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14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 v.

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

21 Defendants.

Case No. C08 04548 MHP
 Related Case No. C08 CV 04719 MHP

**RESPONSE MEMORANDUM IN
 SUPPORT OF MOTION OF DVD COPY
 CONTROL ASSOCIATION, INC. FOR
 PRELIMINARY INJUNCTION**

Date: April 24, 2009
 Time: 9:00 A.M.
 Ctrm: 15

Hon. Marilyn Hall Patel

23 AND RELATED CASES

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 25 PUBLIC REDACTED VERSION
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INTRODUCTION

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2 RealNetworks concocted RealDVD -- its software product that makes playable copies of DVDs
3 on computer hard drives -- months before it applied for the license to the CSS technology that DVD
4 playback devices require to unlock and play the content of CSS-protected DVDs, and without regard
5 for the terms of the license. RealNetworks sought the license after-the-fact so that it could advertise its
6 product as "legal," in contrast with illegal "rippers." But the terms of the license do not authorize
7 copying products like RealDVD. The Agreement explicitly states its anti-copying purpose and requires
8 DVD playback devices to perform specific operations in a prescribed sequence, precisely so that
9 protected content on DVDs must be played directly from the DVD Disc itself. RealNetworks
10 incorrectly claims that RealDVD performs these operations when it accesses the content of the DVD
11 Disc to save it to a computer hard drive or other storage medium. RealDVD does not -- and cannot, by
12 definition -- perform the contractually required operations when it plays back the DVD content from
13 the hard drive. RealNetworks' interpretation of the Agreement as permitting DVD copiers like
14 RealDVD is contrary to critical contractual provisions, which RealNetworks' opening memorandum
15 carefully avoids. RealNetworks' interpretation also is vitiated by its own extrinsic evidence, which
16 shows that RealNetworks created RealDVD knowing that the product contradicted DVD CCA's
17 understanding of the Agreement and did not disclose that it held a contrary understanding. Basic
18 contract law principles bind RealNetworks to DVD CCA's understanding of the Agreement.

19 On the equities, RealNetworks attempts to brush aside the Agreement's irreparable injury
20 stipulation but does not dispute the evidence that release of RealDVD would seriously threaten the
21 vitality of the DVD CCA. On the other hand, RealNetworks grossly exaggerates the hardship to itself
22 if RealDVD is enjoined. By its own account, RealNetworks is a major player in the digital
23 entertainment industry, with numerous successful products, and there is nothing to indicate that it will
24 not continue to thrive after it is preliminarily enjoined from selling RealDVD.

25 I. DVD CCA IS LIKELY TO SUCCEED ON THE MERITS.

26 It is undisputed that RealNetworks' DVD playback device, RealDVD ("RealDVD" refers to both
27 "Facet" and "Vegas"), uses the Content Scramble System ("CSS") licensed from DVD CCA to enable
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1 consumers to make lasting, digital copies of DVDs on a computer hard drive or other storage media and
2 to view the copied DVD content without any further need for the physical DVD Disc. RealNetworks
3 contends that this “core functionality” of RealDVD does not breach the Agreement. RealNetworks, Inc.
4 and RealNetworks Home Entertainment, Inc.’s Opposition to Motion for Preliminary Injunction
5 (“RealNetworks Mem.”) at 22. This contention is wrong under basic principles of contract
6 interpretation, which require contracts to be interpreted so as to honor the mutual intent of the parties at
7 the time of contracting. Cal. Civ. Code § 1636. The starting point for ascertaining the parties’ intent in
8 any contract is the language of the agreement, *id.* at § 1638, which must be interpreted as a whole to
9 give effect to each provision. *Id.* at § 1641. If the language of the contract is reasonably susceptible to
10 more than one interpretation, it is ambiguous and the court is then required to consider extrinsic
11 evidence of the parties’ respective understandings of the contract. *Winet v. Price*, 4 Cal. App. 4th 1159,
12 1165 (1992). When the extrinsic evidence reveals that one party understood that the other party
13 interpreted the contract in a particular way, then the latter’s interpretation shall control. Cal. Civ. Code §
14 1649; *Restatement (Second) of Contracts* § 201(2)(a) (1981). By the same token, a party’s
15 uncommunicated subjective understanding of a contract cannot be used to support the interpretation of
16 the contract asserted by that party in litigation. *Winet*, 4 Cal. App. 4th at 1166 n.3.

17 The Agreement’s language is not ambiguous because it is not reasonably susceptible of
18 RealNetworks’ interpretation.¹ 

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[REDACTED]

RealNetworks' effort to justify its interpretation of the Agreement rests on a set of erroneous propositions. RealNetworks falsely claims that the CSS Specifications that prescribe the playback sequence of devices like RealDVD somehow are not part of the Agreement; it seeks refuge in the narrow (and incorrect) state trial court ruling in *Kaleidescape* which, in any event, does not apply here; and its assertion that its interpretation must control because the Agreement supposedly is "adhesive" ignores the rules governing the interpretation of uniform contracts like the Agreement and threatens the economic and societal benefits of standardized intellectual property licenses.

