

Volume 1

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MARILYN HALL PATEL

REALNETWORKS, INC., a)
Washington Corporation; et)
al.,)

Plaintiffs and)
Counter-Defendants,)

v.)

No. C 08-4548 MHP

C 08-4719 MHP

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

Defendants and)
Counter-Complainants.)

San Francisco, California

Friday, April 24, 2009

TRANSCRIPT OF PROCEEDINGS

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APRIL 24, 2009

9:46 A.M.

THE CLERK: Calling Civil 08-4548, Civil 08-4719, RealNetworks versus DVD Copy Control Association, et al.

THE COURT: May I have your appearances, please.

MR. CUNNINGHAM: Leo Cunningham for the RealNetworks entities.

THE COURT: Good morning.

MR. SCOTT: Don Scott for RealNetworks, Your Honor.

THE COURT: Good morning.

MR. SCOTT: Good morning.

MR. WILLIAMS: Good morning, Your Honor. Bart Williams on behalf of defendants and cross-complainant Motion Picture Studios.

THE COURT: Good morning.

MR. STEER: Good morning, Your Honor. Reginald Steer on behalf of the DVD CCA.

THE COURT: Good morning.

MR. WILLIAMS: In addition, Your Honor, on behalf of the studios is Mr. Rohit Singla and Mr. Kelly Klaus.

MR. SINGLA: Good morning, Your Honor.

THE COURT: Good morning.

MR. WILLIAMS: Also, Mr. Bob Rotstein, from the Mitchell Silberberg firm, is here on behalf of the studios.

THE COURT: Good morning.

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1 You have some other people at your table who are?

2 **MR. STEER:** And I would like to introduce them.

3 **THE COURT:** Oh, you are going to do that. Okay.

4 **MR. STEER:** First is my partner, Steven Mick.

5 **MR. MICK:** Good morning, Your Honor.

6 **THE COURT:** Good morning.

7 **MR. STEER:** And Mark Lambert of White & Case.

8 **MR. LAMBERT:** Good morning, Your Honor.

9 **MR. SINGLA:** Your Honor, one last introduction. Mr.
10 Shannon Bales will be running our computer systems.

11 **MR. CUNNINGHAM:** And, if I may, Your Honor.

12 **THE COURT:** Yes.

13 **MR. CUNNINGHAM:** Bob Kimball, the general counsel in
14 RealNetworks, whom you've met before, is here at our table.

15 **THE COURT:** Yes. Good morning.

16 **MR. KIMBALL:** Good Morning.

17 **MR. CUNNINGHAM:** From my firm, Michael Berta and
18 Colleen Bal.

19 **THE COURT:** Good morning.

20 **MS. BAL:** Good morning, Your Honor.

21 **MR. BERTA:** Good morning, Your Honor.

22 **MR. CUNNINGHAM:** And Mr. Scott's partner, Mark
23 Ouweleen.

24 **THE COURT:** Yes. Good morning.

25 **MR. OUWELEEN:** Good morning.

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1 **THE COURT:** Are you, in fact, going to be using some
2 kind of a screen for some of the presentation?

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

4 **MR. CUNNINGHAM:** Yes.

5 **THE COURT:** Which screen are you using? Are you
6 using the big drop-down or using the computer ones?

7 **MR. WILLIAMS:** There's one feature, if I may bring to
8 the Court's attention. There are some highly confidential
9 documents that will be referred to in our opening statement.
10 And we've already spoken with Mr. Bowser about displaying those
11 only to the Court and to counsel, and not displaying it on the
12 screens that are to the gallery.

13 **THE COURT:** Do we have those screens set up so that,
14 in fact, you can do that, accomplish that?

15 **MR. WILLIAMS:** I believe so, Your Honor, yes.

16 **MR. STEER:** In addition, Your Honor, if I may raise
17 this issue now. Our one witness to be presented in court is
18 Dr. John Kelly, a computer scientist; an expert.

19 His testimony, which we expect to put on this
20 afternoon, is going to involve entirely highly confidential
21 information both of DVD CCA and, I believe, of RealNetworks,
22 having to do with the technical specifications of DVD CCA,
23 which have been, in a number of cases, ruled to be trade
24 secrets and which have always been filed under seal in this
25 matter and also with respect to the way RealNetworks' products

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1 at issue in this case function.

2 And we would ask that the courtroom be sealed during
3 his testimony.

4 **THE COURT:** Maybe you should have got a private
5 judge. This is a public forum. Right?

6 **MR. CUNNINGHAM:** Your Honor, we're not requesting
7 that the courtroom be sealed with respect to any of our
8 information. But his request is what it is.

9 **THE COURT:** Will some of his testimony at least not
10 be of that nature?

11 **MR. STEER:** Very little. The introductory portion,
12 of course. But we'll get directly to what the specifications
13 require, and in detail.

14 **THE COURT:** Well, we'll see how we can handle that,
15 and whether or not it can be handled in some way so that it's
16 just submitted to the Court.

17 **MR. STEER:** Thank you, Your Honor.

18 Again, our client is a defendant in this action,
19 didn't choose to come here. So we feel compelled to protect
20 those trade secrets.

21 **THE COURT:** Well, are these the DVD CCA trade
22 secrets?

23 **MR. STEER:** They are.

24 **THE COURT:** And are their RealNetworks trade secrets
25 involved here, as well? I assume so.

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1 **MR. CUNNINGHAM:** There's information that in a
2 perfect world we would rather not share. But in this context
3 it's a public courtroom; it's a public reading. We don't have
4 a private judge, and we're prepared to incur that cost.

5 **THE COURT:** And what is your position with respect to
6 the DVD CCA's highly confidential --

7 **MR. CUNNINGHAM:** If I may, I have a non-spirited
8 opposition to it. I oppose it, but I appreciate their concern.

9 **THE COURT:** Well, and I suppose one of the questions,
10 and who would be the person to answer those questions, is the
11 degree to which that confidentiality has been maintained.

12 **MR. STEER:** I think Mr. Lambert can address that. He
13 has litigated other matters on behalf of DVD CCA, and I'm
14 informed has made every effort to maintain that
15 confidentiality.

16 I believe the --

17 **THE COURT:** Not just in the courtroom but just
18 generally in terms of parties who had access to that particular
19 information. I'm not suggesting we necessarily need to take
20 that up right now, but I think at some point before that
21 testimony we should take that up. And that is the degree to
22 which this information is available outside of DVD CCA,
23 essentially.

24 **MR. STEER:** Generally, Your Honor, it is not
25 available outside of DVD CCA. And, in fact, part of the

1 evidentiary presentation in this case will have to do with the
2 way these technical specifications were provided to
3 RealNetworks. Great care was taken not to disclose them
4 publicly. In fact, in my opening statement I will show the
5 Court a Federal Express receipt having to do with just that
6 issue.

7 **MR. CUNNINGHAM:** Your Honor, it is the case that our
8 client has always treated these materials as confidential.
9 However, the reality is that the CSS technology was cracked a
10 long time ago, and it's well-known. A California court has
11 ruled it's not a trade secret.

12 So there's a little bit of being on the dark side of
13 the moon here. We behave as if these things are secret.
14 Hence, why we filed things under seal. And we respect their
15 request.

16 But the reality is, and I think if we were to voir
17 dire perhaps even Dr. Kelly on this, it would come out that
18 this information is widely known. So that might be a way to
19 handle this matter.

20 **THE COURT:** Well, that is what I'm talking about, is
21 essentially in the form of a proffer with regard to that and,
22 also, then with some foundational testimony with regard to what
23 degree of confidentiality or secrecy have these "trade
24 secrets" -- and I'm putting that in quotes right now -- been
25 maintained?

1 Not just in connection with this litigation, but in
2 connection with the licensing that is done, the other parties
3 that may have access to this information, other lawsuits, as
4 well. So I guess what we would need is some foundational
5 testimony from somebody.

6 **MR. LAMBERT:** And in anticipation of that, one
7 distinction ought to be made. And that is, the information
8 that is purported to be publicly known has to do with certain
9 keys, certain algorithms, particulate matter from the CSS
10 technology.

11 That is distinguishable from the documentary
12 technical specifications that include those things but much,
13 much more, which are -- which have been filed under seal in
14 numerous proceedings, which are maintained under seal, which
15 have withstood challenges to be unsealed.

16 And, in fact, there's a California Court of Appeals
17 from 2006, from the Kaleidescape case, when Kaleidescape tried
18 to get the documents unsealed. And they failed at both the
19 trial court level, and the Court of Appeal upheld the trial
20 court's decision to keep the documents under seal because of
21 this distinction.

22 **THE COURT:** But I think we need some testimony on
23 that.

24 So are we ready, then, to proceed? And with respect
25 to the motions in limine, I don't really see a basis for

1 getting into Mr. Pak's testimony regarding AMX, or whatever
2 it's called. AMX.

3 What I want to hear, first of all, is what goes to
4 the likelihood of success? And this really goes, I assume, to
5 the issue of the extent to which -- what do I call you,
6 defendants, plaintiffs, the studios -- you know, have attempted
7 to enforce their copyright.

8 I'm assuming that's what that all goes to. And that
9 seems to me is at the tail end of this case. But I think
10 that's more of a sideshow and really unnecessary.

11 Now, with respect to the evidence regarding
12 settlement discussion, I'm a little concerned. I mean,
13 generally, I think, you know, we would just flatly exclude that
14 kind of testimony.

15 On the other hand, if -- and that's what I would be
16 inclined to do, generally. But if, in fact, there are
17 statements that were made that somebody gets on the stand and
18 testifies, and testifies to the contrary, and they have in fact
19 in those settlement negotiations said something else about the
20 very fundamentals about how the RealNetworks system works,
21 something along those lines, then, you know, I may be inclined
22 to allow some impeachment with respect to that.

23 But, certainly, with regard to any actual settlement
24 discussions, of course, that's not going to come in. But I'd
25 hate to see somebody get on the stand and testify one way

1 about, you know, how RealNetworks works, the DVD works, or
2 something like that. I'm using that because I'm not sure
3 exactly what that person might testify to, but something of
4 that nature. And then, you know, it turns out to be totally
5 contrary to what that person or substantially contrary to what
6 that person has previously said even in settlement negotiation.

7 With a proffer, I would be inclined to let that in.

8 **MR. WILLIAMS:** That's acceptable to the studios, Your
9 Honor.

10 **THE COURT:** Okay.

11 **MR. CUNNINGHAM:** Your Honor, I have a hunch that's
12 going to work with our witnesses. Just let me clarify though,
13 because, the Court has used the phrase "the settlement
14 discussions." And, in fact, there's a long chronology here, and
15 the chronology matters.

16 That is, my client first went to the studios in
17 August -- let me tell you what the milestone date is. The
18 milestone date is September 6th. That's the date this tolling
19 agreement and code of silence descended. So it's not until
20 September 6 that the parties are having what might be called
21 settlement discussions.

22 We started on August 15, and prior to September 6,
23 but in the first week of September, we talked to a number of
24 studios. I may misremember them, but I think it was Sony, NBC,
25 and Warner.

1 So we would like to present evidence about stuff that
2 is unambiguously not settlement discussions. We'll talk about
3 in truth what those are were.

4 **THE COURT:** Excuse me. Clearly, we have a tolling
5 agreement. Nobody is disputing that, right?

6 **MR. KLAUS:** No one is disputing --

7 **THE COURT:** There have been discussions about tolling
8 agreements, perhaps, communications between companies and so
9 forth.

10 And I would assume that we're not talking about that
11 to the extent that's relevant. It's when it gets to the point
12 of having some discussions whether they were settlement or
13 whether they were trying to resolve issues in some way related
14 to the litigation that I think that the motion is well-taken.

15 Is that understood?

16 **MR. CUNNINGHAM:** Your Honor, I would have more to
17 say, but I would probably be repeating what's in my papers.

18 **THE COURT:** Well, then, I think what we do is, if you
19 feel that with those parameters you're not going into dangerous
20 territory -- and I'm not going to strike you dead if we do
21 that.

22 **MR. CUNNINGHAM:** Thank you for that, Your Honor.

23 (Laughter)

24 **THE COURT:** A bolt of lightening comes out of the
25 ceiling. But I assume there will be an objection, and then I

1 will rule on it. Sort of hard to do in the abstract.

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

3 **THE COURT:** Okay.

4 **MR. KLAUS:** That's fine. Thank you, Your Honor.

5 **THE COURT:** That sort of sets the general parameters.

6 We are aware there have been discussions. But not
7 every discussion, not every communication is -- because, after
8 all, they would have to show they were enforcing their
9 copyrights, as well.

10 But not every discussion or communication is a
11 settlement discussion. And we have to parse out what was
12 communications that don't fall within that rubric and what do.

13 **MR. KLAUS:** Right. And the only thing I would add to
14 what Mr. Cunningham said is, he says the chronology starts on
15 August 15th. The chronology with our product actually started
16 in January of 2007, and there were 18 months of development,
17 and work contacting lots of third parts.

18 **THE COURT:** My guess, I'm going to hear about that,
19 right?

20 **MR. KLAUS:** Yeah.

21 **THE COURT:** So how are we going to proceed?

22 **MR. WILLIAMS:** We're ready with opening statements,
23 Your Honor.

24 **THE COURT:** This is your motion.

25 **MR. WILLIAMS:** It is. And we are ready with a

1 15-minute --

2 **THE COURT:** You are the one who has to start the ball
3 rolling. Are you going to make a brief opening statement?

4 **MR. WILLIAMS:** Yes, 15 minutes, Your Honor, and then
5 we're ready to call our first witness.

6 **THE COURT:** Are you going to each make an opening
7 statement?

8 **MR. WILLIAMS:** Yes.

9 **MR. STEER:** Yes, Your Honor. We had discussed this
10 with the Court in our last appearance. And you agreed that we
11 could have 10 minutes --

12 **THE COURT:** Each at the outset. And then you will
13 respond to each of their opening statements --

14 **MR. CUNNINGHAM:** We will.

15 **THE COURT:** -- in a non-argumentative fashion.

16 **MR. CUNNINGHAM:** We will try to be non-argumentative,
17 Your Honor, as is our style.

18 **THE COURT:** That comes later.

19 **MR. CUNNINGHAM:** If I could indulge on one point.
20 That is, Mr. Scott and I will be sharing the opening. And we
21 may run a little bit over what is 15, in response to their 25.
22 I hope you won't strike us dead for that. And if anyone wants
23 to extract that time from our case later on, so be it.

24 **THE COURT:** I'll give you a total of 20 minutes.

25 **MR. CUNNINGHAM:** Thank you.

1 **THE COURT:** Since each of them have 15. So that
2 gives you 10/10, right?

3 **MR. CUNNINGHAM:** Thank you.

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

5 **THE COURT:** Who is going to start this ball rolling?
6 You, Mr. Williams?

7 **MR. WILLIAMS:** I am, Your Honor.

