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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.

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**REALNETWORKS' OPPOSITION TO  
 STUDIOS' MOTION *IN LIMINE* TO  
 EXCLUDE EVIDENCE AND  
 TESTIMONY RE SETTLEMENT  
 COMMUNICATIONS**

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

**[PUBLIC REDACTED VERSION]**

27 AND RELATED CASES

1 I. INTRODUCTION

2 The Studios' motion *in limine* seeks to exclude all evidence of pre-litigation discussions  
3 between Real and the Studios, which the Studios characterize as "settlement communications"

4 [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]  
20 [REDACTED]

21 [REDACTED] Real informed the  
22 Studios about RealDVD in advance of its release in order to explore mutual business  
23 opportunities has nothing to do with settlement of this or any other dispute. Nor is the evidence  
24 of those discussions being offered to prove the invalidity of the Studios' claims. It will be  
25 offered to show Real's good intentions to support Real's witnesses' credibility, and to refute the  
26 Studios' continuing canard that Real "rushed to market" with RealDVD. [REDACTED]

27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]

2 [REDACTED] That proof does not relate to the invalidity of the Studios' claim. It is  
 3 relevant to issues of intent and credibility. In particular it refutes the Studios' innuendo that Real  
 4 was cavalier regarding the Studios' purported rent-rip-and-return concern and that Real's CEO  
 5 responded to the issue with a "tacit wink-and-nod." In short, the Studios have repeatedly  
 6 attacked Real's character, and now seek to hide the truth behind FRE 408.

7 Finally, the Studios argue that evidence of Real's discussions with them should be  
 8 excluded because the PI hearing will simply be too busy. The Studios have put these issues  
 9 regarding Real's intent and credibility before the Court with their continued assertions that Real  
 10 "rushed to market" and ignored rent-rip-and-return. The Studios are not entitled to a hit-and-run  
 11 when reality is otherwise.

12 **II. ARGUMENT**

13 **A. Real's Discussions with the Studios Occurred Prior to the [REDACTED] and**  
 14 **are Not Subject to FRE 408**

15 [REDACTED]

16 [REDACTED] Real's business  
 17 discussions with the Studios regarding RealDVD began in mid-August – well before there was  
 18 any dispute between the parties or any discussion of resolving a dispute. The testimony of Rob  
 19 Glaser, Elizabeth Coppinger, and others, establishes that Real began meeting with the Studios on  
 20 approximately August 15, 2008, to introduce RealDVD and explore mutually beneficial business  
 21 opportunities. At this time, the parties also discussed the security features of RealDVD, Real's  
 22 willingness to work with the Studios regarding concerns over rental discs being copied, and  
 23 Real's willingness to delay the launch of RealDVD to address Studio concerns (which it  
 24 ultimately did). Real conducted more than a half dozen business conversations with the Studios  
 25 regarding RealDVD between mid-August and the [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

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

4 [REDACTED] The Studios have ignored this fact and offered no reason why such  
5 discussions should be excluded.

6 **B. The Studios Have Repeatedly** [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]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]

26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [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]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

\* \* \*

24 \_\_\_\_\_

25 <sup>1</sup> Indeed in the very portion of the transcript cited by the Studios to support that assertion --  
 where Real's counsel tells the witness [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 The Studios cannot credibly claim that they did not elicit the testimony at issue. *See* Mtn. in  
 Limine at 3-4.

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[REDACTED]

[REDACTED]

[REDACTED]

Counsel for the DVD CCA solicited similar testimony from Richard Wolpert. [REDACTED]

[REDACTED]

The Studios should not be permitted to take and receive extensive discovery regarding protected conversations and then object when they do not like the testimony received.

Under California law, the Studios' [REDACTED]

[REDACTED]

1           **C.     Real Does Not Offer the Disputed Evidence for Purposes Proscribed by FRE**  
 2           **408**

3           Nor does the evidence offered by Real violate FRE 408. As discussed above, many of  
 4 the discussions at issue were business conversations, did not involve any disputes or settlement  
 5 thereof, and are therefore not even within the ambit of FRE 408. Even those discussions that  
 6 occurred [REDACTED] are not offered for any purpose contrary to FRE 408, and  
 7 therefore should not be excluded under that rule. *See Zurich American Ins. Co. v. Watts*  
 8 *Industries, Inc.*, 417 F.3d 682, 689-90 (7th Cir. 2005) (settlement communications may be  
 9 admitted for purposes other than to demonstrate liability, including rebuttal, to show knowledge  
 10 and intent, to show a continuing course of reckless conduct and to prove estoppel).