A. The Agreement's Language Prohibits CSS Implementations That Copy Protected DVD Content To Computer Hard Drives For Playback Without the DVD Disc.

[REDACTED]

² [REDACTED]

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[REDACTED]

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3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 Consistent with these requirements, the Procedural Specifications provide that, "The
7 Authenticator in a CSS Decryption Module shall correctly engage in and complete the authentication
8 process *with the DVD Drive* and ensure that the CSS Keys are received by the Descrambler *only if the*
9 *authentication process is successful.*" Pak Dec., Exh. P at DVD016784 (§ 6.2.3) (emphasis added).

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
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[REDACTED]

[REDACTED]

[REDACTED]

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1 [REDACTED]

2 Moreover, DVD CCA's interpretation of the contract documents carries out the central objective
3 of the Agreement: [REDACTED]

4 [REDACTED]
5 [REDACTED]

6 In contrast, RealNetworks' interpretation cannot be squared with the language of the
7 Agreement and violates its explicitly stated overarching purpose.

8 1. RealDVD Does Not Comply With The Language Of the Agreement.

9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
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[REDACTED]

RealNetworks' recitation of what RealDVD does is a sideshow. RealNetworks Mem. at 24-25. It ignores what RealDVD fails to do -- namely, implement CSS in the manner required by the language of the Agreement. RealNetworks never actually explains how the text of the Agreement supports its argument.

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]

4 2. RealNetworks' Challenges To DVD CCA's Interpretation Of The Language Of The
5 Agreement Are Meritless.

6 In addition to its primary (and profoundly mistaken) contention that its interpretation of the
7 Agreement is reasonable because the contract does not state explicitly that "DVDs must be played back
8 from the physical DVD Disc and not a computer hard drive," RealNetworks levies a series of attacks
9 on DVD CCA's interpretation of the Agreement. Each of these attacks misfires.

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 Parsons and Pak are not attesting to the meaning of the language of the Agreement. Parsons'
26 declaration describes the purpose of CSS and the formation of the DVD CCA. Pak's describes the
27 process for becoming a CSS licensee and the documentation that DVD CCA provides to licensees.

1 [Redacted]
2 [Redacted]
3 [Redacted]
4 [Redacted]

5 B. The Extrinsic Evidence Shows That RealNetworks Was Aware That DVD CCA
6 Understood The Agreement To Prohibit Applications That Copy Protected DVD Content
7 To Computer Hard Drives For Playback Without Any Further Need For The Physical
8 DVD Disc.

8 [Redacted]
9 [Redacted]
10 [Redacted]
11 [Redacted]
12 [Redacted]
13 [Redacted]
14 [Redacted]
15 [Redacted]
16 [Redacted]

17 There is no evidence whatsoever that RealNetworks informed DVD CCA that it had a contrary
18 interpretation. Under California rules of contract interpretation, RealNetworks is bound by its own
19 understanding of DVD CCA's understanding of the Agreement. RealNetworks' subjective construction
20 of the Agreement, which it did not disclose to DVD CCA, cannot be used to support the interpretation
21 that RealNetworks is advancing in this litigation.⁸

22 [Redacted]
23 [Redacted]
24 [Redacted]

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26 ⁸ [Redacted]
27 [Redacted]
28 [Redacted]

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[REDACTED]

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4 C. RealNetworks' Grounds for Its Interpretation Of The Agreement Are Untenable.

5 In ducking critical provisions of the Agreement and the extrinsic evidence of the parties'
6 understanding, RealNetworks rests its interpretation of the Agreement on the following three grounds:

7 (a) the confidential CSS Specifications are not part of the Agreement, and thus do not constrain the core
8 functionality of RealDVD; (b) the California state trial court ruling in the *Kaleidescape* case allegedly
9 rejected DVD CCA's interpretation of the Agreement and thereby renders RealDVD contractually
10 lawful; and (c) the Agreement is a contract of adhesion and therefore must be construed according to
11 RealNetworks' interpretation. None of these grounds holds water.

12 1. The Confidential CSS Specifications Are Part Of The Agreement.

13 RealNetworks argues that the confidential CSS Specifications -- the Technical Specifications
14 applicable to the particular membership categories that RealNetworks selected and the CSS General
15 Specifications applicable to all CSS licensees -- impose no restrictions on RealDVD because
16 RealNetworks did not receive those documents prior to executing the CSS License Agreement and thus
17 they "were not properly incorporated into the CSS Agreement." RealNetworks Mem. at 24.
18 RealNetworks is wrong. Both the CSS Technical Specifications and the CSS General Specifications are
19 very much part of the Agreement.