8 **THE COURT:** You may proceed.

9 **OPENING STATEMENT**

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

11 Your Honor, the motion picture studios put
12 technologies on DVDs that prevent people from copying them.

13 And Congress passed a statute in 1998, the DMCA, that
14 makes it unlawful to traffic in devices that circumvent that
15 technology.

16 Now, Real wants to do exactly what Congress said they
17 cannot do. They would like to sell a device that is used to
18 circumvent copy control technology.

19 You received a lot of briefing, about 200 pages
20 worth. And I'm certainly not going to repeat what was said
21 there. But, instead, I would like to give Your Honor a roadmap
22 to what we're going to prove through the witnesses and exhibits
23 at the hearing.

24 In this hearing, the studios will prove three things:
25 Number one, RealDVD is a device for circumventing the

1 Content Scramble System, or CSS, which all of the studios place
2 on all of their DVDs.

3 Number two, RealDVD is a device for circumventing
4 ARccOS and RipGuard, which are additional technologies that are
5 used on a number of DVDs by some of the studios on some of
6 their DVDs.

7 Number three, Real's excuses for their conduct are
8 just that. They are excuses. They do not erase the harm to
9 the studios from using RealDVD. And they just don't hold up to
10 close scrutiny for reasons that I'll describe.

11 On the first point, when we were here at the TRO
12 hearing back in October, we told you that it was apparent that
13 RealDVD is used to circumvent numerous protections. And we
14 listed them. And some of them are showing on your screen now.

15 There were at least four ways that Real DVD avoids or
16 bypasses CSS's protections. And we expect that Mr. Steer, from
17 the Copy Control Association, will explain them in greater
18 detail. They have to do with authentication, bus encryption,
19 and the like.

20 But you will hear evidence that each of the things
21 that we said about how RealDVD works back in October is true.
22 And, in fact, they are undisputed.

23 One of the experts that we will call, Mr. Robert
24 Schumann, will walk you through Real's circumvention of all of
25 these protections. And, in fact, Real's expert, Dr. Bishop,

1 will admit that RealDVD does not implement any of the
2 protections that we outlined in October, at the time that a DVD
3 plays back a movie.

4 One of the questions that Your Honor has raised in
5 the past is whether the license at issue here authorizes Real
6 to build a product like RealDVD, which we call a copying
7 product. It does not.

8 And by the end of this preliminary injunction hearing
9 we're very, very confident that you will be firmly convinced
10 that any way you look at the CSS license, whether you look at
11 it down in the weeds, or if you take a big step back and look
12 at the purpose for those protections, either way you go it
13 cannot possibly be read to expressly authorize someone to build
14 a DVD copier as distinct from a DVD player.

15 We will show this to you through the terms of the
16 license and the specifications. And you're going to hear
17 testimony, I think this afternoon -- maybe this morning, with
18 any luck -- from Dr. John Kelly. He will walk you through the
19 specific terms of the license. Mr. Steer will examine him.
20 And the evidence will show you that Real is not complying with
21 numerous requirements.

22 So what will Real's response be? Well, we believe
23 that by the end of the hearing next week that you will conclude
24 that Real's responses come down to semantics and word games
25 about the structure and the words that appear in the CSS

1 license. We believe that we will prove that those ignore the
2 purpose of the license, which is a pretty simple one.

3 Real will say, effectively, Look, we do everything
4 that the license says. If the license says there are nine
5 steps, we do all nine of the steps. There's no problem. But,
6 oh, by the way, between steps seven and eight of those nine
7 steps, we make a copy of the DVD, a complete, pristine, perfect
8 copy that is permanent, that resides on someone's hard drive.

9 We will show you, first, that Real does not comply
10 with those steps. That will be the point of our experts.

11 But the other point will be that even if Real were
12 right that it complied with all of those steps, the fact is
13 that it has no affirmative authorization from anyone to build a
14 device that is a DVD copier, even for one copy.

15 Real's argument will make no sense. And we're
16 confident that by the end of this hearing you'll be convinced
17 of that.

18 It will be clear from all of the evidence that the
19 entire purpose of CSS and the CSS system is to prevent exactly
20 the type of copying that Real does. It's clear from the very
21 first page of the license.

22 (Document displayed.)

23 And what I've called up here is the first page of the
24 license. You can see in the very first paragraph, one of the
25 parties, it starts there, is the DVD Copy Control Association.

1 It is an association that exists for the purpose of controlling
2 copies of DVDs.

3 And the license says in its very first recital --
4 still on that very first page, you see the language here --
5 that it is to provide reasonable security for content on DVD
6 discs and, thereby, together with the terms and conditions of
7 this agreement to provide protection for such copyrighted
8 content against unauthorized consumer copying.

9 There's more. You will hear this morning from
10 someone who was present at the creation of this CSS license.
11 You will hear from Ms. Marsha King. And she is literally a
12 framer of the license in the organization. And she is going to
13 give the Court undisputed evidence of what the expressed intent
14 was of the founders.

15 And from day one, moment one, Your Honor, the idea
16 was to prevent consumer copying. That was the one thing that
17 this license was intended to accomplish.

18 And there's not just language and there's not just
19 evidence of the intent of the framers of this license, there's
20 performance under the license, as well, Your Honor. Because we
21 will prove that for more than a decade everyone who took a CSS
22 license and made part of this system made the components of
23 this system, understood that you couldn't make a DVD copier.

24 Up until the Kaleidescape case -- which Real uses as
25 a role model -- all of the licensees understood that you get

1 authorization to make a player and not a copier.

2 But there's more. Because there's also undisputed
3 evidence about what the studios do with the packaging of their
4 content. And it starts with the actual DVD itself, and the
5 casing.

6 This is "Eyes Wide Shut," (indicating). This is one
7 of the DVDs that was mentioned in one of the declarations
8 provided by Real.

9 It says right on the back that there shall be no
10 copying. It has a disc-to-disc copying with a circle, red
11 circle around it, with a slash through it, that tells you that
12 you're not supposed to copy the DVD.

13 And here you can also see that it's on the DVD
14 itself, there's indication that you're not supposed to copy.

15 And when you actually put the DVD into a player and
16 play it, there's a warning that says that you're not supposed
17 to copy.

18 Sometimes this warning appears at the very beginning
19 of the DVD. Sometimes it appears at the end. But the fact of
20 the matter is that one is not supposed to copy the DVD. And
21 that's exactly what RealDVD does.

22 Your Honor will also see it through Real's own
23 documents, that they knew that the license did not authorize
24 them to build a copier. They thought -- and we'll show you
25 with documents -- that they were exploiting a loophole.

1 Well, that is not the law because Real needs to show
2 that it was authorized to build a device that is used to
3 circumvent the protections of CSS; that it was authorized to
4 build a copier. And that they cannot do. So that's CSS.

5 The second point we will show is that RealDVD is used
6 to circumvent ARccOS and RipGuard. And I want to be clear
7 about what those protections are.

8 All of the things we told you in October about CSS,
9 that relate to authentication, bus encryption and the like,
10 those are not relevant to ARccOS and RipGuard. These are
11 different technological protection measures.

12 And ARccOS and RipGuard add an additional level of
13 protection for DVDs. They are two similar technologies, one to
14 the other, ARccOS and RipGuard. But they protect DVDs against
15 copying by encoding various obstacles onto the DVDs themselves,
16 which frustrate and in some instances completely block copies.

17 You'll hear on Tuesday from the studios' expert,
18 Mr. Hollar, about the variety and effectiveness of those
19 techniques.

20 But unlike CSS, Real does not have a license to hide
21 behind when it comes to ARccOS and RipGuard. So what will Real
22 do? We expect the evidence will be the following:

23 Real witnesses will pretend that they don't know what
24 ARccOS is, or RipGuard. They will say, just as they did in
25 their brief at page 16, pages 14 through 15, these engineers

1 knew next to nothing about ARccOS and RipGuard, with reference
2 with to their own engineers.

3 In fact, we will provide the Court with evidence --
4 now, Mr. Bowser, if we could switch it over.

5 We will provide evidence, Your Honor, that the actual
6 specifications that are used by RealDVD in internal documents,
7 the one that is in front of Your Honor right now, is an
8 October 2007 document. It's 150 pages long. It's an internal
9 Real documents that is a handbook for RealDVD, in which they
10 describe precisely what ARccOS does.

11 And when you hear the experts describe what ARccOS
12 does, they will do no better job than this first paragraph that
13 describes it as a system that is used to corrupt sectors on
14 DVDs. They knew what it was.

15 **THE COURT:** Excuse me.

16 **MR. WILLIAMS:** Yes.

17 **THE COURT:** What you are displaying now is what
18 exhibit number?

19 **MR. WILLIAMS:** What we are displaying now does not
20 yet have an exhibit number. Oh, excuse me. It was from
21 Mr. Buzzard's deposition, Exhibit No. 50.

22 And they will say, in addition to saying that, "We
23 don't know what ARccOS and RipGuard are" -- the very engineers
24 who prepared these type of documents and who studied ARccOS --
25 they will also say they did not believe that ARccOS was a copy

1 protection system. That's how they testified in their
2 depositions.

3 But Real repeatedly recognized in their internal
4 documents that ARccOS and RipGuard are, in fact, copy
5 protection systems.

6 The document that's in front of you now -- and this
7 is from Mr. Barrett's deposition, Exhibit 5 -- is a
8 presentation that describes DVD protection schemes, in those
9 words, as DVD protection schemes, referring to ARccOS, RipGuard
10 and others.

11 There will be no dispute that these are, in fact, DVD
12 protection schemes.

13 The next document here is not yet marked, I don't
14 believe. We will mark it at this examination. This is Section
15 6.4.1 of another internal document at Real, that describes copy
16 protection schemes, in those terms. And it lists ARccOS and
17 RipGuard.

18 And it says, RealDVD will properly support playing
19 and saving of DVDs authored with the following copy protection
20 schemes. They knew what they were.

21 So we will prove that the same engineers who gave
22 testimony in this case in December 2008, that they really
23 didn't know what ARccOS and RipGuard were, wrote documents
24 describing ARccOS and RipGuard accurately, studied ripping
25 devices, some of them illegal, designed to get around ARccOS

1 and RipGuard.

2 And, in fact, we will prove that Real engineers
3 actually purchased from computer hackers in the Ukraine, a
4 company called Rocket Division, instructions for bypassing
5 ARccOS.

6 And we believe you will be moved by the exhibits, by
7 the evidence that are internal e-mails from Real, because they
8 make crystal clear that Real knew exactly what it was doing,
9 that it was trying to circumvent this copy protection scheme.

10 In short, ARccOS and RipGuard are copy protection
11 technologies. RealDVD is used to circumvent them. And that is
12 an independent basis for Real's liability under the DMCA.

13 The studios will also make a clear showing of the
14 likelihood of success on the merits. The studios have a clear
15 case of harm.

16 First, RealDVD is circumvention device. So
17 trafficking in that device threatens the studios' businesses,
18 existing businesses, where the studios can through iTunes or
19 through Amazon.com, consumers can actually purchase movies.
20 They can rent them if they want. They can buy them if they
21 want.

22 But in those instances, as distinct from RealDVD, the
23 content owners, the studios, get paid by iTunes or Amazon.com.
24 The entire business model for RealDVD is for that not to occur.

25 So I've talked about some of Real's excuses in this

1 case. And let me talk for a few minutes about some of the
2 others that we believe will come up. They came up over and
3 over again in their briefing. And they come up in their
4 depositions when witnesses testify.

5 Excuse number one is, Look, we as Real are just
6 trying to help consumers to make a fair use of these products.
7 It's fair use copying.

8 Well, to begin with, Your Honor -- and we won't argue
9 the law now, but at the end we will -- fair use is not a
10 defense to trafficking in circumvention technology under the
11 DMCA. It's clear from the statute, from the legislative
12 history. It's clear from a decade's worth of cases.

13 And Real knows that that is the law. Because when
14 the shoe was on the other foot, when Real was worried about the
15 technology that it used to protect copyrighted works, Real said
16 that an end user's fair use claim is irrelevant.

17 What you have before you here is a transcript of
18 Mr. Diboise, formerly the lead counsel in this case for Real,
19 arguing to the Court that there is no fair use defense to the
20 Digital Millennium Copyright Act.

21 So what we have is Real taking an inconsistent
22 position in this case from when they were trying to protect
23 other copyrighted works, when it suited their purposes.

24 And, in fact, the court agreed in that case. It's
25 called Stream Box. And Real is, we would argue, just playing

1 fast and loose in this case, making the exact opposite
2 argument.

3 But not only is fair use irrelevant, Real doesn't
4 even bother, in their papers, Your Honor, trying to prove that
5 copying DVDs is a fair use. It is not. And, indeed, they do
6 not even mention any of the four factors that are supposed to
7 be considered about fair use in their papers. It is not fair
8 use to copy any DVD.

9 Now, all of Real's arguments about fair use are about
10 copies that someone owns. Real does not bother to try to say
11 that there is a fair use when someone rents a DVD or borrows a
12 DVD from a friend, and then use Real's product.

13 Which leads me to excuse number two. In response to
14 the fact that RealDVD permits consumers to rent a DVD or to
15 borrow one, to copy it and then return to their friend the
16 borrowed DVD, or to Netflix the rented DVD, Real says: Don't
17 worry. You can trust us. People will not do that.
18 Law-abiding people will not do that. They will not rip, rent
19 and return.

20 But, in fact, Real knows that's not so. They did a
21 focus group themselves, back in May of 2008, which was produced
22 in discovery. And in that document, one of those documents --
23 there are several. The one that's before you now is from
24 May 2008.

25 And in that focus group they learned that consumers

1 told Real that copying their own DVDs is of limited value
2 because the content has often already been viewed by the person
3 who owns the DVD.

4 So that leads me to excuse number three. What they
5 argue here, Your Honor -- and you'll hear it -- "We're not as
6 bad as Napster, in the music industry matters, because people
7 can't use RealDVD for viral distribution."

8 First of all, there is no requirement of viral
9 distribution under the DMCA. And, in fact, there was were no
10 peer-to-peer services at all when the DMCA was passed in 1998.

11 But, moreover, RealDVD is subject to its own viral
12 distribution, because the same DVD can be passed around without
13 limit, in a dorm, amongst friends, et cetera.

14 And the way that would work, Your Honor, is that a
15 single DVD is used by an individual who signs up for Real.
16 That individual may use that and copy that DVD onto up to five
17 different computers. They can be laptops. They can travel.

18 But then the same DVD could be borrowed, could be
19 rented, could be owned, could be given to someone else who also
20 has RealDVD. And so on and so on and so on. And you can
21 clearly see how there could be a viral dissemination of the
22 copyrighted works, of the content.

23 That, we would argue, is inappropriate. But the
24 whole argument about how there is no viral distribution, or
25 it's only five copies, or we only allow one copy but you can

1 use it on five different computers, all of that is window
2 dressing that they put onto the product in order to survive a
3 legal challenge.

