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 Counterclaim Defendants
 10 REALNETWORKS, INC. and
 REALNETWORKS HOME
 11 ENTERTAINMENT, INC.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

14 REALNETWORKS, INC., a Washington
 Corporation; and REALNETWORKS HOME
 15 ENTERTAINMENT, INC., a Delaware
 corporation,

16 Plaintiffs,

17 v.

18 DVD COPY CONTROL ASSOCIATION, INC., a
 19 Delaware nonprofit corporation, DISNEY
 ENTERPRISES, INC., a Delaware corporation;
 20 PARAMOUNT PICTURES CORP., a Delaware
 corporation; SONY PICTURES ENTER., INC., a
 21 Delaware corporation; TWENTIETH CENTURY
 FOX FILM CORP., a Delaware corporation; NBC
 22 UNIVERSAL, INC., a Delaware corporation;
 WARNER BROS. ENTER. INC., a Delaware
 23 corporation; and VIACOM, Inc., a Delaware
 Corporation,

24 Defendants.
 25

26
 27 AND RELATED CASES
 28

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**REALNETWORKS' MOTION IN
 LIMINE TO EXCLUDE OR STRIKE
 JACOB PAK'S APRIL 10, 2009
 TESTIMONY REGARDING AMX
 CORPORATION PURSUANT TO FRE
 602, FRE 403 AND RULE 30(E)**

**Before: Hon. Marilyn Hall Patel
 Dept: Courtroom 15
 Date: April 24, 2009
 Time: 9:00 a.m.**

[PUBLIC REDACTED VERSION]

1 RealNetworks, Inc. and RealNetworks Home Entertainment, Inc. (collectively, "Real")
2 submit this Motion *In Limine* to Exclude or Strike Jacob Pak's April 10, 2009 Testimony
3 Regarding AMX Corporation. In particular, Real asks the Court to exclude or strike the
4 assertion in Mr. Pak's declaration that [REDACTED]

5 [REDACTED].

6 For three reasons, this testimony should be stricken or excluded:

7 First, Mr. Pak lacks personal knowledge to declare that the DVD CCA [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED] This goes far beyond his

13 personal knowledge, and must therefore be excluded under FRE 602. Based on his prior

14 deposition testimony, the most Mr. Pak can do is authenticate the "records" in question. Not

15 only does Mr. Pak's declaration attempt to go far beyond authentication, but the records

16 themselves upon which he purportedly relies have been withheld from Real. It is doubtful that

17 such records even exist because as discussed below, [REDACTED]

18 [REDACTED]

19 [REDACTED].

20 Second, Mr. Pak's new AMX testimony should be excluded under FRE 403 because its

21 probative value is substantially outweighed by the risk that it will mislead the Court and

22 prejudice Real. As the accompanying declaration of Tracy Tosh Lane ("Lane Dec.") indicates,

23 the DVD CCA's assertion that [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED] Mr. Pak's April 10 declaration to the contrary is misleading. Further,
2 because Mr. Pak will not be testifying at the preliminary injunction hearing, absent *in limine*
3 relief, Real will have no opportunity to impeach his last-minute testimony (which is a clear effort
4 to hide the fact that the DVD CCA has acquiesced to products identical to RealDVD).

5 Third, Mr. Pak's April 10 testimony should be excluded or stricken under Federal Rule of
6 Civil Procedure 30(e) as an improper and untimely alteration of his prior deposition testimony.
7 Mr. Pak's April 10, 2009 sworn statements about AMX constitute a marked departure from his
8 December 16, 2008 deposition testimony, and satisfy none of the requirements of Rule 30(e),
9 including that any changes to deposition testimony (i) occur within 30 days of a deposition, (ii)
10 be accompanied by a written explanation, and (iii) be corrective rather than contradictory in
11 nature.

12 **Mr. Pak's April 10 Testimony Regarding AMX Is Not Based Upon Personal Knowledge**

13 Mr. Pak claims in his April 10 declaration that [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 This account
20 should be stricken under FRE 602 because Mr. Pak has no personal knowledge regarding the
21 supposed [REDACTED].¹

22 During his December 16, 2008 deposition, Mr. Pak [REDACTED]

23 [REDACTED]
24 [REDACTED]

25 _____
26 ¹ Although during a preliminary injunction proceeding courts may give weight to evidence
27 that would be inadmissible at trial, *Flynt Dist. Co., Inc. v. Harvey*, 734 F.2d 1389 (9th Cir. 1984),
28 the Federal Rules of Evidence are only relaxed "when to do so serves the purpose of preventing
irreparable harm before trial." *Id.* at 1394. As set forth in Real's briefing in opposition to the
defendants' motion for a preliminary injunction, the defendants' claims of irreparable harm are
without merit, which means that FRE Rule 403 need not be relaxed.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED]² Mr. Pak’s April 10 declaration to the contrary
7 plainly lacks foundation, is not based on personal knowledge, and is nothing more than an
8 improper interpretation of supposed “DVD CCA records”—which DVD CCA has refused to
9 produce in this litigation³—designed to hide the fact that the DVD CCA has acquiesced in
10 products with identical functionality to RealDVD.

11 **Mr. Pak’s April 10 Testimony Regarding AMX Is Misleading and Will Prejudice Real**

12 FRE 403 provides that evidence “may be excluded if its probative value is substantially
13 outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . .
14 .” FRE 403. “‘Unfair prejudice’ . . . means ‘an undue tendency to suggest decision on an
15 improper basis, commonly, though not necessarily, an emotional one.’” *United States v.*
16 *Allen*, 341 F.3d 870, 886 (9th Cir. 2003). Here, Mr. Pak’s April 10 testimony must be excluded
17 because it is highly misleading, and because Real will have no opportunity to impeach Mr. Pak
18 with the truth at the PI hearing.

19 The truth is that [REDACTED]
20 [REDACTED]

21 _____
22 ² Real also addressed the [REDACTED]
23 [REDACTED] Also like Mr. Pak, Mr. Parsons will not be testifying at the PI hearing.

24 ³ Upon learning of Mr. Pak’s testimony regarding AMX, Real asked the DVD CCA for
25 copies of all “DVD CCA records” relating to the supposedly [REDACTED]
26 [REDACTED] (Lane Dec., Ex. C.) In response, counsel for the Defendants claimed that all such
27 records are shielded from disclosure by [REDACTED]
28 [REDACTED]

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

4 The DVD CCA’s actual course of conduct was as follows. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]

19 [REDACTED] Mr. Pak’s April 10
20 testimony to the contrary is extremely likely to mislead, and cannot be impeached since he will
21 not be testifying at the PI hearing. It should therefore be stricken under FRE 403.

22 **Mr. Pak’s April 10 Testimony Regarding AMX Violates Federal Rule 30(e)**

23 Allowing Mr. Pak to change his testimony at this late stage would also violate Federal
24 Rule 30(e). Indeed, the Defendants have followed none of the procedural steps that are required
25 to change deposition testimony. Mr. Pak did not change his testimony within the prescribed 30-
26 day period. Fed. R. Civ. P. 30(e). The Defendants have not provided a “sign[ed] . . . statement”
27 identifying the alteration to Mr. Pak’s testimony about AMX. *Id.* And the Defendants have not
28 provided the required “reason” for the change to Mr. Pak’s testimony, other than Mr. Pak’s