20 As a threshold matter, RealNetworks' "incorporation" argument is specious. Whether the
21 Agreement separately and individually "incorporates" the CSS Technical Specifications and CSS
22 General Specifications verbatim is not the relevant inquiry. It is undisputed that Section 4.2 of the CSS
23 License Agreement requires all licensees to comply with the "CSS Specifications." Pak Dec., Exh. J at
24 Real001418. Thus, the relevant inquiry is whether the CSS Technical Specifications and the CSS
25 General Specification are themselves "CSS Specifications." They are.

26 RealNetworks' argument that the CSS Technical Specifications are not part of the Agreement is
27 absurd. The CSS Technical Specifications that RealNetworks received from DVD CCA after executing
28

1 the CSS License Agreement -- the Authenticator Specifications and the Descrambler Specifications --
2 were the very CSS Technical Specifications that RealNetworks knew it would be getting because those
3 documents corresponded to the DVD CCA membership categories that RealNetworks had selected. The
4 language of the CSS License Agreement underscores this fundamental point. That document defines
5 "CSS Specifications" as "documentation relating to CSS entitled 'CSS Specifications' (including the
6 Procedural Specifications and the *Technical Specifications that [DVD CCA] makes available to*
7 *Licensee. . .*" Pak Dec., Exh. J at Real001412 (emphasis added). Thus, as a procedural matter, when it
8 executed the CSS License Agreement, RealNetworks was aware that DVD CCA subsequently would
9 "make available" to it the CSS Technical Specifications applicable to the membership categories that
10 RealNetworks selected. *Id.* at Real001443. As a substantive matter, RealNetworks was aware that these
11 CSS Technical Specifications would provide RealNetworks with the confidential information necessary
12 to ensure that its device would be in "technical compliance" with the Agreement. Pak Dec., Exh. G. at
13 Real001732. All told, RealNetworks was not caught by surprise when it acknowledged receipt of the
14 CSS Technical Specifications from DVD CCA on September 10, 2007. DVD CCA Mem. at 8-9 & n.9.

15 The infirmity of RealNetworks' position is compounded by what RealNetworks itself says it did
16 after receiving the CSS Technical Specifications. RealNetworks did not contact DVD CCA to ask "what
17 are these documents -- we did not know that we would be getting them" or to inquire whether
18 compliance with the CSS Technical Specifications was necessary under the Agreement.

19 [REDACTED]

21 _____
22 10 [REDACTED]

1 [REDACTED]

2 [REDACTED] This evidence further undermines RealNetworks' interpretation of the Agreement as

3 somehow excluding the CSS Technical Specifications. *See Southern Cal. Edison Co. v. Superior Court*,

4 37 Cal. App. 4th 839, 851 (1995) (“The practical interpretation of the contract by one party, evidenced

5 by his words or acts, can be used against him on behalf of the other party, even though that other party

6 had no knowledge of those words or acts when they occurred and did not concur in them. In the

7 litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other

8 party’s earlier words, and acts, can introduce them to support his contention.”) (internal quotations

9 omitted); *Kennecott Corp. v. Union Oil Co.*, 196 Cal. App. 3d 1179, 1189 (1987) (t]he conduct of the

10 parties *after execution of the contract and before any controversy has arisen as to its effect* affords the

11 most reliable evidence of the parties’ intentions.”) (emphasis added).

12 RealNetworks’ argument that the CSS General Specifications are not part of the Agreement fares

13 no better. RealNetworks received the CSS General Specifications along with the CSS Technical

14 Specifications on September 10, 2007, as part of a single package. Pak Dec. ¶ 21, [REDACTED]. The “Receipt

15 of Documents” that RealNetworks then executed and returned to DVD CCA explicitly identifies the

16 CSS General Specifications as a “CSS Specification.” *Id.* And after it had the package in hand,

17 RealNetworks did nothing to suggest that it believed that the CSS General Specifications were not CSS

18 Specifications with which it had to comply pursuant to Section 4.2 of the CSS License Agreement.

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]