4 Because, remember, at the end of this proceeding
5 Real's view of the license, Your Honor, will be that it does
6 not put any limits on copying; that there is no limitation in
7 the license.

8 So if Real's reading of the license were correct, it
9 would mean that tomorrow or six months from now or a year from
10 now Real could, in its discretion, turn a switch and allow
11 RealDVD to make hundreds of copies or thousands of copies,
12 because there is no principled basis for their arbitrary
13 limitation on the copying.

14 Finally, excuse number four. They will argue that
15 this is really all about just the studios trying to make money
16 improperly themselves.

17 But that's wrong. Because the studios have every
18 right to get paid for additional copies of their copyrighted
19 content. That is what the whole copyright system is built
20 upon.

21 And, as I mentioned earlier, one can get copies of
22 DVDs through Amazon.com, iTunes, and other methods. Sometimes
23 from the studios themselves. A person can pay for it and
24 download an additional copy of the content.

25 Real knows that. And the irony is that when Real is

1 the copyright owner, it doesn't say, Go ahead and make a
2 convenience copy. When Real is the copyright owner, they
3 charge \$20 for an additional copy.

4 That's how their product works. It's \$30 to buy it.
5 "If you want to put it on another computer, you've got to pay
6 us another 20. Another computer, another 20. Another
7 computer, another 20." So they understand how that works when
8 it comes to material that they believe they have copyrighted.

9 So Real's objective on this is to make money off the
10 studios' investment without having to pay for it.

11 And when Real sells a copy of RealDVD, and someone
12 uses that machine to make copies of movies, Real gets to
13 pockets \$30.

14 But Real didn't make any investment in the movies.
15 They didn't pay anything to the studios at all. And, indeed,
16 that is what's going to be used under their scheme to entice
17 consumers to use their product.

18 But Real's play here is much broader than just the
19 \$30 they get for actually buying the device. This document
20 before you, Your Honor, is an October 2008 document.

21 It is after the launch of the product. After they
22 launch this product. And it tells you what, how, and why they
23 intend to make money.

24 And they intend to do that by getting their foot in
25 the door. But the key point is -- there are two points about

1 this document.

2 In the top bullet, I would refer you to the third
3 sentence that refers to the fact that their format is protected
4 by what they will tell you is a second layer of protection.
5 And what they will argue to you, Your Honor, is that that
6 second layer of protection is just to make sure that this
7 product can't get out. Almost as though they are trying to do
8 the studios a favor by putting this second layer, called
9 AES128, as an encryption layer.

10 But, Your Honor, their own documents will make clear
11 that the idea behind that is to put this in a format that is
12 protected and owned by Real so that once someone is locked into
13 Real, Real can start to sell those people other products,
14 because the consumer stays connected to what we'll call mother
15 Real once they buy the product.

16 The second major bullet point on that document before
17 you explains how they intend to make money. And this is the
18 hook. Because they intend to make even more money than the
19 money that's paid to actually buy the product, because the
20 whole idea is that they are going to leverage the existing
21 consumer's DVD collection.

22 That is the studios' product. That is their crown
23 jewels, is the content for their movies. And they are going to
24 use that to entice people to buy the product because they can
25 make a copy of it up to five, and then pass it on.

1 But the whole idea is that that will then, in turn,
2 lead Real to being able to sell other products and rent other
3 products and videos over both their personal computer and over
4 other devices.

5 So the hook --

6 **THE COURT:** Now, can those five copies be copied? Or
7 is there any protection in those five copies that prevents them
8 from being copied?

9 **MR. WILLIAMS:** The way the Real product works, Your
10 Honor, and there will be testimony about it, is that the DVD is
11 placed into the machine. The DVD is copied. Thereafter, that
12 copy of the DVD can be placed upon five -- up to four other
13 computers, for a total of five.

14 Once that is placed on the other computers, that
15 computer cannot be used to make an additional copy. But the
16 same DVD, assume it's borrowed, assume it's rented, or even if
17 it's owned, can be given to someone else who also has Real, and
18 additional copies can be made.

19 So from a single DVD that was purchased, an unlimited
20 number of copies could be paid. It just is a question of
21 passing the DVD around. That's the way in which, we would
22 argue, there could be viral proliferation --

23 **THE COURT:** Passing around to other people who have a
24 RealDVD player?

25 **MR. WILLIAMS:** That's correct, Your Honor.

1 **THE COURT:** So not each one of the those RealDVD
2 players has its own key, different from other RealDVD players?

3 **MR. SINGLA:** Your Honor, if I could address the
4 Court's question.

5 **THE COURT:** Yes. I assume we are going to get some
6 evidence on this, and I should not bother you with that.

7 **MR. SINGLA:** Mr. Schumann will be testifying --
8 hopefully this afternoon, maybe Tuesday morning -- on exactly
9 the question that the Court asked.

10 Very briefly, each copy of RealDVD shares the same
11 key. So all copies of RealDVD sold use the same key.

12 What Mr. Schumann will explain is, if someone got
13 access to that key, they could unlock and use all the copies
14 made by anyone anywhere. That's the second question the Court
15 asked.

16 The first question the Court asked is: Can you copy
17 the copies? I believe that's what the Court was trying to get
18 at.

19 What Mr. Schumann will explain and show the Court is,
20 yes, you can copy the copies. You take a DVD, make a copy on a
21 thumb drive. You can take that, return the DVD to Netflix.
22 And you can make as many copies from that thumb drive as you
23 want.

24 However, what RealNetworks has done, on their own, is
25 locked those copies down so they can only be played, right now,

1 on the thumb drive, the first drive. They can't be played off
2 the other copies.

3 But what Mr. Schumann will explain is, it will be
4 trivial for RealDVD in the future to change that. And they
5 could make it easily so that any copy could be played, and you
6 could, you know, have these things copied willy-nilly. It
7 would work on all the different computers with Vegas. And
8 that's something they could change easily in their product in
9 the future.

10 **MR. SCOTT:** That, Your Honor, is mistaken. That's
11 mistaken.

12 **THE COURT:** I will hear from you all after I hear
13 from these people. You may address those matters in your
14 opening.

15 Yes.

16 **MR. WILLIAMS:** Thank you, Your Honor. Let me just
17 say that in the end, this case will be about how Real tries to
18 take money that is not theirs, by asking consumers to pay Real
19 for the right to access and copy movies, instead of paying the
20 people who paid for the movies, who made the movies, who took
21 the risks, and own the rights to those movies. And those are
22 our clients, the motion picture studios.

23 We look forward to speaking with you later. Thank
24 you.

25 **THE COURT:** Thank you.

1 I guess we are going to hear from you now, Mr. Steer.

2 **OPENING STATEMENT**

3 **MR. STEER:** Thank you, Your Honor.

4 As I said earlier, we represent the DVD CCA. DVD CCA
5 is a nonprofit association in which members are companies,
6 businesses in the consumer electronics, computer and IT, and
7 movie production, movie studio fields.

8 The DVD CCA came into existence back in the 1990s, as
9 a result of the need to figure out a way to control the copying
10 of the digital movies.

11 Everyone knows what a wonderful advance digitization
12 is because it allows for features that were never imagined
13 before and quality that was never imagined to be available for
14 consumers for use in their own homes.

15 The problem with digitation, of course, is, once you
16 have a digitized movie out there, it can be -- unlimited
17 numbers of perfect copies can be made, unless there is a
18 protection system.

19 So the protection system that was created is the
20 Content Scramble System, or CSS as I will refer to it
21 throughout this hearing.

22 That system came about through long negotiations
23 between the companies, many of them, many companies in the
24 categories that I described to you earlier.

25 The technology locks the DVDs so that the content

1 cannot be copied by the consumers. But the consumers can watch
2 the movies that are on the DVDs and enjoy the other features.

3 The result of this, of the creation of this
4 technology, has been sales of hundreds and hundreds of millions
5 of DVDs -- there's 68,000 titles available now on DVD -- broad
6 access by consumers, for consumers, to movie and television
7 titles; and a great convenience that didn't exist previously.

8 The protection that was created was intended to be
9 sufficient so that the studios would feel safe in selling their
10 products in DVD format, and, at the same time, to establish a
11 system that would allow consumer electronics and IT and
12 computer companies to manufacture the products that would be
13 needed to play the DVDs.

14 And, as I say, it's been an extremely successful
15 system.

16 **THE COURT:** Excuse me. You mentioned members. And I
17 understand studio members, and so forth, and who may be
18 included in that group.

19 But with respect to consumer electronics or
20 technology companies, can you give me a few examples.

21 **MR. STEER:** Absolutely.

22 **THE COURT:** For example, would RealNetworks be a
23 member, or is it a member?

24 **MR. STEER:** RealNetworks is a member, Your Honor.
25 There are many. Hewlett-Packard. IBM. Intel. Microsoft.

1 Pioneer. Matsushita, Toshiba.

2 It includes, Your Honor, to cut to the chase, many
3 companies that could have manufactured a DVD copier long ago.
4 There's no question that these companies have great resources
5 and technical skills. They didn't do that because they adhere
6 to the rules. And that's the point I'm getting to, the first
7 point.

8 The CSS license establishes a set of rules, agreed to
9 by all sides, that are designed to protect against copying.
10 That's why my client is called the "Copy Control Association."

11 This lawsuit is about RealNetworks' intentional
12 violation of those rules. Under the rules, CSS licensees can
13 use CSS to build devices that play back DVDs.

14 But the rules do not allow -- and Dr. Kelly will
15 explain why this is so -- licensees to use CSS to build devices
16 that copy DVDs. Everyone has understood that. It's clearly
17 stated in the license document and the specifications.

18 And the first document on the screen here is a
19 recital from the start of the CSS license. And what it says,
20 Your Honor, is that:

21 "Matsushita Electric, Ltd. and Toshiba Corporation
22 have developed a Content Scramble System, as defined below, to
23 provide reasonable security for content on DVD discs, and,
24 thereby, together with the terms and conditions of the
25 agreement to provide protection for such copyrighted content

1 against unauthorized consumer copying, and have filed patent
2 applications with respect to the Content Scramble System."

3 Now, Matsushita Electric and Toshiba made the
4 technology available to the DVD CCA to license to companies
5 like RealNetworks. So that's the first point here.

6 I would like to now turn -- and if Mr. Bowser will
7 switch to the confidential mode here -- to another provision,
8 which is section 1.2 of the general specifications.

9 May I do that, Mr. Bowser?

10 **THE CLERK:** It's done.

11 **MR. STEER:** As I said earlier, the general
12 specifications and the other specifications to which
13 RealNetworks subscribed are highly confidential.

14 But the objective that I just described in the
15 introduction to the license agreement, which is publicly
16 available, is also stated here.

17 And I won't read it aloud, Your Honor, because I do
18 want to attempt to preserve the highly confidential nature.

19 **THE COURT:** Can you help me out for a moment.

20 **MR. STEER:** Absolutely.

21 **THE COURT:** I have my own printed copy here, as well.
22 And I sometimes like to mark that up. And I'm looking at 1.2.
23 And my 1.2 in this document, in the agreement itself, is not
24 the same.

25 This is from the license agreement?

1 **MR. STEER:** It's from the general specifications,
2 Your Honor. It's not in the license agreement.

3 The overall contract between the companies is a
4 multi-part contract. There is a license agreement that
5 generally describes the relationship. Anybody can get that off
6 of the Internet.

7 There are procedural specifications also public.
8 They tell people what you have to do, how you behave, how you
9 get licensed, et cetera.

10 And then there are technical specifications, the
11 highly confidential things, including the general
12 specifications and, in this case, the two categories for which
13 RealNetworks signed up, which are authenticator and descrambler
14 specifications.

15 And those, of course, are technical terms. And,
16 again, I'll defer to Dr. Kelly rather than get into them now.

17 **THE COURT:** Right. But the general specification,
18 however, is -- what exhibit is this in the exhibits that you
19 have submitted to the Court?

20 **MR. STEER:** Right. It's Exhibit L to the declaration
21 of Jacob Pak on March 19th of this year.

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

23 **MR. STEER:** The screen -- and if it would be helpful
24 to the Court, I actually have poster boards that would make it
25 easier for the Court to follow.

1 **THE COURT:** That's fine.

2 **MR. STEER:** Good.

3 **THE COURT:** I like this little copy to mark up here
4 myself.

5 **MR. STEER:** I understand.

6 **THE COURT:** I didn't bring out all the exhibits, so
7 we'll pull it at the next break.

8 **MR. STEER:** Your Honor --

9 **THE COURT:** He's holding up an extra copy there.

10 **MR. STEER:** My partner, Mr. Mick, always a step ahead
11 of me, has a spiral bound copy of the declaration of Mr. Pak,
12 which, if I may, I would like to hand to the Court.

13 **THE COURT:** Thank you.

14 And then I can follow along and mark up as well.

15 **MR. STEER:** Absolutely.

16 **THE COURT:** May I have this one then?

17 **MR. STEER:** It's yours to enjoy.

18 (Laughter)

19 **THE COURT:** That's so exciting.

20 **MR. STEER:** That's the only misleading statement I'll
21 make in this presentation, Your Honor.

22 (Laughter)

23 **THE COURT:** Okay. Go ahead, please.

24 **MR. STEER:** Do you need a moment to read section 1.2
25 of the objectives?

1 **THE COURT:** No, that's fine. I have read it from
2 here. Thank you.

3 **MR. STEER:** And I'll also state that the same
4 objective, essentially which is to prevent copying, is stated
5 repeatedly throughout these highly confidential and
6 nonconfidential documents.

7 And, again, when Dr. Kelly testifies, we'll show the
8 Court a number of instances. They're expressed in different
9 language in the different specifications because these are
10 technical documents that we're talking about here. And exactly
11 how the principle is stated reflects the different technical
12 focus of each of these documents.

13 So what did RealNetworks do in this case, that led to
14 this case? It decided, in early 2007, to make a DVD copier, a
15 device that makes lasting, playable copies of DVDs to computer
16 hard drives so that the movie can be played back without any
17 further need for the DVD disc.

18 I think that's obvious. And there's no dispute about
19 that. There's no dispute about what the RealDVD products do.

20 Real created a prototype code for RealDVD, using
21 illegal ripper software long before it became a CSS licensee.
22 And after that, it applied for a CSS license in order to try to
23 cloak its illegal product in a license that is designed to
24 prohibit the very thing that RealDVD does.

25 And what it is doing is using the license to

1 advertise its product as a legal product, in contrast with the
2 illegal rippers that it says are available on the Internet.
3 That's for its commercial advantage, Your Honor.

4 RealDVD signed up for a license to manufacture
5 CSS-compliant authenticators and descramblers. And, as
6 Dr. Kelly will explain, those are components in the playback
7 mechanisms for DVDs. It did not sign up for a license to
8 manufacture a DVD copier. There is no such thing.