11           At every turn in this litigation, the Studios have cast aspersions upon Real's intent with  
 12 respect to RealDVD and the credibility its witnesses. The Studios argue as recently as the  
 13 preliminary injunction briefing that:

- 14           • “Despite Real's knowledge that RealDVD was of dubious legality, Real rushed  
 15 it to market.” Studios Opening PI Brief at 8.
- 16           • Real “decided to rush to market first and fight about the legality of its product  
 17 later.” *Id.* at 25.
- 18           • “Real was fully cognizant that RealDVD could and would be used by customers  
 19 to make free copies of the Studios' DVDs, including DVDs rented or borrowed  
 20 from friends. Its response was a tacit wink-and-nod, as exemplified by CEO  
 21 Rob Glaser . . .” *Id.*
- 22           • “[R]eal decided it was more concerned with having a “first mover advantage”  
 23 and so it opted not to approach the Studios until just days before the planned  
 24 launch of RealDVD . . . And importantly, RealDVD cannot distinguish between  
 25 rented, borrowed or purchased DVDs.” *Id.* at 21.

26 The evidence that Real intends to offer – that it approached the Studios in mid-August to  
 27 introduce RealDVD, explain its features, explore mutual business opportunities, and address the  
 28 Studios' concerns – all go to Real's intent, good faith, and credibility (and ironically, the

1 Studios' bad faith and lack of credibility in making such false assertions), which the Studios have  
2 put in issue in this case. The evidence at issue does not relate to the parties' proposed settlement  
3 demands or offers, and it is not offered on the issue of harm as the Studios contend. Motion in  
4 Limine at 5. The evidence is responsive to the Studios' false assertions regarding Real's intent  
5 and credibility, and cannot be excluded under FRE 408. Discussions otherwise protected by  
6 FRE 408 have been admitted when "the purported settlement discussions are intertwined with  
7 other, substantive matters in the case." *Motorola Inc. v. DBTel, Inc.*, No. 02 C 3336, 2002 WL  
8 1348849, at \*1 (N.D.Ill. June 19, 2002); *see also eAcceleration Corp. v. Trend Mirco, Inc.*, 408  
9 F.Supp.2d 1110 (Court admitted settlement discussions in preliminary injunction context  
10 unrelated to liability).<sup>2</sup>

11 **D. The Disputed Evidence Should Not Be Excluded Under FRE 403**

12 Finally, the Studios' half-heartedly argue that the evidence Real seeks to offer will be  
13 time consuming and require the Studios to call their own witnesses in rebuttal. This is false.  
14 Real does not expect testimony regarding pre-release discussions to take a significant amount of  
15 time during the hearing. And nothing Real intends to offer requires the Studios to call additional  
16 witnesses – indeed they cannot. The Studios have been aware since at least the opening  
17 preliminary injunction briefing that Real intended to offer evidence of the parties' pre-release  
18 discussions, and the Studios elected not to designate their own witness on this issue. They  
19 cannot do so now.

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26 <sup>2</sup> The Studios' reliance on a Utah district court opinion is misplaced. *See Serocetin Research &*  
27 *Tech., Inc. v. Unigen Pharm., Inc.*, 541 F. Supp. 2d 1238, 1239 n.1 (D. Utah 2008). During a  
28 preliminary injunction proceeding courts may give weight to evidence that would be inadmissible  
at trial. *Flint Dist. Co., Inc. v. Harvey*, 734 F.2d 1389, 1394 (9th Cir. 1984).



1 **III. CONCLUSION**

2 For all the foregoing reasons, the Court should deny the Studios' Motion in Limine and  
3 admit the limited evidence offered by Real regarding the parties pre-litigation discussions  
4 regarding RealDVD.  
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6 Dated: April 23, 2009

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Professional Corporation

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8 By:                     /s/                      
Leo P. Cunningham

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Attorneys for Plaintiffs  
REALNETWORKS, INC. AND  
REALNETWORKS HOME  
ENTERTAINMENT, INC.

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