2. The Trial Court Decision In *Kaleidescape* Does Not Rescue RealDVD.

RealNetworks' suggestion that its interpretation of the Agreement was adopted in the March 2007 state trial court decision in the *Kaleidescape* case is wrong. RealNetworks Mem. at 27-28. DVD CCA's theory of breach in *Kaleidescape* was limited to the contention that the Kaleidescape system violated Sections 1.5 and 2.1.2 of the CSS General Specifications. The trial court decision in *Kaleidescape* was confined to that theory: it held only that the General Specifications are not CSS Specifications with which licensees must comply.¹¹ In contrast, DVD CCA's charges against RealNetworks are not limited solely to violations of the CSS General Specifications. DVD CCA alleges that, in designing RealDVD, RealNetworks violated not only the CSS General Specifications, but also the Procedural Specifications, the CSS License Agreement, and the category-specific Technical Specifications that RealNetworks selected. Even if the trial court's ruling in *Kaleidescape* that the CSS General Specifications are not "CSS Specifications" were affirmed on appeal, it could have no conceivable bearing on the applicability of these other contract provisions to RealDVD.¹²

Moreover, even as to the applicability of the CSS General Specifications themselves, the trial

¹¹ As mistaken as its decision was, the trial court in *Kaleidescape* did not go so far as to adopt RealNetworks' thesis that the CSS Technical Specifications are excluded from the Agreement -- it held only that the CSS General Specifications are not part of the Agreement.

¹² [Redacted]

1 court decision in *Kaleidescape* does not shelter RealDVD.¹³

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9 By contrast, there is no evidence that DVD CCA was aware that RealNetworks had a
10 contrary understanding of the Agreement. On these uncontested facts, California contract law binds
11 RealNetworks to its understanding of DVD CCA's understanding, *i.e.* that the Agreement requires that
12 devices play back CSS protected content directly from a DVD Disc.

13 3. RealNetworks' Adhesive Contract Theory Would Undermine The Societal Benefits
14 Achieved Through Uniform Arrangements For the Licensing Of Intellectual Property
15 And, In Any Event, Misapprehends The Rules Governing The Interpretation Of
16 Standardized Agreements.

17 RealNetworks claims that because the Agreement is "adhesive," its interpretation is dispositive.
18 RealNetworks Mem. at 22-23. RealNetworks bases its argument on a series of cases that primarily
19 involved boilerplate agreements between an individual, on the one hand, and a large company, on the
20 other. In each of these cases there was no question that the agreements met the definition of a contract
21 of adhesion: "a standardized contract, which, imposed and drafted by the party of superior bargaining
22 strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."
23 *Armendariz v. Foundation Health PsychCare Servs., Inc.*, 24 Cal. 4th 83, 113 (2000) (internal quotations
24 and citation omitted).¹⁴ RealNetworks cites no cases, however, involving agreements for the licensing

25 ¹³ As DVD CCA pointed out in its opening memorandum, the *Kaleidescape* case is on appeal and
26 thus the trial court's ruling is not final under California law for purposes of res judicata and collateral
27 estoppel. DVD CCA Mem. at 18 n.20.

28 ¹⁴ The cases involving consumers on the one hand, and corporations on the other, that
RealNetworks cites are: *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003) (consumer telephone services
contract with telephone company); *Oestreicher v. Alienware Corp.*, 502 F. Supp. 2d 1061 (N.D. Cal.
2007) (consumer computer purchase contract with computer seller); *Madden v. Kaiser Foundation*

1 of intellectual property to sophisticated companies, such as RealNetworks. Its attempt to fit unique and
2 vitally important uniform technology licenses into the adhesive contract mold misses the mark.

3 By their very nature, uniform intellectual property licenses can rarely, if ever, be subject to
4 separate negotiation with each prospective licensee. It is instead essential that licensors of intellectual
5 property have the latitude to set uniform rules governing use of that property. This approach is fair to
6 the licensor because what the licensee buys is not the intellectual property per se (unlike in a sale of
7 goods where a consumer actually acquires the good), but permission to use the property within the
8 limits of the license terms. See Nimmer, *Licensing in the Contemporary Information Economy*, 8
9 Wash. U. J.L. & Pol'y 99, 123, 136-37, 162-65 (2002). It is also fair to licensees because the
10 uniformity ensures a level playing field on equal terms for all licensees -- large companies and start-ups
11 alike, and across multiple industries. Furthermore, it is widely acknowledged that the setting of
12 standards for the use of intellectual property pursuant to uniform licensing arrangements can lead to
13 profound societal benefits by producing efficiencies, increasing innovation, and fostering increased
14 access to new technology. See Nimmer, 8 Wash. U. J.L. & Pol'y at 104 (uniform licensing of
15 intellectual property "contributes to the efficient tailoring of an information product and its cost to meet
16 diverse market demands").