9 This is the DVD Copy Control Association. It doesn't
10 license copying.

11 So the DVD CCA, we will submit, will be entitled to
12 preliminary relief because RealNetworks' creation of a DVD
13 copying machine breaches the contract under which the CSS
14 license was given to RealNetworks. And DVD CCA will suffer
15 irreparable harm if preliminary relief is not granted.

16 So our breach of contract argument is based on three
17 main points, which I'll go through quickly.

18 First, a DVD-copying device like RealDVD violates the
19 explicitly stated contractual objectives of the CSS licensing
20 system.

21 The objectives are front and center in the license --
22 you have already read them in two different forms -- no
23 copying. There is no ambiguity in those provisions that state
24 the contractual objections.

25 CSS is made available for the playback of DVDs, not

1 for copying. And, indeed, Judge Illston said exactly that in
2 the 321 Studios case which she decided just a few years ago.

3 So RealNetworks violates the agreement because it
4 makes a device that allows consumers to copy DVDs.

5 Second basis for our contract violation claims:
6 RealDVD violates the agreement because it does not comply with
7 the technical description of the authorized product that is
8 contained in the CSS specifications for which it signed up.

9 Mr. Williams prefaced his statements by saying that I
10 will talk about details of the CSS system. And I will, but,
11 Your Honor, I think it's premature to do it now. I think using
12 Dr. Kelly as the vehicle will make a lot more sense and allow
13 the Court to ask questions and get into the details and have a
14 stronger understanding. I am not suggesting that this is
15 simple stuff. It's technical.

16 So RealNetworks' principal argument on this point is
17 that RealDVD does comply with the CSS specifications, but only
18 because, as they argue, there is no explicit prohibition
19 against making copies of the DVD on a hard drive.

20 That argument is wrong. And there are two simple
21 reasons why it's wrong.

22 First, the statements of objectives that you've seen
23 present those clear prohibitions. But, secondly, the technical
24 specifications that RealNetworks signed up for provide an
25 engineering description of what an authorized product can do.

1 If you follow the sequence of steps that set forth in
2 those technical specifications, the end result is a product
3 that plays back DVDs, not a product that copies DVDs.

4 Dr. Kelly will explain the specifications and how
5 Real fails to comply with them, how it circumvents them.

6 Mr. Williams said a few words. He's correct in what
7 he said. There's more detail.

8 So this is a second reason why a device that copies
9 DVDs for playback without the disc is contractually foreclosed.

10 And, third, Your Honor, even if there was some
11 ambiguity with the language of the agreement -- and
12 RealNetworks doesn't identify any actual ambiguity -- the
13 evidence of the contractual intent of the parties and their
14 mutual understanding of the contract supports DVD CCA's
15 interpretation.

16 The intent to prevent consumer copying of DVDs is
17 stated right in the documents. It's undisputed that
18 RealNetworks was well aware of DVD CCA's interpretation of the
19 contract when it signed on to the license.

20 And, by law, we'll submit that the Court should
21 construe the contract in a manner consistent with the stated
22 intent and with DVD CCA's known and publicly expressed
23 understanding of the contract.

24 Now, for all these reasons, we are entitled to
25 preliminary relief. But I want to go back for a moment to make

1 another -- to the point of addressing: What exactly is the
2 license?

3 You've seen recital A. I'd like to go to section 4.2
4 of the CSS license agreement.

5 This is public, so, Mr. Bowser, you can go back to
6 that.

7 And that, Your Honor, is Mr. Pak's declaration,
8 Exhibit J.

9 **THE COURT:** This is of the license agreement itself?

10 **MR. STEER:** In the license agreement itself, yes,
11 correct.

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

13 **MR. STEER:** And you'll see it says, "Compliance with
14 CSS specifications." And general, "Licensee shall comply with
15 the CSS specifications as may be amended by the licensor from
16 time to time in accordance with the bylaws. Each DVD product
17 shall comply with the version of the CSS specifications which
18 is in effect at the time such DVD product is manufactured,
19 taking into account specific effective date provisions and
20 amendments to the CSS specifications."

21 Well, there is a very straightforward statement.
22 It's in the license agreement. It was public. They had it
23 before they received the technical specifications, the highly
24 confidential ones. And it says, You're going to have to comply
25 with the specifications in order to be in compliance with this

1 contract.

2 Now, if I may go to the next slide, there's a long
3 series of definitions. And, again, this is Mr. Pak's, Exhibit
4 J.

5 And definition 1.13, Your Honor, defines CSS
6 specifications. And it says, "CSS specifications shall mean
7 the documentation relating to CSS, entitled 'CSS
8 specifications,' including the procedural specifications and
9 the technical specifications that licensor makes available to
10 licensee, as such documentation may be revised from time to
11 time," and so on and so forth.

12 So, that leads us to the question: What was made
13 available to RealNetworks? And my next slide will address
14 that.

15 Here, again, this is documentation that was produced
16 by RealNetworks. This is a copy of a receipt of documents.
17 And this receipt of documents, Your Honor, is an exhibit to the
18 Hamilton deposition. And I'm sure it appears in association
19 with -- excerpts of that deposition, in our March 19 filing.
20 It was, as I say, produced by RealNetworks.

21 And if the Court can see this -- actually, if you
22 can't see it, I have a poster board.

23 After they signed up, they received -- and I
24 mentioned this earlier -- a Federal Express package. And that
25 Federal Express package was signed for by Nichole Hamilton, who

1 was the project manager at RealNetworks, who was responsible
2 for taking Real through the license sign-up procedures and for
3 compliance.

4 And you will see that the purpose of this blow-up
5 here is to cross-reference. The first item here is the general
6 specifications that were delivered. And they are numbered.
7 The number on the receipt corresponds to the number on the
8 general specifications.

9 In addition, there are two other documents, which I
10 haven't put on the screen here but could. And they are the
11 authenticator specifications and the scrambler specifications.
12 And those are -- those documents correspond to items 2 and 3 on
13 this list.

14 So in September they received, knowing full well what
15 the agreement is going to be, they received these documents.
16 What did they do? Did they return any of them and say, "Oh,
17 no, we aren't not going to abide by this"? No. Not a word.
18 Did they say, "We want something different"? Well, later they
19 did order something different. That's not really relevant to
20 this lawsuit.

21 Nothing. There was no indication that they disagreed
22 with DVD CCA's explicitly-stated position as to what is the
23 agreement between the parties. They had it all in hand. And
24 they didn't have any problem understanding it.

25 So going back to why we're entitled to preliminary

1 relief, Your Honor, we have an additional point. And that is
2 the violation of the covenant of good faith and fair dealing.
3 This, Your Honor, is a classic case of violation of the implied
4 covenant.

5 In this case, RealNetworks entered into its
6 agreement, its contract with DVD CCA with the intent from the
7 very beginning of depriving DVD CCA of the explicit benefit of
8 that contract, which is abiding by rules that prevent copying.

9 And it goes to the very heart of the DVD CCA's
10 existence. Because, Your Honor, if anybody -- if they can --
11 if RealNetworks can manufacture DVD copiers and do so lawfully,
12 so can all these other members.

13 And a system that's been in effect for many years
14 now, and has been extremely effective and beneficial not only
15 to the companies involved but to consumers, is likely to fall
16 apart.

17 And so on that basis, Your Honor, we will ask the
18 Court to issue preliminary injunctive relief. And I thank you.

19 **THE COURT:** Thank you.

20 Mr. Cunningham, are you up next?

21 **OPENING STATEMENT**

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

23 RealNetworks, my client, is a company that respects
24 copyrights. It's a technology company. It's been in existence
25 for about 15 years. And during those 15 years it's, among

1 other things, produced technologies that animate the Internet
2 by allowing streaming audio content and streaming video
3 content. It provides technologies that have made the Internet
4 come alive and make it worthwhile for something other than
5 reading documents.

6 To do that, Real has had to have a healthy and
7 symbiotic relationship with content providers. And it has had
8 such a relationship.

9 The products in this case, Vegas, Facet -- sometimes
10 we call them RealDVD collectively -- were conceived more than
11 two years ago. And that was in the spring of 2007.

12 And the idea behind them was that they were part of a
13 strategy to take advantage of what was foreseen as a potential
14 new market that would be created by interactive TV. And we're
15 not going to spend much time, if any, talking about interactive
16 TV.

17 But Real wanted to have -- establish a presence in
18 the consumer's living room. And the way to do that was to
19 replace a device that's already there. The device to be
20 replaced was the video player. So RealNetworks was going to
21 provide a better DVD player, and a DVD player that has the
22 features that we'll describe.

23 That box, that replacement DVD player, is the Facet
24 product. And we'll show it to you and demonstrate to you what
25 it can do.

1 Real saw that there was an unmet consumer need. And
2 that need was for the in-home management of a consumer's DVD
3 collection.

4 So it turns out that Americans have a lot of DVDs.
5 The average household has more than 50.

6 **THE COURT:** Can you hold one moment. Can you have a
7 seat somewhere. There are seats here. It's not a drop-in
8 clinic.

9 **MR. CUNNINGHAM:** May I, Your Honor?

10 **THE COURT:** Fine. Thank you.

11 **MR. CUNNINGHAM:** So Real's product was intended to be
12 attractive to consumers and enhance the value of a DVD. It
13 would do that by allowing the content of the DVD to be
14 transferred onto a hard drive. And once that happens, the
15 consumers can do a lot of things that they couldn't do before.

16 In the first place, they can now protect their DVD
17 collection because the chances of a smudge or a scratch or
18 getting lost are much smaller with a hard drive. It also let
19 the consumer manage their DVD collection with searchability
20 functions and parental controls, and things like that.

21 And with respect to the Vegas product, which is the
22 software, it made the transportation or portability of the DVD
23 content much simpler.

24 And in contrast to existing software that was already
25 available, Real's products were designed to prevent piracy.

1 The movies that are copied from DVD are locked down
2 to a single hard drive. They can only be played from that one
3 drive.

4 Your Honor has enjoined a product and is being asked
5 to further enjoin two products. These are real products with
6 real features, not hypothetical products. And we'll explain to
7 you how these products work.

8 But the fact of the matter is, once a copy is made on
9 a hard drive, that copy cannot be copied in a playable way. So
10 we're not going to have an explosion of copying based on our
11 product. Nor can a playable copy be distributed on a network,
12 any network. And that includes the Internet.

13 So, in short, there's nothing about our product that
14 makes it attractive to the criminal that wants to steal movies.
15 That person, the thief, they already have a software, that's
16 just a few clicks away on the Internet, if what they want to do
17 is steal movies. And they can steal them in ways that don't
18 impose limitations that our product imposes.

19 Now, skipping to last summer, in August of 2008,
20 that's when Real began sharing with the studios its plans to
21 release the software product.

22 Real didn't go to the studios because it was looking
23 for permission to launch the product. It didn't need their
24 permission. It went to the studios because it recognized that
25 there were potential business relationship, win/win situations,

1 that Real and the studios could have.

2 For example, Real believed that the studios could
3 sell to consumers right in the consumer's living room, taking
4 advantage, perhaps, if a viewer watches Sopranos Season One,
5 might, on an impulse, then, be interested in buying Sopranos
6 Season Two. That's the kind of thing the product could enable,
7 and that would create win/win with the studios.

8 So Real described the product to the studios.

9 **MR. WILLIAMS:** Excuse me, Your Honor. Objection. I
10 just want to interpose an objection on the settlement
11 communications, with respect to these conversations.

12 **THE COURT:** Well, I don't think we've got into that.

13 **MR. WILLIAMS:** Just for the record. Sorry to
14 interrupt.

15 **THE COURT:** Yes.

16 **MR. CUNNINGHAM:** So Real described the product to the
17 studios; made engineers available to discuss it; and discussed
18 these kinds of marketing ideas.

19 Real described how the products were intended to
20 enable a consumer fair use, and how they were designed to limit
21 the potential for piracy.

22 Once the studios understood how the product really
23 was locking down the copies, they focused on the possibility of
24 a consumer renting, copying, and then returning a movie, the
25 rent, rip and return phenomenon.

1 There is a reasonable solution to that problem. And
2 the reasonable solution to that problem is for the studios to
3 code their rental product, and then our client respecting that
4 coding by disabling the possible copying or saving of the
5 electronically-marked rentals.

6 Real delayed launching its product for about three
7 weeks, in order to work things out with the studios. And,
8 ultimately, that fix that was uniquely within the studios'
9 control was not implemented.

10 So what's driving --

11 **THE COURT:** I think you've danced about as close as
12 you can.

13 **MR. CUNNINGHAM:** And now I'm moving on, Your Honor.

14 (Laughter)

15 **THE COURT:** I hope so.

16 **MR. CUNNINGHAM:** What's behind this lawsuit is the
17 studios' desire to serve that market for in-home management of
18 DVDs. They want that market to themselves, without the
19 competition of a technology company like Real.

20 The case isn't about rent, rip and return. And it's
21 really not going to end up being about the CSS specs. And it's
22 obviously not about security for DVDs, because -- I think we're
23 now going to have testimony this afternoon, as part of the voir
24 dire process -- CSS was cracked a long time ago. So DVDs can
25 be freely had on the Internet.

1 The evidence or, really, the lack of it, shows that
2 RealNetworks poses no threat to the established DVD business.
3 What the studios are calling the threat here is the legitimate
4 competition that my client's technology allows with similar
5 products that the studios want to offer.

6 For example, they have something that they call
7 Digital Copy. They sell another version of the movie with or
8 on the DVD, side-by-side DVD. And that product allows the same
9 manageability and flexibility and portability that our product
10 enables consumers to make.

11 And while we've been enjoined, the studios have been
12 aggressively marketing that product --

13 **THE COURT:** Well, but isn't the difference that they
14 have the copyright?

15 **MR. CUNNINGHAM:** So, Your Honor, I think that we're
16 getting down to what the nub of the --

17 **THE COURT:** That's the issue here, right? They have
18 the copyright.

19 **MR. CUNNINGHAM:** That is, of course, an issue here
20 and --

21 **THE COURT:** Gives you the right to exclude, right?

22 **MR. CUNNINGHAM:** But it doesn't. It doesn't, Your
23 Honor.

24 And the reason for that, the reason for that is
25 within the fair use doctrine, which is not a defense, if you

1 will, to the DMCA, but it matters here.

2 So with respect to the copyrighted content, our
3 product will enhance its value because it makes it more
4 attractive to consumers. Consumers will want to buy DVDs.

5 **THE COURT:** It's even more attractive to consumers if
6 you can get everything for free. Right?

7 **MR. CUNNINGHAM:** That's not good for anyone in this
8 room, if people get everything for free, Your Honor. Because
9 we're a commercial enterprise, and we want to make money by
10 working with content providers. That's what we've done for 15
11 years.

