINGHAM:** Your Honor, there were three
7 identical e-mails that were sent. They did go to the Facet
8 team. One of the Facet team members in his deposition,
9 Mr. Beilman, did not recall getting it. In fact, if you look
10 at Exhibit A to Lindsey Godfrey's declaration, you will see
11 that there are the e-mails there, and Mr. Beilman, did, in
12 fact, get the e-mail. So it did go to the Facet team. The
13 company did all the right steps. About eight days late, but it
14 took all the right steps.

15 **THE COURT:** Now, also you mentioned earlier something
16 about -- and it sounded as if it was a decision that Real made
17 with regard to waiving the attorney-client privilege, you know,
18 with respect to Ms. Hamilton and Ms. Hamilton's testimony.

19 **MR. CUNNINGHAM:** Yes. I'm sorry --

20 **THE COURT:** And did not that occur when, in fact, she
21 was testifying and allowed essentially to testify and go off
22 even after the attorney-client privilege was asserted?

23 **MR. CUNNINGHAM:** No. What happened at her deposition
24 was that the questions would be asked. She would begin to
25 answer them, and our attorney would interpose instructions to

1 cease the answer as she began to tread on privileged grounds.
2 Frankly, we think that she was someone artful in trying to
3 evade those directions, but that's neither here or nor. The
4 fact is we tried to protect the privilege at her deposition.
5 We believe we have done so. There has been no motion
6 suggesting that there has been a waiver. And if there were, we
7 would contest it dramatically.

8 **THE COURT:** How far -- how many times did she
9 overstep the lawyer?

10 **MR. CUNNINGHAM:** I don't know. I mean, I haven't
11 counted -- I think there were a number of times -- and I
12 actually thought that there might be subsequent litigation on
13 the instructions that hadn't happened.

14 **THE COURT:** I mean, were there times when you didn't
15 try to shut it down?

16 **MR. CUNNINGHAM:** Your Honor, there was no time that
17 we did not try to shut it down, to the best of my recollection
18 of the transcript, and I was not at that deposition. We were
19 attempting to protect the privilege.

20 **MR. SINGLA:** Your Honor, we have grave concerns on
21 this issue that the Court has raised. it doesn't directly
22 relate to the spoliation motion, but this is an issue that we
23 have looked at very closely. What we have seen is a pattern
24 both with respect to attorney-client privilege and asserting a
25 joint privilege and also documents relating to her termination

1 of selective waiver. So, for example, attorney-client
2 privilege.

3 The testimony is very clear -- no denial from the
4 other side -- that their lawyers were trying from the very
5 beginning to teach the engineers the language to use, the kind
6 of e-mails to write, the kinds of words to use. In some
7 depositions, with some of their witnesses, they allowed us to
8 ask, "What language did you guys use? What were the
9 conversations between you about what language to use? What did
10 Mr. Barrett tell you?"

11 In other depositions, like Ms. Hamilton's, they would
12 sometimes object and instruct witnesses not to answer and block
13 us from inquiring into these conversations about language to
14 use and how to tone and craft e-mails and documents.

15 So there has been this pattern across depositions,
16 not just within Ms. Hamilton's, of claiming privilege sometimes
17 and then allowing witnesses to answer -- different witnesses to
18 answer the same question.

19 **THE COURT:** Was Mr. Barrett an attorney?

20 **MR. SINGLA:** No, Mr. Barrett was not an attorney.

21 **THE COURT:** Well, how does the attorney-client
22 privilege even get plugged in here if there were was no
23 attorney giving this advice?

24 **MR. SINGLA:** Well, the assertion that Real has made
25 and Real's lawyers has made, in some depositions, for example,

1 sometimes in Ms. Hamilton's deposition, is that what
2 Mr. Barrett was telling these engineers about how to write
3 e-mails and the words to use and the ways to characterize
4 ARccOS or CSF, that he had gotten those views based on his
5 conversations with Real's lawyers at the beginning or
6 instigation of the project. And so, therefore, when he told
7 somebody, "Don't use these words" --

8 **THE COURT:** And we don't have time to go down that
9 road today.

10 **MR. SINGLA:** Well, one other thing I would point out,
11 Your Honor, is with respect to Ms. Hamilton -- I took her
12 deposition. I just want to respond to a question the Court
13 raised about whether she's disgruntled, and I understand that
14 she is somewhat disgruntled.

15 But on the substance of her testimony on which we
16 rely, there is very little objection from the other side. For
17 example, she said that litigation, she thought, was inevitable.
18 She was told by Mr. Barrett that it was inevitable from the
19 beginning. They don't deny that. Mr. Barrett doesn't deny
20 that he told her that and that that was their view from the
21 beginning, that the litigation was inevitable.

22 **THE COURT:** Okay. You know, we have to wind this up.
23 I have another matter that was on the 2:00 calendar. We still
24 haven't heard that one, to say nothing of 3:00 and 4:00.