17 The CSS License administered by the DVD CCA is a classic example of a uniform agreement
18 that provides equal access to technology by parties from multiple industries that has created enormous
19 societal benefits -- namely, the advent of the market for DVDs and devices that play them. The notion
20 that RealNetworks' interpretation controls because the Agreement is not negotiated, and hence is
21 "adhesive," if accepted, would seriously impair the ability of DVD CCA to safeguard the dissemination
22

23 *Hosp.*, 17 Cal. 3d 699 (1976) (arbitration provision in employment contract); *Armendariz, supra* (same);
24 *State Farm Fire & Casualty Co. v. Keenan*, 171 Cal. App. 3d 1 (1985) (individual's fraud claim against
25 flight service company and insurer); *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160 (N.D. Cal.
26 2002) (agreement to arbitrate disputes arising from loan agreement between consumers and financial
27 institution). RealNetworks also cites three adhesive contract cases that did not pit consumers against a
28 corporation. See *Oritani Savings & Loan Ass'n v. Fidelity & Deposit Co. of Maryland*, 744 F. Supp.
1311 (D.N.J. 1990) (agreement between financial institution and surety); *Graham v. Scissor-Tail, Inc.*,
28 Cal. 3d 807 (1981) (agreement between concert promoter and music performer); *Founding Members
of the Newport Beach Country Club v. Newport Beach Country Club, Inc.*, 109 Cal. App. 4th 944 (2003)
(agreement memorializing regulations governing a private club). But for the reasons set forth below,
these cases are of no help to RealNetworks either.

1 of CSS. More fundamentally, RealNetworks' position would have pernicious consequences beyond
2 this litigation, and serve to unravel the benefits that may be achieved through standard licensing
3 arrangements. Under RealNetworks' theory, individual licensees would be empowered to impose their
4 own self-serving, idiosyncratic terms of use of the licensed technology, which is supposed to be made
5 available to all comers under uniform terms, and would thereby diminish the likelihood that owners of
6 intellectual property will agree to license its use.

7 This Court need not, however, resolve whether the Agreement is adhesive, because
8 RealNetworks is wrong on the implications of calling a contract "adhesive." Contrary to
9 RealNetworks' supposition, adhesive contracts are not automatically construed according to the
10 adhering party's interpretation, and none of the cases that RealNetworks cites holds otherwise. Indeed,
11 as the California Supreme Court stated in one of the cases on which RealNetworks relies, "[t]o describe
12 a contract as adhesive in character is not to indicate its legal effect. It is, rather, the beginning and not
13 the end of the analysis" *Graham*, 28 Cal. 3d at 819 (internal quotations omitted). That same case
14 states unequivocally that, in analyzing an adhesive contract, courts generally should enforce the
15 agreement "according to its terms," *id.*,¹⁵ and that the terms of the agreement are to be construed
16 "under established principles" of contract interpretation, just like any other agreement. *Id.* at 819 n.16;
17 *see Badie v. Bank of America*, 67 Cal. App. 4th 779, 798 (1998) (applying "standard rules of contract of
18 interpretation" in construing an adhesive consumer banking agreement); *24 Hour Fitness, Inc. v.*
19 *Superior Court*, 66 Cal. App. 4th 1199, 1214 (1998) (applying "standard rules of contract
20 interpretation" in construing an adhesive health club membership agreement). The interpretive rule of
21 last resort known as the doctrine of contra proferentem states that ambiguities in an agreement are to be
22 construed against the drafter, including the drafter of an adhesive contract.¹⁶ This doctrine, however,

23
24 ¹⁵ An adhesive contract is unenforceable if it (i) "does not fall within the reasonable expectations
25 of the . . . 'adhering' party," or (ii) "is unduly oppressive or 'unconscionable.'" *Graham*, 28 Cal. 3d at
26 820. RealNetworks is not arguing that the Agreement is unenforceable. To the contrary, RealNetworks
27 affirmatively seeks to enforce the Agreement based on its interpretation of the Agreement. Thus,
28 RealNetworks' reliance on a series of cases addressing the enforceability of adhesive contracts, as
opposed to their interpretation, is misplaced. RealNetworks Mem. at 22-23 (citing *Ting*, *Oestreicher*,
and *Madden*).

¹⁶ Cal. Civ. Code § 1654; *Badie*, 67 Cal. App. 4th at 800; *Gaines v. Sargent Fletcher, Inc. Group*
Life Ins. Plan, 329 F. Supp. 2d 1198, 1216 (C.D. Cal. 2004).