12 So, no, there is no reason to let people get stuff
13 for free. At least not in this business context.

14 The issue that Your Honor has put her finger on is
15 whether or not the studios get to extend their legitimate
16 monopoly in the copyrighted content to the fair use.

17 That is, if a consumer wants to make a backup, secure
18 copy of something they already own, do the studios get to
19 charge them again for that?

20 And we submit that the evidence and then the argument
21 at the end about fair use is going to show, no, they can't
22 charge them again for that. That's a right that the consumer
23 has. It's a fair use right. And it's no longer part of the
24 legitimate monopoly of the studios.

25 So that's the nub of the thing. Ultimately, the

1 fight is about: Who's going to prevail in the market for
2 technology that allows you to protect your DVD collection and
3 manage it and provide portability for it?

4 So with that, let me turn it over to Mr. Scott.
5 Thank you.

6 **THE COURT:** Mr. Scott.

7 **OPENING STATEMENT**

8 **MR. SCOTT:** Good morning, Your Honor. And thank you
9 again.

10 **THE COURT:** Good morning.

11 **MR. SCOTT:** I remember courtesy in accommodating my
12 schedule last time I was before you and that has been
13 invaluable to me and I thank you again for that.

14 Coming forth, I do want to try to clarify a few
15 things that come before me. You can already see that the
16 parties give the Court different answers to the question what
17 this case is all about. And because of that, I want to address
18 some things the evidence will cover in outline form but also
19 their larger import.

20 Mr. Cunningham has already talked about the purpose
21 of Real's product. And that's why I have this on the screen
22 just in summary. It is designed to maximize the appeal of DVD
23 owners and minimize the appeal to the rippers. And for that
24 reason, the significance of this is that from the start we are
25 trying to target the fair use market.

1 Now, Mr. Williams made an interesting point that we
2 addressed in our brief and I want to argue it now. It's a
3 legal point, but I want to identify it for the Court, which is,
4 it is apparently the studios' position that RealNetworks, as a
5 licensee to implement the CSS system in building a product,
6 must also have embedded within that license agreement an
7 express license from the studios for the consumers to make
8 copies for their own personal backup use.

9 And, he is conflating the question of whether we are
10 licensed and complying with that license to implement the
11 specifications with whether or not the studios have given an
12 express license for consumers to make copies, which, as the
13 Court knows, raises the issue of whether or not the consumers
14 have that right, or if it's the studios' right to grant it or
15 withhold it. And that's where we came to fair use. And I'll
16 leave that for today, to address the evidence here.

17 In terms of what our product does, Mr. Cunningham
18 said it locks a copy down to a single hard drive. And you
19 asked, you asked Counsel whether or not copies could be made of
20 copies. And Mr. Singla rose to tell you, yes, they could.

21 Except, copies made of copies are unplayable. The
22 only playable copy is the one locked down to a single hard
23 drive, which can then be shared among five registered devices,
24 presumably the same family from one single hard drive that must
25 be shared, in the PC Vegas version of this. That is the

1 product that has no appeal to rippers.

2 Moving on to CSS --

3 **THE COURT:** Can that copy be played -- or any of the
4 copies that are made, be played on other Real DVD players other
5 than in this family of -- of players?

6 **MR. SCOTT:** My understanding, to be confirmed by the
7 witnesses, is that in the Vegas product, which is not the hard
8 box but is the software, it is locked down to a single hard
9 drive, which could be internal to that machine or an external
10 drive.

11 In that machine are up to five ckck that are
12 registered to play from that one hard drive. If they have that
13 one hard drive, can play it. The family's home theater, the
14 kids' computer in their bedroom, or taking it on a vacation
15 with the family.

16 If it were somebody outside family, that's possible
17 too, but that's not the intention. It must be played from that
18 one shared hard drive.

19 **THE COURT:** It's not a question of intention, it's
20 what can happen. Right? So what I'm asking is, can other
21 persons who have RealDVD players -- you know, your next-door
22 neighbor or the person down the street -- can they play a copy
23 that's been made on your RealDVD player?

24 **MR. SCOTT:** If they had my hard drive, and they are
25 one of the five registered computers. It could be somebody --

1 somebody next-door instead of in the family, is my
2 understanding. But it must be that hard drive, and they must
3 be registered, up to five. Which is the same feature I
4 understand the studios are offering on their digital copy,
5 playing on five, five devices.

6 Now, on CSS, Mr. Steer's comments, there's an issue
7 about -- first, the issue whether CSS prohibits all copying,
8 and secondly, whether we comply with the technical terms.

9 The most popular language for the Defendants in this
10 case is what Mr. Steer showed you, to prevent
11 digital-to-digital copying. I always have trouble with that
12 phrase, the digital-to-digital copying in a PC environment.

13 And what I'm going to show you in a moment from the
14 document that you had before you, Your Honor, is that that is
15 specifically explained in that specification as providing
16 security from non-CSS-licensed reception or interception.

17 And also in the evidence, though I won't spend time
18 this morning laying this out, there is nothing in the specs
19 that requires disc in the drive or disc in the tray while
20 playing. Not explicitly, nor by technological requirement.
21 Because, in fact, the CSS specifications say nothing pro or con
22 about whether a copy can be made by a licensed device to the
23 hard drive for storage.

24 On the screen now -- this needs to go to the
25 confidential version, Mr. Bowser. This is from the general

1 specifications.

2 Is this showing up?

3 **UNIDENTIFIED MAN:** Yes, it is.

4 (Off-the-Record discussion)

5 **MR. SCOTT:** Your Honor, you were looking at this a
6 few moments ago with Counsel, where the numbered paragraphs
7 only were shown, reciting the objectives of CSS, where the
8 first one is to make them playable only on devices subject to
9 the license terms. Secondly, to prevent digital-to-digital
10 copying in a personal computer environment.

11 These specifications are written by engineers for
12 engineers, for other engineers. And this document goes on to
13 state exactly how Objective (2) is to be implemented, to
14 explain what it means.

15 Going down two paragraphs, in support of Objective
16 (2), the bus authentication and bus encryption. Bus
17 authentication is to check the validity of the recipient before
18 sending the data, to make sure it's CSS-licensed.

19 Bus encryption is to prevent unauthorized
20 interception after the authentication occurs. Don't send it to
21 unlicensed people, don't let unlicensed people intercept it.

22 These specifications, when they talk about copying,
23 the engineers talking to each other about how to implement it,
24 are about not having interception of the data by unauthorized
25 people. Has nothing do with whether or not the CSS licensee

1 within this circle of licensed people can copy down to hard
2 drive, and lock in a copy in that fashion.

3 They don't say you can; they don't say you can't.
4 Because that's not what these specs are about. They're about
5 the DVD data and keys not getting into the hands of unlicensed
6 people. That's what they're about.

7 But in fact, those general specifications -- we can
8 go back on the regular screen, Mr. Bowser.

9 General specifications are not the ones that really
10 deal with copy protection. You have seen what they do -- what
11 they say when they do talk about it. It is -- the general
12 specifications are part of the group below the dotted line that
13 came to RealNetworks after it signed the license.

14 The ones that talk about copy protection are the
15 procedural specifications, which are part of the package that
16 we got before signing. And there, in the procedural
17 specifications, they go through in detail exactly what the DVD
18 CCA is saying should be done about copy protection. What the
19 concerns are, and what the solutions.

20 In particular, on the screen here right now, from the
21 procedural specs, Section 1.8 goes to the copy protection
22 functions that are expected of a licensee. And just by
23 illustration, everything in Section 1.8 has an implementing
24 paragraph.

25 For example, regional playback control has an

1 implementing paragraph I've highlighted there. 6.2.1.4. I'm
2 not going through content now, Your Honor, but to illustrate
3 the way these are put together.

4 **THE COURT:** Uh-huh.

5 **MR. SCOTT:** Recordable media playback control, the
6 next concern, has an implementing paragraph as to what that's
7 that is about. Don't write them down to playable DVD's. And
8 so on, right through that paragraph, a lengthy section, 6.2,
9 implementing all the concerns about copy protection that are in
10 the CSS.

11 So, CSS does deal with copy protection, and tells
12 exactly what it's concerned about, and exactly how to implement
13 it. And nothing in the CSS system has to do with making copies
14 to hard drive. It's about keeping it away from unlicensed
15 people. By sending it to them erroneously, or interception.

16 CSS as protective technology, do we comply? And, we
17 will show you, although I won't detail it today, that we comply
18 fully with the CSS as it is written.

19 There's one overarching fact, though, Counsel have
20 not mentioned, Counsel for Defendants. Which is that as soon
21 as RealNetworks' device retrieves RealNetworks CSS-protected
22 data, the keys or the data, it encrypts it further immediately
23 in the authenticator module with AES 128 government-approved
24 encryption for classified information. This happens
25 immediately.

1 We also put on the CSS encryption, the bus
2 encryption, because it's required. And we take it off when
3 it's required to be taken off. But throughout the whole
4 process, we put AES on it. And it stays on that data as long
5 as it's in Real's possession in that device.

6 Now, AES -- we know CSS was broken ten years ago.
7 AES is an encryption approved by the government that -- I say
8 this not metaphorically, but mathematically -- is like 30
9 septillion times harder to break than CSS, based upon the
10 permutations that are involved in that code. It's never been
11 broken. Breaking it is a hypothetical, but it's never been
12 broken.

13 And this is why this case is not about security of
14 the DVD, as Mr. Cunningham said. Because the safest time in
15 the life of a DVD movie is when it's in the hands of RealDVD.
16 Its most vulnerable time is when the cellophane wrapper is
17 taken off of that, when it's protected only by CSS. And that's
18 the reality. The case is not about security. And I think --
19 it's not about security.

20 The situation about ARccOS and RipGuard, the question
21 of whether or not Real DVD circumvents an effective
22 technological measure by the means it takes to respond to
23 ARccOS and RipGuard, there's that question.

24 And I want to say this to orient the Court to the
25 evidence you will hear. You are aware already, we have two

1 different kinds of devices. They handle ARccOS and RipGuard,
2 they handle errors in completely different ways.

3 The hard box Facet was designed first, by a different
4 design team -- they had different design teams -- and they
5 wrote their source code first, and from scratch.

6 And the copy function, when a consumer presses "Save"
7 in Facet, the software will just go through to save everything,
8 regardless of errors.

9 If it hits a hitch, if it runs into something,
10 whether it's a scratch, or something else, or an
11 intentionally-put-in problem, it will stop cold. It doesn't go
12 around anything. It stops cold, it throws out the partial
13 copy, and then it implements the save by walking through the
14 DVD playable sectors according to the DVD specifications of
15 which we are a licensee. And it never, ever encounters ARccOS
16 and RipGuard in doing that.

17 Facet does not circumvent anything. Vegas was --
18 called RealDVD in many of the documents -- does it differently.
19 In that design process, a different team was writing code
20 around an existing piece of software from a vendor.

21 And when they did that, the approach they took to
22 responding to errors, be they ARccOS or scratches, was to skip
23 over that cell. And they -- they do that, they did it knowing
24 ARccOS was the there. They do it the same way for
25 unintentional errors, like scratches, or for intentional ones.

1 The question on Vegas is different. Facet does not
2 circumvent anything. On Vegas, the question will be, is that
3 circumvention of an effective technological meaning --
4 technological measure within the meaning of the DMCA. Where,
5 where in fact Vegas or RealDVD could have been and could be
6 rewritten to do it the same way that Facet does, which is just
7 to implement the DVD playback protocol, just copy the playable
8 sectors, and never, ever encounter ARccOS and RipGuard.

9 And this is perhaps why these technologies, ARccOS
10 and RipGuard, are very little used by the studios. And as far
11 as I can tell, the studios don't take it seriously anywhere,
12 except as an argument to make to this Court in this lawsuit.

13 Finally, on irreparable harm -- I'm running a little
14 over our time, Your Honor. I am appreciate your indulgence. I
15 will be done in two minutes, with your indulgence.

16 On irreparable harm, the evidence will not show that
17 Real causes an attitude shift as the studios allege, because
18 it's the evidence, in fact, that the consumer already believes
19 he or she has a right to make a backup fair-use copy. We're
20 not changing any attitudes about that; there's no evidence of
21 that.

22 It's not about RealDVD harming the studios by
23 reducing their security. We enhance their security, of the
24 DVDs. It's not even about the studios believing that they can
25 stop the promulgation of technology, to manage these in-home

1 DVDs and have backup copies. It's about who will do it, as
2 Your Honor realizes, I believe.

3 We actually enhance the value of copyrights on the
4 original DVD, as sold. It's the question of who's providing
5 this non-copyrighted service of creating a safe backup,
6 managing it, parental controls, and portability. And whether
7 or not the studios have a legal right to do that without
8 competition.

9 And in that sense, the stakes in the hearing are
10 high. We have been enjoying, for six months -- they are
11 running out their products, trying to close the window on us
12 commercially as fast as they can. And, grant our preliminary
13 injunction will be the death knell of our product. Denial, we
14 would hope, would open the market to competition.

15 Thank you, Your Honor.

16 **THE COURT:** Thank you. Now, ready to call your first
17 witness? I guess we have enough changeability here of court
18 reporters so that we can proceed.

19 Okay. Yes.

20 **MR. SINGLA:** Your Honor, while we are waiting for
21 Ms. King, I would like to raise two logistical issues, if I
22 may, with the Court.

23 **THE COURT:** Yes.

24 **MR. SINGLA:** The first is we have agreed -- the Court
25 had asked about witness lists a few weeks back. And we have an

1 agreement with RealNetworks, they are going to provide us
2 Sunday morning a list of all of their witnesses, in appearance
3 order. First item.

4 The second is with respect to exhibits. I notice the
5 Court asked during opening about exhibit numbers.

6 **THE COURT:** Uh-huh.

7 **MR. SINGLA:** And we were trying, the parties, to
8 decide how to deal with this. This is an unusual situation,
9 since it's not a formal trial.

10 Our thought had been, because there are many
11 documents submitted to the Court in stacks and stacks of
12 documents, certainly less will be used here at the hearing, and
13 also there will be some documents at the hearing that I think
14 were not submitted as part of the preliminary injunction
15 papers, to use the numbering system used in the depositions,
16 Deposition Exhibit Such-and-such, and at the end, provide the
17 Court with a stack of those.

18 Or even when the witnesses get on the stand, to
19 provide the Court a binder with the documents the witness would
20 be referring to. Would that be acceptable? Does that make
21 sense?

22 **THE COURT:** Only as long as we can have them
23 essentially in one location at some point.

24 **MR. SINGLA:** Yes.

25 **THE COURT:** In other words, not having, you know,

1 bits and pieces, so we have to look for one deposition with one
2 exhibit, and then another deposition for another exhibit and so
3 forth.

4 You can just renumber them as Trial 1, 2, 3,
5 et cetera, too, T1, T whatever, so that we know what they are.

6 **MR. SINGLA:** What we would suggest, Your Honor, is we
7 use the same exhibit numbers during all of our depositions that
8 we took. So, Exhibit 50 is Exhibit 50 in every one of the
9 depositions.