25 **MR. WILLIAMS:** I understand. Your Honor, may I make

1 just one point with respect to the Hynix case that counsel was
2 able to discuss. I just want to try to distinguish it, if I
3 may?

4 **THE COURT:** Can you be brief?

5 **MR. WILLIAMS:** Very brief.

6 **THE COURT:** Because I'm going to cut you off.

7 **MR. WILLIAMS:** Okay. In that case, Your Honor, here
8 are some of the steps that had to be met before the Court was
9 going to find that there was no anticipated litigation. In
10 that matter, patents had to be issued. It was unclear whether
11 that was ever going to happen. Patents had to cover the
12 products that were being discussed. The company had to make a
13 decision about whether or not it was going to file a lawsuit.
14 Those are all hurdles or steps that had to happen before the
15 litigation would commence.

16 Here, it's totally different. In this case, Real
17 knew that there had been litigation relating to Kaleidescape
18 because that's why they did this product. They knew that there
19 would be a lawsuit pending. And that's the distinction in the
20 case, Your Honor.

21 **THE COURT:** Okay. Thank you.

22 **MR. WILLIAMS:** Thank you.

23 **THE COURT:** And we've got dates for the preliminary
24 injunction, and we will issue an order on this. And the thing
25 that I want to say is -- and what's your last name, Kimball?

1 **MR. KIMBALL:** Kimball, Bob Kimball.

2 **THE COURT:** -- it's either you or your colleague
3 here, I'm going to hold personally responsible for preservation
4 orders, enforcement of preservation orders, of discovery and
5 making sure that the discovery complies with what is required,
6 and that it is entirely produced so there is no gap between
7 outside counsel and in-house counsel. You are responsible and
8 you're going to have to sign off on every discovery request or
9 not the request but the responses to requests yourself or
10 through -- I'm sorry, your name again.

11 **MR. WAY:** Way, Your Honor.

12 **THE COURT:** Mr. Way, is it? How do you spell it?

13 **MR. WAY:** W-A-Y.

14 **THE COURT:** Mr. Way, A-Y. Oh, that's easy. Mr. Way,
15 one of you will have to sign off on it and be responsible so
16 that we don't have any gaps at all here about whether discovery
17 is being produced or whether, you know, the preservation orders
18 are being issued or complied with.

19 So it should have been clear, and hopefully it was
20 clear from what was said earlier, with regard to Facet, as well
21 any other product that may potentially be in litigation here,
22 that any and all documents, et cetera, are to be preserved.
23 And you know what those memos are supposed to look like. And
24 they go out, I trust, over your signature.

25 **MR. KIMBALL:** We have litigation counsel. It went

1 out over her signature, but it certainly happened at my
2 direction, and the buck absolutely stops with me. I will be a
3 responsible person.

4 **THE COURT:** Is Mr. Way the second in command?

5 **MR. KIMBALL:** Yes, he is.

6 **THE COURT:** Okay. You or Mr. Way, so I'll be looking
7 for one of your names. Make sure that, you know, when you say
8 that every and all documents that have been sought and searched
9 for have, in fact, been turned over -- and I'm going to put the
10 responsibility on your shoulders and Mr. Way's to look for
11 those notebooks that Ms. Hamilton said -- and make sure that
12 every corner of that office or the offices, whatever, not just
13 her office, are turned to make sure that they aren't, you know,
14 somewhere in the office.

15 **MR. KIMBALL:** I will insure that we do the most
16 detailed possible search for those documents when we get back,
17 and we will report back.

18 **THE COURT:** Okay. I expect you to respond and be
19 responsive. Where are you a member of the bar.

20 **MR. KIMBALL:** In Illinois and Washington.

21 **THE COURT:** They're two states that we can --

22 **MR. CUNNINGHAM:** He clerked in the Ninth Circuit,
23 however.

24 **MR. KIMBALL:** I clerked for Judge Alarcon in the
25 Ninth Circuit, as well.

1 **THE COURT:** Okay. Well, very good. Okay. So we're
2 going to see you on the 24th, right?

3 **MR. CUNNINGHAM:** Yes.

4 **THE COURT:** Thank you.

5 **MR. WILLIAMS:** Thank you, Your Honor.

6 **MR. CUNNINGHAM:** Thank you, Your Honor.

7 *(Hearing concluded at 3:36 p.m.)*
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1 CERTIFICATE OF REPORTER

2 I, MARGARET "MARGO" GURULE, Pro Tem Court Reporter
3 for the United States Court, Northern District of California,
4 hereby certify that the foregoing proceedings in Case
5 No. CV 08-4547 Real Networks, Inc. v. DVD, Copy Control
6 Associates, et al. and a related case, were reported by me, a
7 Certified Shorthand Reporter, and were thereafter transcribed
8 under my direction into typewriting; that the foregoing is a
9 true record of said proceedings as bound by me at the time of
10 filing.

11 The validity of the reporter's certification of said
12 transcript may be void upon disassembly and/or removal from the
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16 /s/_____
MARGARET "MARGO" GURULE
17 CSR No. 12976
March 30, 2009
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