1 comes into play *only* when the meaning of an adhesive contract cannot be ascertained through the
2 agreement's text and the extrinsic evidence of the parties' understanding.¹⁷

3 The application of basic interpretive principles to adhesive contracts is illustrated in *Founding*
4 *Members*, which RealNetworks cites. In that case, the plaintiff argued that the contract was adhesive.
5 109 Cal. App. 4th at 962. But the court did not just adopt the plaintiff's interpretation of the
6 agreement; instead, it used standard rules of contract interpretation to determine the meaning of the
7 agreement by ascertaining the parties' intent. To that end, the court first examined the language of the
8 contract. *Id.* at 956-57. The court then considered extrinsic evidence of the parties' understanding of
9 the contract. *Id.* at 957-60. Based on the language and the extrinsic evidence, the court construed the
10 contract according to the interpretation advanced by the defendant, which had drafted the contract. *Id.*
11 at 961. The court held that the doctrine of contra proferentem was inapplicable because there was no
12 material ambiguity to construe against the drafting party. *Id.* at 962.¹⁸

13 D. RealDVD Breaches The Implied Covenant Of Good Faith And Fair Dealing.

14 RealNetworks does not seriously contest DVD CCA's claim that RealDVD breaches the implied
15 covenant of good faith and fair dealing. RealNetworks devotes just a footnote to that claim, in which it
16 asserts that the implied covenant does not impose duties that are not part of the express terms of the
17 contract. RealNetworks Mem. at 27 n.12. As DVD CCA showed in its opening memorandum, however,
18 RealNetworks' creation of a device that does exactly what the terms of the Agreement forbid frustrates
19 DVD CCA's legitimate contractual expectations and thereby breaches the covenant of good faith and fair
20 dealing. DVD CCA Mem. at 18-19.

21 II. THE EQUITIES COMPEL ENTRY OF PRELIMINARY RELIEF.

22 As DVD CCA showed in its opening memorandum, RealNetworks' multiple breaches of the
23 Agreement entitle DVD CCA to a preliminary injunction under the parties' stipulation in Section 9.2 of

24 _____
25 ¹⁷ *Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315, 325 (1975); *Rainier Credit Co. v. W.*
Alliance Corp., 171 Cal. App. 3d 255, 263 (1985).

26 ¹⁸ *State Farm v. Keenan, Oritani, and Acorn*, *supra* note 12, also cited by RealNetworks, are in
27 the same vein as *Founding Members*. The contracts in those three cases were said to be adhesive. But
28 as in *Founding Members*, the courts in *Keenan, Oritani, and Acorn* applied basic rules of contract
interpretation to ascertain the meaning of the agreement -- they did not adopt the adhering party's
interpretation merely because the agreement was adhesive.

1 the CSS License Agreement that DVD CCA would suffer irreparable injury from those breaches. DVD
2 CCA Mem. at 20. RealNetworks blithely dismisses the legal effect of the stipulated irreparable injury
3 provision as “just one factor in the analysis” of whether injunctive relief should be entered.
4 RealNetworks Mem. at 47. The case law is not on RealNetworks’ side. Most of the courts nationwide
5 that have addressed the enforceability of stipulated irreparable injury provisions have held that such
6 provisions are dispositive and should be honored, without any need to evaluate the evidentiary basis for
7 the irreparable injury claim. DVD CCA Mem. at 20-21. Although not explicitly making the
8 connection, courts in this line of precedent have essentially treated stipulated irreparable injury
9 provisions like liquidated damages provisions, which courts generally honor without analyzing the
10 evidentiary basis for the amount of damages claimed. *See, e.g., Utility Consumers’ Action Network,*
11 *Inc. v. AT&T Broadband of Southern California, Inc.*, 135 Cal. App. 4th 1023, 1038 (2006).

12 RealNetworks cites *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256
13 (10th Cir. 2004), as support for the proposition that the stipulated irreparable injury provision counts
14 for little in the equities equation. That is not what *Dominion Video Satellite* says, however. In that
15 case, the Tenth Circuit noted that courts generally have afforded weight to stipulated irreparable injury
16 provisions so as to honor the parties’ up-front agreement on the impact of a breach. *Id.* at 1266. In that
17 regard, *Dominion Video Satellite* is in keeping with a second line of precedent, which, while holding
18 that stipulated irreparable injury provisions are not dispositive, state that such provisions should be
19 given their due, along with evidence of irreparable injury, in deciding whether to enter interim relief.
20 DVD CCA Mem. at 20 n.22 (citing *Dominion Video Satellite* and others cases in its line).¹⁹

21 DVD CCA is entitled to interim relief under either line of precedent. Under the first line, the
22 stipulated irreparable injury provision in Section 9.2 of the CSS License Agreement itself justifies the
23 entry of a preliminary injunction. In fact, enforcement of the stipulated remedy provision in this
24

25 ¹⁹ A federal district court recently declined to give any weight to a stipulated irreparable injury
26 provision. *Inspection Management Sys., Inc. v. Open Door Inspections, Inc.*, No. 2:09-cv-00023, 2009
27 WL 805813, * 4-5 (E.D. Cal. March 26, 2009). This decision is out of step both with the precedents that
28 consider such provisions to be dispositive and those that afford them significant weight. The court based
its wayward ruling on a misreading of *Dominion Video Satellite*, as well as on an unpublished Ninth
Circuit decision from 1995. *Id.*