10 **THE COURT:** I see.

11 **MR. SINGLA:** So we thought that would make it easy
12 for the Court if here we refer to it as Exhibit 50. At the
13 end, we could give the Court a binder or a stack of all those
14 exhibits referred to, with the numbers. And you can refer back
15 in the depositions, they've the same numbers.

16 **THE COURT:** And then what I would do with respect to
17 those, then, is just for the -- the purposes of the Record
18 here, is to -- those that are admitted into evidence would be
19 indicated as Trial Exhibit with T or something.

20 **MR. SINGLA:** Okay, certainly.

21 **THE COURT:** That doesn't mean, then, that because we
22 have admitted a T50 that we necessarily have a 49.

23 **MR. SINGLA:** Certainly, Your Honor.

24 **THE COURT:** We understand that that may be an exhibit
25 that does not come in as a Trial Exhibit, but at least we will

1 be able to tell what came in at trial.

2 **MR. SINGLA:** That's a very good idea.

3 **THE COURT:** Okay?

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

5 **THE COURT:** Now, are we going to number them both,
6 whether they're your exhibits or Real's exhibits?

7 **MR. SINGLA:** Our numbers go to about 700, from 1 to
8 about 700. So Real could number them however it wishes.

9 **MR. CUNNINGHAM:** Yes, and I suspect that the bulk of
10 our documentary exhibits are going to come out of what is
11 already submitted, and we numbered our preliminary injunction
12 submission exhibits sequentially.

13 So, we have two issues here. We have the labeling
14 for clarity, and then we have the availability. I think we can
15 work this all out. I understand the Court's concerns.

16 **THE COURT:** As long as we have them available. But
17 also, at the end of the day, for the Record, then we have what
18 is clearly Trial Exhibits and were admitted only at trial, and
19 were not just used in depositions. Or whatever. Other
20 purposes that may have been raised.

21 **MR. CUNNINGHAM:** Yes.

22 **THE COURT:** I'm saying "trial," I'm talking about the
23 preliminary injunction. But we know what we are talking about,
24 right?

25 **MR. CUNNINGHAM:** Yes.

1 **THE COURT:** All right. Now, what in fact is your
2 order of witnesses today?

3 **MR. SINGLA:** Your Honor, the order of witnesses for
4 the Defendants is Ms. Marsha King, and then Dr. Kelly. DVD CCA
5 will be presenting Mr. Kelly.

6 Then we have a video we would like to present from
7 Ms. Nicole Hamilton, who is an employee of RealNetworks. Our
8 portion of that video is about 25 minutes. RealNetworks asked
9 us to include about 20 minutes of material, so we have included
10 that in our video.

11 **THE COURT:** Are you intending to play it here or just
12 give it to me, and I can --

13 **MR. SINGLA:** We could just give it to Your Honor on
14 DVD. We are happy do that.

15 The testimony of Ms. Hamilton I think directly
16 addresses a lot of the issues that were raised in opening
17 statements, so we think it is -- it would be very helpful and
18 interesting for the Court to see how a former Real engineer
19 explains exactly what was going on inside RealNetworks. If the
20 Court does not want to take up time, we can provide a DVD, if
21 that's better.

22 After Ms. Hamilton, we have Mr. Schumann, an expert
23 for the Studio Defendants. And the final witness from the
24 studio perspective, putting aside any depositions or video,
25 final live witness, is Mr. Hollar. H-O-L-L-A-R.

1 **THE COURT:** A-R?

2 **MR. SINGLA:** A-R. Yes, Your Honor.

3 **THE COURT:** Okay. Then we can get started with
4 Ms. King?

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

6 Your Honor, we call Ms. Marsha King to the stand.
7 She just came into the courtroom.

8 **THE COURT:** Yes.

9 (Witness placed under oath)

10 **THE CLERK:** Please state your full name, and spell
11 your last name.

12 **THE WITNESS:** Marsha K. King, K-I-N-G.

13 (Short off-the-Record discussion)

14 **MARSHA K. KING,**

15 called as a witness for the Defendants herein, having been
16 first duly sworn, was examined and testified as follows:

17 **DIRECT EXAMINATION**

18 **BY MR. WILLIAMS:**

19 Q Good morning, Ms. King.

20 A Good morning.

21 Q Please describe for the Court a little bit about your
22 background after college.

23 A I graduated from USC, with a BA. I did my master's at USC
24 in special education. And then I received my law degree in
25 1984 from Harvard Law School.

1 Q What did you do after you took the bar exam?

2 A After I took the bar exam, I was employed as an associate
3 as Rosenfeld, Meyer & Susman in Beverly Hills from 1984 to
4 1987. Then from 1987 to 1990, I was at Twentieth Century Fox
5 Film Corporation as counsel, and then senior counsel.

6 Then in 1990 all the way to 2006, I was at Warner
7 Brothers, in a variety of capacities. Starting out as the
8 general counsel of the video division, and ending up as the
9 executive vice-president and general manager of the video
10 division.

11 And then from 2006 to 2007, I was executive
12 vice-president, worldwide business affairs, for Paramount
13 Pictures.

14 Q During your career at Warners, were you involved in the
15 development of the DVD?

16 A Yes.

17 Q How were you involved?

18 A From my arrival, my first meeting with my boss, Warren
19 Lieberfarb, who is known as the godfather of DVD, he told me he
20 wanted to put a movie on a CD, and that he wanted me to be
21 involved in all the legal and business aspects of going about
22 doing that. So it started, my first week on the job.

23 Q And your job at that time, just to repeat where we were in
24 your career, when you first were there at Warner, having this
25 meeting with Mr. Lieberfarb?

1 A I was the general counsel of the video group.

2 THE COURT: And that was what year?

3 THE WITNESS: 1990.

4 BY MR. WILLIAMS:

5 Q When you want to work for Warners, what were your
6 responsibilities with respect to this new DVD format?

7 A I was responsible for all the agreements we entered into
8 with consumer electronics companies to develop the format. And
9 everything that had to do with DVD that had a legal or
10 negotiating aspect, I was brought in.

11 Q Were there any particular legal issues related to DVDs
12 that were important at the time, to the studio, to Warner?

13 A Any legal issues that were important --

14 Q Yes.

15 A Well, first of all, there were lots of legal issues that
16 were important, because we were one of the creators of the
17 format. So, Time Warner's position in all the groups that
18 developed the format was important, whether we had patents or
19 whether we had copyrights.

20 And the other important aspect of -- from a legal
21 standpoint was the protection of our copyrights in a new
22 format.

23 Q Did you have discussions with Mr. Lieberfarb regarding
24 copy protection?

25 A I did.

1 Q And what was the -- putting aside those conversations,
2 just generally speaking, from a high level, what was copy
3 protection about from the studio's standpoint, specifically
4 Warner?

5 A It was about protecting our content in that -- securing
6 our content in the digital domain. Because digital copies are
7 perfect. Analog copies deteriorate, we had certain protections
8 for video cassettes, but digital copies are absolutely perfect,
9 and we needed some protections if we were going to go on to a
10 new digital format.

11 Q Why does the fact that those copies were perfect, as
12 opposed to VHS copies, a greater concern?

13 A Well, they never deteriorate. So, if you have a copy of a
14 movie, first of all, that we had anti-copying devices like
15 Macrovision was one of them, that would deteriorate the copy.

16 But even if there was no Macrovision, if you go tape to
17 tape to tape, they get worse each time. And they deteriorate.
18 Whereas, a copy in digital media is perfect, all through the
19 342nd generation.

20 Q Did Warner make a decision, one way or the other, about
21 whether it would release its movies on DVDs without an
22 acceptable form of copy protection?

23 A Yes. It decided it would not release its movies on DVD
24 until we had acceptable copy protection, which was -- which
25 they decided early on.

1 Q And during this time period, were you in discussions with
2 other motion picture studios, other industry personnel,
3 regarding their position on whether DVDs would be released to
4 the market without copy protection?

5 A From around 1995 when the format was accepted, and was one
6 format -- there has been a format war, and it resolved about
7 1995 -- the other studios became very involved in deciding if
8 they were going to put product out on DVD or not.

9 And a fundamental, absolute fundamental rule was they
10 wanted no perfect copies, no copies at all of their product
11 made, if they were going to put their product onto the DVD
12 disc.

13 Q Let me ask you to focus your attention on approximately
14 1995. Do you have that time frame in mind?

15 A Yes.

16 Q Can you explain to the Court how the copy protection
17 effort of Warner and the other studios and other stakeholders
18 in the area evolved?

19 A First, the studios were contacted by an organization
20 called the Consumer Electronics Manufacturing Association,
21 called CEMA. And these were the consumer electronics
22 manufacturers. You've heard their names, Sony, Matsushita,
23 Toshiba, Philips, Thompson, the big -- the big makers of what
24 was VHS cassettes, that would then become DVD players.

25 And they came to us to offer them -- to offer the studios

1 an idea of copy protection with a similar protection to what
2 they have on CDs. We at Warner, and other studios, including
3 Disney, said "Wait a minute, this is going -- this new DVD is
4 going to be -- this new -- new disc is going to be playable
5 also on computers. So, where's the computer industry here?"

6 And so, we reached out at that time to the computer
7 industry. And representatives from many companies in the
8 computer industry then came and joined us in discussing how to
9 protect our property.

10 And, these are the major computer companies, you know,
11 like Microsoft, IBM, Apple. Any -- anyone could come to our
12 meetings, but they were all -- all the major players were
13 there.

14 Q Let me stop you for a second.

15 Are you familiar with the Copy Protection Technical
16 Working Group?

17 A I am.

18 Q What is that group?

19 A That group was formed once the computer industry came in
20 with their very strong opinions about what they thought could
21 be done to their computers, in order to help us protect our
22 copyright works. And we formed the Copy Protection Technical
23 Working Group in around '95.

24 And, it was an open group. In other words, anybody could
25 come to be part of -- it's sort of a standard-setting group.

1 And it had in it the Motion Picture Association of America; the
2 Recording Industry Association; CEMA; the computer companies;
3 the Recording Rights Coalition, which represented consumers,
4 all came to the meetings to decide how we could protect in the
5 new media.

6 Q Were you personally involved or present during those CPTWG
7 meetings? I'll call them the working group meetings.

8 A Okay. Yes, I was. I was there with what I called my
9 partner at the time from Warner Brothers, a gentleman by the
10 name of Chris Cookson.

11 Q Approximately how many working group meetings would you
12 estimate you attended after 1995?

13 A I don't know. Twenty, 30.

14 Q And, were -- I take it there were -- were there any other
15 discussions outside of the big formal meetings, amongst the
16 members of the working group?

17 A There were discussions all the time. The motion picture
18 companies met separately to discuss what was being proposed,
19 what technologies were being proposed to protect their product.

20 I met, myself, individually with computer companies, with
21 consumer electronics companies, because to get what became the
22 three-pronged approach to our protection meant that you were
23 constantly negotiating and talking to everyone, so you had all
24 the information.

25 Q Let me ask you about that three-pronged approach in a

1 moment.

2 But first, over what period of months or years did the
3 Copy Protection Technical Working Group meet?

4 A I'm not exactly sure of the dates, but it met through '96.
5 '95 and '96, is to the best of my recollection.

6 Q You mentioned that there was a three-pronged approach that
7 was ultimately developed. Can you describe what that -- what
8 you are referring to there?

9 A In order to get real protection in the digital domain,
10 first we needed technological protection. And, the three
11 different industries proposed an encryption or a scrambling of
12 the picture.

13 Then, to enforce the technological protection, we had a --
14 we would have licensing, where the owners of the technological
15 protection would license it to anyone who wanted to make DVD
16 players, DVD drives, DVD discs.

17 And then those people that got the information of how to
18 unlock the encryption to make it so that you could see it,
19 they'd follow by all the rules that were contained in that
20 license agreement.

21 And the third step was, out there in the real world there
22 are people that don't come to you for licenses, and may want to
23 hack your movies. In other words, break into the encryption,
24 just ruin it, rip it, whatever.

25 And for them, we proposed legislation that would make

1 circumventing our encryption against the law.

2 Q Let me take you back to the first leg of that stool, about
3 some of the technology.

4 Were there discussions in the working group phrase, about
5 encryption systems? The types of encryption systems that could
6 be used?

7 A Yes.

8 Q What kind of conversations or issues were raised by the
9 computer companies in response to the request that computers
10 have copy protections for DVDs?

11 A Well, at the very beginning, when the consumer electronics
12 companies were proposing a one-bit CD-like protection, the
13 computer industry said no, no, no, no, because it would have
14 meant, to recognize the one bit, that they would have had to
15 change the architecture on all their computers, whether the
16 computer was playing a DVD or whether the computer was a
17 medical imaging system.

18 And so, we then sat down to talk about what type of
19 encryption could they have that wouldn't disable computers that
20 were not involved with the entertainment product, and we came
21 up with the idea of an encryption system that you could opt in
22 or opt out.

23 So a computer manufacturer, if they wanted to make their
24 drives so that the consumer could watch a movie on their PC,
25 they could get a license and get the keys to decrypt it so that

1 it could be seen on the computer monitor, but if they wanted to
2 use -- make a medical imaging system that had nothing to do
3 with us, they wouldn't have to change anything.

4 Q Are you familiar -- strike that.

5 Through your work with the working group that included the
6 computer companies and IT companies, did you become familiar
7 with the term "buffering" as it relates to DVDs?

8 A I did.

9 Q How did you become familiar with it?

10 A I became familiar with it because the studios were very
11 adamant about no copies. And we were sitting with a lot of
12 computer industry attorneys who said "There's a little problem
13 with saying 'no copies,' because when you put a picture up on a
14 computer monitor" -- and I'm not a technologist, so excuse me
15 for being broad.

16 But when you put it up, there's something called buffering
17 or caching, where it's temporarily copied. But it's not a
18 persistent, sustainable copy, it's just there for a second.

19 So there was an exception made in the license agreement so
20 we weren't pulling in honest computer manufacturers for caching
21 or buffering.

22 Q Let me turn to the -- well, still on that first layer or
23 part of the stool, with respect to the protections, was there
24 ultimately some type of protection that was agreed upon by the
25 members of the working group?

1 A Yes.

2 Q What was that?

3 A It was called The Content Scramble System, or CSS.

4 Q And what was the intention behind that system?

5 A Well, the intention behind that system was to make it
6 difficult for a person to undo the encryption and make copies
7 of copyrighted works.

8 However, there were a lot of considerations that went into
9 what type of encryption we could use. For example, there were
10 government rules on the level of encryption, there were cost
11 factors for both the consumer electronics companies and the
12 computer companies. There were how robust the studios wanted
13 it.