1 fashion is vitally important to the functioning of the Agreement as a whole. DVD CCA's insistence
2 that licensees adhere to the licensing requirements ensures the maintenance of the delicate balance that
3 the Agreement strikes to accommodate the interests of content providers, on the one hand, and the
4 consumer electronics and information technology companies that make the devices consumers use to
5 play back DVDs, on the other. If licensees are permitted to get around those requirements by making
6 and selling products that implement CSS to make unlawful copies of DVD content, the entire system is
7 undermined. Parsons Dec. ¶¶ 5-6. Instead of trying to guess upfront in a liquidated damages provision
8 as to the amount of damages such harm would cause, the Agreement provides a simple and fair
9 solution: the parties agreed in advance that a breach would result in irreparable injury and that the
10 remedy for that breach would be injunctive relief.²⁰ The agreed stipulated remedy comprehensively
11 assesses the injury that DVD CCA will suffer from the degradation of its system for protecting
12 intellectual property, the attendant risk that other licensees will forsake their obligations and follow the
13 violator's lead, and the destruction of DVD CCA's critical trust relationships with other businesses.²¹

14 The result is the same under the second line of precedent. Applying these decisions, the
15 stipulated irreparable injury must be factored into the injunctive relief calculus, along with the evidence
16 that DVD CCA will incur irreparable injury in the absence of interim relief. RealNetworks alleges that
17 the "only harm articulated by the DVD CCA" is that some members of the DVD CCA "may . . .
18 question the terms of the Agreement" if RealDVD is allowed to go to market. RealNetworks Mem. at

19
20 ²⁰ Although it denigrates the stipulated irreparable injury provision, RealNetworks does not
assert that damages to DVD CCA from a breach of the Agreement could readily be calculated.

21 ²¹ RealNetworks argues that while a contractual stipulation to irreparable injury in the event of
22 breaches of certain provisions of the Agreement may have made sense at the time the documents
originally were drafted, RealNetworks Mem. at 47-48, that is no longer the case because for over a
23 decade, "hundreds" of Web sites [have] posted a DVD copying product DeCSS, 'enabling untold
24 numbers of persons to download it and to use it.'" *Id.* at 48 n.21 (quoting *DVD Copy Control Ass'n,
Inc. v. Brunner*, 116 Cal. App. 4th 241 (2004)). RealNetworks' attack on the premise of the stipulated
25 irreparable injury provision through invocation of DeCSS is misplaced. DeCSS made its way onto the
26 internet through illicit cracking of the CSS code – unlike RealDVD, it was not the by-product of actions
of a rogue CSS licensee who deliberately misused the technology after obtaining a license from DVD
27 CCA. *Brunner*, 116 Cal. App. 4th at 247-48. The threat that DeCSS poses to DVD CCA is thus very
28 different from the threat posed by RealDVD. DeCSS does not directly impinge on the CSS licensing
arrangement. RealDVD does just that, however, because its "licensed" presence on the market would
upset the balance struck through the CSS licensing system, which binds all licensees to respect the anti-
copying commands of the Agreement so as to safeguard protected content and facilitate the
dissemination of DVDs to the public.

1 48. There is much more evidence of harm than just that, but RealNetworks ignores it. The record
 2 shows that if RealNetworks is permitted to launch its product and test its prediction of a strong
 3 consumer response to a device that can make playable copies of DVDs, the integrity of the entire CSS
 4 system will be fatally undermined, thus vitiating the purpose and mission of DVD CCA. Parsons Dec.
 5 ¶ 7; [REDACTED]. DVD CCA was
 6 formed to create an environment in which content providers could release their intellectual property on
 7 the DVD format without fear of copying, and in which the consumer electronics and information
 8 technology companies would be assured that there would be content available to be played back on
 9 their products and that their products would be affordable. Parsons Dec. ¶¶ 4, 6. Allowing
 10 RealNetworks to market a product capable of copying would poison the environment of trust essential
 11 to DVD CCA's mission. *Id.* at ¶ 6. And absent that collective trust, DVD CCA will be irreparably
 12 injured because its value as an organization hinges on its ability to enforce the Agreement and ensure
 13 compliance with the CSS safeguards. *Id.* at ¶ 7. Simply put, the *raison d'être* of DVD CCA will be
 14 gutted if licensees are permitted freely to violate the Agreement by selling a DVD copying machine.²²
 15 This injury to DVD CCA's reputation and goodwill alone warrants injunctive relief. *See eBay, Inc. v.*
 16 *Bidder's Edge, Inc.*, 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000) (loss of customer goodwill is
 17 irreparable "because it is neither easily calculable, nor easily compensable and is therefore an
 18 appropriate basis for injunctive relief").²³

19 _____
 20 ²² [REDACTED]

21 [REDACTED] Its governing Board of Directors consists of five Motion
 22 Picture Industry Directors; three Consumer Electronics Manufacturer Directors; three Computer
 23 Manufacturer Directors; and one "At Large" Director. Declaration of Jacob Pak in Support of April 10,
 24 2009 Response Memorandum ("Pak Response Dec."), ¶¶ 2-3, Exh. A. The DVD CCA Bylaws contain
 provisions defining Board quorum, two thirds majority voting with concurrence by one director from
 each group to ratify Board actions, and other procedural safeguards, as well as rules providing for
 membership eligibility and privileges, and democratic processes for members to advance proposed
 amendments to the CSS Specifications. *Id.*

25 ²³ RealNetworks states that DVD CCA's claim of economic harm is watered down as a result of
 26 DVD CCA's supposed "acquiescence" to products offered for sale by CSS Licensees AMX and
 Telestream. RealNetworks Mem. at 48. RealNetworks has the facts wrong. DVD CCA has not
 "acquiesced" to either the AMX product or the Telestream product, referred to as "Drive-in". [REDACTED]

27 [REDACTED] Telestream became a CSS licensee in May
 28 2008, *id.* ¶ 5, and appears to have announced the commercial release of Drive-in September, 2008.
 Ellinikos Response Dec., Exh. 9. DVD CCA first became aware of the existence of Drive-in only last

1 RealNetworks' plea that it will suffer "extreme hardship" if its launch of RealDVD is
2 preliminarily enjoined rings hollow. The balance of the equities weighs against the party seeking to
3 avoid an injunction when the harm of which that party complains is self-inflicted. *See, e.g., Triad Sys.*
4 *Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1338 (9th Cir. 1995) (party resisting injunction
5 "cannot complain of the harm that will befall it when properly forced to desist from its infringing
6 activities") Here, RealNetworks has brought economic harm upon itself. [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED] RealNetworks' decision was a calculated
12 gamble. Having lost that bet, it now has to endure the consequences -- including what is says will be
13 the loss of returns on its investment in RealDVD. *See Triad*, 64 F.3d at 1338 (party's claim that it will
14 suffer lost profits as a result of injunction barring "an activity which has been shown likely to be
15 infringing . . . merits little equitable consideration") (internal quotations omitted).

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 month, however, when RealNetworks mentioned the product in its brief in opposition to DVD CCA's
25 preliminary injunction motion. Pak Response Dec. ¶ 5. DVD CCA has no intention of "acquiescing" to
26 that product.

27 ²⁴ Of course, any competitive advantage gained by RealNetworks would have come as a result of
28 its breach of the Agreement and attendant erosion of the level playing field the Agreement seeks to
foster. Any competitive disadvantage suffered by RealNetworks as a result of the entry of a
preliminary injunction is just the flip side of the fruits that it would have enjoyed in the absence of the
injunction, and thus is entitled to no weight in the balance of the equities. *See A&L Technology v.*
Resound Corp., No. C93-00107, 1995 U.S. Dist. LEXIS 22442, at *12 (N.D. Cal. March 15, 1995)

1 [REDACTED]
2 [REDACTED] As it boasts elsewhere

3 in its memorandum, RealNetworks "is not a company operating on the fringes of the Internet," but
4 rather, has a solid and extensive track record of success in the digital entertainment business and offers
5 a wide variety of music and video services to huge numbers of individuals and corporate customers.
6 RealNetworks Mem. at 5. A continued injunction on the sale of RealDVD will not constrain
7 RealNetworks' ability to profit from the provision of these other popular products.

8 From DVD CCA's side of the equities equation, RealNetworks' influence in the marketplace
9 makes the continuance of injunctive relief all the more imperative. Consumer perception that it is
10 "legal" to copy DVDs on computers using RealDVD is likely to take hold precisely because
11 RealNetworks' products are so widely-known and used. If an entrenched player in the digital media
12 industry like RealNetworks is promoting it, then such copying must be lawful -- or so people might
13 reasonably believe should this Court decline to issue a preliminary injunction and thereby permit
14 RealNetworks to flood the market with RealDVD. See Memorandum of Studio Plaintiffs' in Support
15 of Motion for Preliminary Injunction at 22-23.

16 III. CONCLUSION

17 For the reasons set forth in its Opening Memorandum and above, DVD CCA respectfully
18 submits that the Court should grant its motion for a preliminary injunction.

19 Dated: April 10, 2009

Respectfully submitted,

AKIN GUMP STRAUSS HAUER & FELD LLP

WHITE & CASE LLP

23 By _____ /s/
24 Reginald D. Steer
25 Attorneys for Defendant and Counterclaimant
26 DVD COPY CONTROL ASSOCIATION, INC.
27
28