14 So we came up with the idea that -- what I understood, and
15 I went to a lot of the technology meetings, along with Chris
16 Cookson, coming to a lot of the policy and legal meetings, was
17 that we wanted to keep honest people honest.

18 We knew that the graduate student at Berkeley that had
19 unlimited processing capability probably could hack any type of
20 encryption, but we wanted to keep the regular consumer away
21 from doing that.

22 **MR. SCOTT:** Your Honor, I hesitate to interrupt.

23 **THE COURT:** Yes.

24 **MR. SCOTT:** I would just like clarity to who "we" is
25 so we can differentiate knowledge from hearsay. Just that last

1 answer --

2 **THE COURT:** I think in terms of using "we," let's
3 finds out who we are talking about.

4 **MR. WILLIAMS:** Sure.

5 **BY MR. WILLIAMS:**

6 Q When you say "we" in reference to the discussions
7 regarding the level of encryption, to whom are you referring?

8 A I'm referring to the Copy Protection Technical Working
9 Group, which means the multiple industries. I mean, when you
10 put together all their interests -- and the interests were
11 different.

12 I mean, the manufacturers, whether they are computer
13 manufacturers or hardware manufacturers, they were interested
14 in cost. And time to get to market. The studios were
15 interested in "We don't want copies made of our product,
16 period, end of story. We want it as robust as we can get it."

17 And so, there were compromises made. And so, the "we" was
18 the groups working together, on that answer.

19 Q Let me move to the second prong or second leg of the
20 stool.

21 You mentioned the desire to get a license or develop a
22 license. How did that come about -- let me lay some
23 foundation.

24 Were you involved in the process of developing the
25 ultimate license that was developed to relate to these

1 protections?

2 A Yes.

3 Q How were you involved?

4 A There were members from each studio, and both legal
5 members from each studio, attorneys, and also technological
6 members from each studio that participated. As well as
7 representatives from the other industries, the computer
8 industry, and the consumer electronics industry.

9 And we decided as we got very close to accepting the
10 Content Scramble System, which was originally owned by
11 Matsushita and Toshiba, that we would sit down and work out a
12 license that would be acceptable to all the parties involved.

13 Q Did you personally participate in the negotiation of that
14 license?

15 A I did.

16 Q Let me more for now, I'll show it to you in a minute. But
17 let me for now move on to the third leg. That is the legal
18 protection.

19 Did you have involvement in that development?

20 A I did.

21 Q What was your involvement there?

22 A I worked with our representatives that were working in
23 Washington to propose legislation to protect against
24 circumvention of our product through perhaps hacking,
25 anti-circumvention legislation.

1 A gentleman by the name of Art Sackler at Time Warner, and
2 a gentleman by the name of Dean Marks, who was also with Time
3 Warner at the time.

4 Q What legislation ultimately resulted, if any, from those
5 efforts?

6 A The Digital Millennium Copyright Act.

7 Q Do you know when that act was passed?

8 A I think it was passed in 1998.

9 **MR. WILLIAMS:** Your Honor, I would like to show the
10 witness, if I may, what we have marked as Hearing Exhibit
11 No. 1. And I have an extra copy for the Court.

12 **THE COURT:** Yes.

13 **BY MR. WILLIAMS:**

14 Q Ms. King, I've handed you a multi-page document that's
15 been marked Hearing Exhibit No. 1. It's called, bears a
16 heading, "Amended and Restated CSS Interim License Agreement."

17 Are you familiar with this document?

18 A Yes, I am.

19 Q How are you familiar with it?

20 A I was involved in many, many meetings to negotiate this
21 agreement. I wasn't the only one from Warner, but I was
22 involved.

23 Q Who else was involved from other studios? Not by name,
24 but could you list the studios and other participants who were
25 involved in negotiating this?

1 A Well, the studios were the major motion picture studios.
2 Sony, Twentieth Century Fox, Disney, Universal. Who am I
3 leaving out? MGM.

4 Q Is it fair to say that all of the major motion picture
5 studios were involved in those negotiations?

6 A Yes. And the MPAA was involved. Plus outside counsel.

7 Q Are you familiar with the terms of this license?

8 A Yes, generally.

9 Q What do you mean by "generally"?

10 A It's been a long time.

11 Q Just, can you describe the level of your understanding of
12 the terms of this license? Let me put it --

13 A I understand it very well. I spent a tremendous amount of
14 my time working on this document.

15 Q And again, which years would this have covered, your
16 involvement in working on the document?

17 A '96 to '97.

18 **MR. WILLIAMS:** Your Honor, we would offer Hearing
19 Exhibit 1.

20 **MR. SCOTT:** No objection.

21 **THE COURT:** Exhibit 1 is admitted.

22 (Exhibit 1 received in evidence)

23 **THE COURT:** There's no objection, as I understand?

24 **MR. SCOTT:** No objection, right.

25 **THE COURT:** And this is your witness, correct? Well,

1 for exam -- cross-examination?

2 **MR. SCOTT:** Yes, it is.

3 **THE COURT:** Okay. Because, no double-teaming. I
4 didn't tell you the rule, did I, that if you object it's your
5 witness whether you planned on that or not.

6 So, if Mr. Cunningham had jumped up, he would be in
7 trouble then.

8 **MR. SCOTT:** Thank you, Your Honor.

9 **THE COURT:** Okay, that's fine. I know he -- it's his
10 witness in terms of calling. But I think you're going into the
11 substance of the agreement.

12 **MR. WILLIAMS:** I am, Your Honor.

13 **THE COURT:** Who else -- you got information regarding
14 major motion picture companies. But who else was involved in
15 negotiating the agreement?

16 Were there other parties, for example, from the
17 computer and electronics?

18 **THE WITNESS:** Yes. The consumer electronics industry
19 was represented in negotiating this agreement. Matsushita and
20 Toshiba especially, because they owned the underlying
21 intellectual property for the Content Scrambling System.

22 But the other consumer electronics companies were
23 there, too. Philips, other ones that were interested. Also,
24 the computer companies were -- were very vital there too,
25 Intel, Microsoft, IBM, and anyone who wanted to participate in

1 a strong basis.

2 And they were represented -- each industry was also
3 represented by their industry group, like the MPAA and the
4 BSA -- and I don't know what BSA stands for, but it's the
5 computer industry. And the CEMA group, and their outside
6 counsel.

7 **THE COURT:** This would include computer software and
8 hardware manufacturers?

9 **THE WITNESS:** Yes.

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

11 **BY MR. WILLIAMS:**

12 Q Let me ask you to look at Recital A on first page of the
13 document.

14 Actually, before I do that, you see at the top there that
15 it's an agreement that is made and entered into as of -- and
16 there's a blank for the date?

17 A Uh-huh.

18 Q And then it says "by and between," and it lists Matsushita
19 Electric Industrial Company, LTD?

20 A Uh-huh.

21 Q Do you see that?

22 A Yes.

23 Q Why is that -- why is Matsushita listed there?

24 A I think Toshiba assigned, however they did it, their part
25 of owning the intellectual property for purposes of entering

1 the license agreement to Matsushita, and Matsushita was going
2 to handle the licensing until a copy protection group that
3 represented all the industries that were involved could be put
4 together.

5 And, so, Matsushita was the original. They owned the
6 intellectual property, so they were the original licensor for
7 the interim license.

8 Q And do you see there that the other party to this contract
9 is left blank?

10 A Yes.

11 Q Why is that? Is this a model of some kind?

12 A Because, because this is a model of the contract that
13 would be used, whether it was signed by a computer company or
14 by a -- a motion picture studio, or by a replicator, which are
15 the people who put the movies on the disc replicator.

16 Q Let me refer you now to Recital A, which says (As read):

17 "MEI and Toshiba have developed a
18 Content Scramble System, as defined below,
19 to provide reasonable security to the
20 contents of DVD discs, and thereby provide
21 protection for copyrighted content against
22 unauthorized consumer copying."

23 And it goes on. Do you see that?

24 A Yes, I do.

25 Q What was the reason for that provision?

1 A The reason for that provision, and the reason it's first,
2 is -- the main reason for all of this was for copy protection.
3 So in other words, it was only what the copyright owners
4 authorized that could be done, according to this agreement.

5 And the only thing we authorized when we did the agreement
6 was no copies. You're able to play the disc on either a
7 monitor or a TV, but you cannot make copies of it.

8 Q And why was the word "unauthorized" included here?

9 A Well, it was --

10 **MR. SCOTT:** Objection, Your Honor. First of all,
11 that question is calling for speculation, why something was
12 included. There's no foundation for that.

13 And we're talking about interim agreements. I think
14 this should be made clear in this line of questioning.

15 **THE COURT:** Well, if this is -- is this a term that
16 ends up in the final agreement, that's relevant here? Yes. I
17 mean, it's a term that's in final agreement as well.

18 And I think, given her testimony -- you can go into
19 it on cross-examination. But given her testimony about her
20 involvement in the development of this, I think she certainly
21 can testify to it.

22 **MR. SCOTT:** The interim.

23 **THE COURT:** Yes, yes.

24 **MR. SCOTT:** Okay.

25

1 **BY MR. WILLIAMS:**

2 Q First of all, Ms. King, were you involved in the
3 negotiation of the final interim agreement?

4 In other words, was there a final version of the interim
5 agreement?

6 **THE COURT:** That's sort of inconsistent, with "final
7 interim."

8 **BY MR. WILLIAMS:**

9 Q Well, my question to you is, did the parties come to rest
10 on what the form of agreement would be with respect to the CSS
11 license?

12 A Yes. Can I explain?

13 This was called the interim agreement because the parties
14 contemplated forming the DVD Copy Control Association, which
15 was formed in due time.

16 But in the meantime, as an interim step -- that's why it's
17 called the interim license agreement -- Matsushita stepped up
18 and said that they would handle the licensing.

19 The agreement was heavily, heavily, heavily negotiated.
20 When I say a lot of meetings, you can imagine, with all those
21 different industries and parties negotiating, this wasn't an
22 easy agreement to come up with.

23 The final agreement which was brought into play by the DVD
24 CCA -- are you calling that something shorter? I don't know --
25 DVD CCA is very similar to this. And in all the major points,

1 including this recital (Indicating), is essentially the same.

2 Q Okay. So, let's keep our focus on this one, then. We
3 will get to that agreement from the DVD CCA later.

4 But with respect to this agreement, did you personally
5 participate in the negotiations with respect to the inclusion
6 or non-inclusion of the word "unauthorized" --

7 A Yes.

8 Q -- before the word "copy"?

9 A Yes.

10 Q How did you participate in those discussions?

11 A Well, the wording is very important. And the -- there's a
12 couple of reasons why the word "authorized" or "unauthorized"
13 is in here.

14 First, there was already the Audio Home Recording Rights
15 Act, which was entered into in 1992, between -- which is
16 legislation that affects the music industry. And that
17 authorizes one copy of a CD, which is one copy of a digital
18 media. So you can -- you can take a CD, and you can put -- you
19 can make one copy onto a -- a cassette or a tape.

20 The studios wanted no part of that. So, they're
21 recognizing that you can authorize something, but if it's not
22 authorized in here, it's not authorized. So it's sort of
23 recognizing for the consumer electronics company that you can
24 authorize something.

25 There was also a forward-future thinking in the studios.

1 I mean, you have to go back to 1995. And they were thinking,
2 "Well, digital media is coming on board, they keep talking
3 about electronic distribution, which keeps coming every five
4 years but never seems to take off. We might at one point want
5 to authorize the making of a copy."

6 So, they used the word "authorize."

7 Q Was there any -- you have testified earlier about the
8 concept of buffering or caching. Do you recall that?

9 A Yes.

10 Q Was there any connection between those phrases and the
11 word "unauthorized" in those discussions?

12 A That's the third piece, is the caching. The caching was
13 specifically authorized somewhere in here. And so, that fell
14 as an exception to the "unauthorized." So, the word was used
15 in that context.

16 Q Did there ever come a time where Warner decided against
17 releasing movies on DVD because it felt it did not yet have
18 adequate protections from one or more of the legs of the stool?

19 A Warner, who had been one of the creators of DVD, wanted to
20 launch the product in 1995, because we -- we felt we had to
21 have copy protection.

22 We were delayed for over two years, making copy protection
23 happen. So, I was under great pressure to try to get this
24 done.

25 But all of the studios had said they wouldn't even think

1 about putting out their product, including Warner, until we had
2 copy protection.

3 Q How many legs of the stool were in place, the three legs,
4 before Warner actually started distributing DVDs?

5 A The technology for CSS was in place, you could get it.

6 One of Warner's sister companies, WEA Manufacturing, was one of
7 the developers of how to put the encryption on to a disc. So
8 we had that.

9 The amended and restated license agreement was done.
10 Although we hadn't quite signed it yet, it was done, and had
11 been fully negotiated.

12 However, the legislation was not in place yet, but Warner
13 felt that they had enough protection at that time to go ahead
14 and to launch in March of 1997. And just a year later, the
15 DMCA came into play.

16 Q Let me direct your attention in this document to Page 21
17 of the interim license agreement. And I'll ask you to look at
18 Section 9.2.

19 This is a section that's entitled Equitable Relief. Do
20 you see that?

21 A Yes.

22 Q Did you have any involvement in the negotiation of this
23 section of the license?

24 A Yes.

25 Q What was your involvement?

1 A I, along with the other motion picture studios, felt it
2 was very important to have the ability to get equitable relief.

3 Q Let me ask you, putting aside why you had it in there --
4 I'll get to that, but I just want to lay the foundation for
5 your level of involvement with respect to this section.

6 A Uh-huh.

7 Q What did you do in connection with this section?

8 A I was there in -- in negotiating this section, with all
9 the -- all the various industries that were negotiating it.

10 I wasn't a drafter. I just want to make that clear.
11 Bruce Turnbull from CEMA, who represented Matsushita, was the
12 primary drafter. And Jon Baumgarten represented the motion
13 picture companies, and was a secondary director.

14 So we were all there, but -- and we all gave comments, you
15 know. We all told everyone, "Oh, change this word," or "Do
16 this." But I wasn't a drafter.

17 Q Now, could you tell us, what was the reason for including
18 this portion of the agreement?

19 (Witness examines document)

20 A Warner and -- and since I worked for two of the other
21 motion picture companies, I can say this for them as well.

22 In the motion picture industry, if your product goes out
23 and is not stopped from going out immediately, and is copied,
24 you can lose a tremendous amount of the value of your
25 investment when it -- it gets transferred all over the world to

1 who knows how many people. So, you need to stop the
2 dissemination quickly.

3 And so, equitable relief gives you the ability to go in
4 and do that.

5 Q Let me direct your attention to about five, five lines
6 down. It's a really long sentence, but I'm going to pick it up
7 on the fifth line down.

8 There's a line that says "CSS" and then there's a comma.
9 And after it, it says (As read):

10 "In the event that licensee breaches its
11 obligations under Section 2.1, 2.3, 2.5, 4.2, 5 or 10
12 hereof, money damages alone will not adequately
13 compensate an injured party, including an injured
14 eligible licensee, pursuant to Section 9.4, and that
15 injury to such party will be irreparable."

16 And that's something which the licensee and MEI agree to
17 in the first line of the section, is that correct?

18 A Correct.

19 Q Were there other parties involved in the negotiations,
20 other than the movie studios to which you just referred, in
21 connection with this section?

22 That is, were the other stakeholders that you have
23 outlined -- the computer industry, the consumer electronics
24 industry -- were they participants in this discussion, as well?

25 A They were.

1 Q Finally, let me ask you to look at Section 9.4 --

2 A Yes.

3 Q -- which is listed as Third-party Beneficiary Rights. Do
4 you see that one?

5 A Yes.

6 Q About six or seven lines down, there's a sentence that
7 begins (As read):

8 "As part of the consideration of the licenses
9 granted herein, licensee, for itself and its
10 permitted sublicensees, hereby confers a third-party
11 beneficiary right upon certain CSS licensees that
12 fall into one of two classes."

13 And then the first class is content providers. Do you see
14 that?

15 A Yes.

16 Q Did you participate in the negotiation of this section
17 relating to third-party rights?

18 A Yes, I did.

19 Q What was your involvement in that discussion?

20 A I was there to make sure that a third-party beneficiary
21 right was given to the studios, because they didn't want any
22 organization to have to vote on whether to bring actions. They
23 wanted the right to go after any real damage that could occur
24 to their copyrighted works.

25 The studios felt very strongly about the need to be a

1 third-party beneficiary to this agreement.

2 Q Was there discussion at the level of the working group,
3 the Copy Protection Technical Working Group, about how the
4 studios might be harmed if someone were to copy their content?

5 A Yes, there was. I mean, there was constant discussion
6 about that. I mean, part of the reason it says, you know,
7 monetary damages will not be enough, is that it is just so
8 difficult to measure theft. And, and who has your product and
9 who doesn't have your product, and how well your product would
10 have done if it hadn't been stolen and distributed.

11 So, this was all made very clear. I remember a little
12 story, that I attended a technology meeting up at Microsoft at
13 the very beginning of the CPTWG, and the engineers were trying
14 to figure out what they could do to help the problems of the
15 motion picture companies. And they were talking about, well,
16 the reason -- the way we --

17 **MR. SCOTT:** Your Honor, this is a story from
18 Microsoft. I think it is hearsay.

19 **THE COURT:** Well, was this -- this was in the
20 context, though, of the working group.

21 Is that correct?

22 **THE WITNESS:** Yes, that's correct.

23 **THE COURT:** All right.

24 **THE WITNESS:** And they were talking about how they
25 upgrade their products, software products. Just happened to be

1 at Microsoft. I don't know if they did that.

2 And I -- I mentioned that that's great way to protect
3 computer software, but we can't do a Version 3.2 of *Gone With*
4 *the Wind*. And so, they began to understand that due to the
5 expense of a motion picture, and what it was -- you know, it's
6 a package, it's all put together, it's a creative, long film --
7 that we couldn't just upgrade it. That we would lose our
8 investment.

9 **BY MR. WILLIAMS:**

10 Q After you -- you indicated that you worked on these
11 licenses or the interim license between 1996 and 1997. Is that
12 correct?

13 A Yes, that's correct.

14 Q What was your involvement with respect to the Copy Control
15 Association, the DVD Copy Control Association, if any, after
16 1997?

17 A Well, my involvement in these particulars groups were
18 taking up so much of my time that I was pulled back to do some
19 of my other work.

20 And I -- a gentleman by the name of Dean Marks was much
21 more involved in putting together -- from the legal and policy
22 standpoint -- the DVD CCA.

23 Q And, to whom did Mr. Marks report?

24 A Hmm. At that time, I think he reported to the general
25 counsel of Time Warner. He's now a Warner Brothers attorney.

1 Q Uh-huh. Did you review the DVD CCA license that
2 ultimately was entered into, once the DVD CCA was established?

3 A In general I have reviewed it.

4 Q Did you review it at the time?

5 A No.

6 Q Have you reviewed it since?

7 A Yes.

8 Q When did you do that?

9 A Last night, I looked at some of the sections.

10 Q With respect to the sections that I've shown you, which,
11 for the Record, are the Recital A -- first of all -- I'll take
12 them one at a time.

13 With respect to the Recital A that appeared on the first
14 page of Exhibit No. 1, did you compare the interim license with
15 the DVD CCA license?

16 A I did.

17 Q What did you find?

18 A I found minor word changes, but generally, it was the
19 same.

20 Q How about the language that talks about providing
21 protection for copyrighted content against unauthorized
22 consumer copying?

23 A It's the same.

24 Q With respect to Paragraph 9.2 of the agreement?

25 A Yes.

1 Q Did you review that one, which is the section entitled
2 Equitable Relief?

3 A I did.

4 Q What did you find?

5 A I found, again with the exception of minor commas and
6 maybe changes in reference to paragraphs, that it's basically
7 the same.

8 Q And how about Section 9.4, the Third-party Beneficiary
9 Rights section?

10 A The numbering changed, I believe, to 9.5 in the new one.
11 But -- and I think there was an added paragraph that didn't
12 really change anything in here. Otherwise it was essentially
13 the same.

14 Q With respect to the reference to the two classes of
15 licensees including content providers who would have a right to
16 bring claims, did that change?

17 A No, it didn't.

18 **MR. WILLIAMS:** Your Honor, I would ask to place
19 before the witness what was Deposition Exhibit 7 to her
20 deposition, which is the CSS license agreement with
21 RealNetworks. May I do that?

22 **THE COURT:** Yes, okay.

23 **BY MR. WILLIAMS:**

24 Q Ms. King, is that the agreement that you reviewed and
25 compared to the interim license agreement that you negotiated?

1 A Yes.

2 **MR. WILLIAMS:** Your Honor, I would offer this hearing
3 exhibit as Exhibit No. 7 to Ms. King's deposition, either
4 through her, or we can get it in -- or we can get it in later,
5 but I would offer it.

6 **MR. SCOTT:** No objection.

7 **THE COURT:** I assume there's no objection to it
8 coming in, in any event. So it will be admitted, and then we
9 are going to figure out the numbering, I guess, on that.

10 **MR. WILLIAMS:** Right. Thank you, Your Honor.

11 (Exhibit 7 received in evidence)

12 (Off-the-Record discussion)

13 **BY MR. WILLIAMS:**

14 Q Ms. King, from the beginning of your involvement with the
15 working group up until the time that you had your last
16 involvement with that group, and these agreements, was there
17 ever a period of time when the movie studios, or Warner in
18 particular, authorized anyone to make a permanent playable copy
19 of content owned by the studios?

20 A No.

21 **MR. WILLIAMS:** No further questions, Your Honor.

22 **THE COURT:** Okay. And I gather from your testimony,
23 then, that the license agreement that we had before us that's a
24 license agreement with Real Networks, if you were to answer
25 with regard to Recital A and 9.2 and 9.5, your testimony with

1 regard to the final agreement would be the same. Is that --

2 **THE WITNESS:** That's correct.

3 **THE COURT:** Correct? Okay. I just want to be clear
4 on that. Thank you.

5 **MR. SCOTT:** Your Honor, this is my first time before
6 you in a trial. And, what is your preference for the lunch
7 hour?

8 **THE COURT:** I don't -- I don't have any set rule with
9 regard to that.

10 How long do you expect you're going to be with this
11 witness? That may tell us when we will take lunch.

12 **MR. SCOTT:** Well --

13 **THE COURT:** Or dinner.

14 **MR. SCOTT:** No, I would expect about 40, 45 minutes.

15 **THE COURT:** Okay. Why don't we do that.

16 **MR. SCOTT:** Do that now?

17 **THE COURT:** Proceed with your examination now.

18 **MR. SCOTT:** Thank you.

19 **CROSS EXAMINATION**

20 **BY MR. SCOTT:**

21 Q I guess it's good afternoon, Ms. King. This is the first
22 time we've met.

23 A Yes.

24 Q Nice to meet you.

25 A Nice to meet you, too.

1 Q Thank you for coming.

2 Just briefly, in terms of your career history in the
3 industry, as I heard you, you were with Warner Brothers and
4 then with Paramount, is that right?

5 A Yes.

6 Q And was there a time you were with Twentieth Century Fox,
7 also?

8 A Yes, before I went to Warner Brothers.

9 Q So your involvement, then, with the DVD product and
10 consumer electronics has been working for the major studios?

11 A That -- that's correct.

12 Q And you retired from Paramount in the fall of 2007, is
13 that right?

14 A At the end of October, 2007.

15 Q And since that time, have you been working with the
16 lawyers for the movie studios in this case?

17 **MR. WILLIAMS:** Objection; vague and ambiguous.

18 **THE COURT:** Objection is overruled. You may answer.

19 **THE WITNESS:** In respect to this case?

20 **BY MR. SCOTT:**

21 Q Yes, ma'am.

22 A Yes.

23 Q And in fact, that's been your only job outside the house
24 since you retired from Paramount in October of 2007, is that
25 right?

1 A I moved east because I became a new grandma.

2 Q Congratulations.

3 A For the first time. So --

4 Q Congratulations.

5 A I'm not working in the industry right now.

6 Q Other than working with the lawyers for the movie studios
7 in this case.

8 A That's correct.

9 Q And are you in fact being compensated for your time to
10 appear?

11 A I am.

12 Q For the work you've done with the lawyers, and for
13 appearance here?

14 A Yes.

15 Q At the rate of \$450 an hour?

16 A Yes.

17 Q And you're not appearing as an expert witness, are you?

18 A No, I'm not.

19 Q You are appearing as a fact witness.

20 A Yes.

21 Q Do you have an estimation of how much money you have
22 been -- you have received from the law firms for the movie
23 studios in connection with this case?

24 A Oh, I have a great estimation. Zero. I haven't been paid
25 yet.

1 Q Have you billed them yet?

2 A Yes, I did. But I know how long it takes the studios.

3 Q I'm sorry?

4 A I know how long it takes the studios.

5 Q How much was your bill?

6 A What -- gee. Less than 20,000. Maybe 16, \$17,000 so far.

7 Q Now, you've testified in response to Mr. Williams about
8 your work on the interim agreement for CSS.

9 Is it true that you did not participate in negotiating the
10 final agreement; it came afterwards?

11 A That's correct.

12 Q Uh-huh. And, until Mr. Williams showed you last night the
13 three portions he just questioned you about, is it true that
14 you had not reviewed the final CSS license agreement?

15 A That's correct.

16 Q Is it also correct that you have not reviewed the general
17 specifications that go along with the final CSS license
18 agreement?

19 A The final specifications?

20 Q The general specifications that go with the agreement,
21 yes, ma'am.

22 A Which agreement? The final agreement? Or the interim
23 agreement?

24 Q The final agreement. The one that RealNetworks signed.

25 A No, I haven't -- I consider that part of the agreement.

1 So, I have not reviewed it.

2 Q And, have you ever seen the procedural specifications that
3 go with the final CSS license agreement?

4 A No.

5 Q Have you reviewed any of the current technical
6 specifications that go along with the agreement?

7 A Aren't the technical specifications part of the procedural
8 and general specifications? I don't -- I don't think there's a
9 third piece.

10 Q Well, whatever they are, you've not reviewed of any of the
11 specifications, by whatever name, is that true?

12 A Yes.

13 Q We were looking -- I'm sorry, you were looking at the
14 interim agreement, with Mr. Williams.

15 **MR. SCOTT:** Am I correct this is called Hearing
16 No. 1, Mr. Williams?

17 **MR. WILLIAMS:** Yes, it is.

18 **MR. SCOTT:** Okay. The Defendant's Hearing Exhibit
19 No. 1.

20 **BY MR. SCOTT:**

21 Q And in the recitals, you discussed with him the reference
22 to "unauthorized consumer copying."

23 Does the interim agreement someplace in here define what
24 is meant by "unauthorized consumer copying"?

25 A I don't think so.

1 Q Does it define what's meant by "authorized consumer
2 copying"?

3 A I think it's self-explanatory.

4 Q Is there a definition anyplace in here, or an explanation?

5 A I -- I don't remember.

6 Q Do you know, from your limited review of the final license
7 agreement, whether it anywhere defines what is authorized or
8 unauthorized in terms of copying?

9 A No. I mean, I didn't read it all.

10 Q Do you know whether the interim agreement that you worked
11 on with the working group has any provision in it you can show
12 us that requires that the DVD disc be in the drive or tray
13 during playback?

14 A I -- I cannot name a specific provision.

15 Q You testified in response to Mr. Williams, that there was
16 much discussion about making an exception for copying into a
17 temporary buffer or cache. Is that right?

18 A Yes.

19 Q And are you aware of any provision in the interim
20 agreement that you worked on, that reflects an exception for
21 copying into cache or buffer?

22 A I know that was allowed, and I don't know the technical
23 and procedural specs. I know that was an exception, an
24 authorization that the attorneys for the computer industry felt
25 very strongly had to be there.

1 It was a general principle, just like the studios'
2 principle that no copies were to be made. So, that was an
3 authorized exception.

4 Q Are you telling the us that you believe that's an
5 exception because the studios' lawyers told you so?

6 A No, I believe it's in there somewhere.

7 Q Can you help us out and tell us where it is, or --

8 A I -- I don't know specific provisions. I didn't go back
9 and review them in that kind of detail. And, we were
10 negotiating this in 1996.

11 Q Do you believe you have seen such a provision in the past?

12 A Well, I believe that -- that caching was allowed. I mean,
13 that was discussed, it was debated, in the -- on the
14 technological side when I was in the room.

15 So, I mean, I know that was in here. And I know that
16 everyone agreed it was okay, because I was in the room for
17 that, too.

18 Q I understand that's what you believe. Now, you said it
19 was discussed. Right?

20 A Absolutely.

21 Q Temporary caching.

22 A Yes.

23 Q Have you ever seen a provision in the interim or final
24 agreement that reflects such an exception?

25 A I don't know the specific provisions.

1 Q Do you remember -- and I can show you if you would like,
2 in your deposition -- that you told lawyers that you believed
3 that there was a prohibition on copying because there was a
4 reference to no digital-to-digital copying?

5 A Right.

6 Q Have you ever seen that phrase in the agreements you've
7 read?

8 A I haven't read the agreements recently. But there were no
9 digital-to-digital copyings allowed, or digital-to-analog.
10 There was no copying allowed, period.

11 Q Ms. King, that was not my question. My question was
12 whether you've seen that in any of the agreements you have
13 read, that phrase, "prevent digital-to-digital copying"?

14 A Not that I recall.

15 Q Now, there is such a phrase in one of these sets of -- one
16 or more of the sets of specifications which you have not read.

17 Was the phrase "no digital-to-digital copying" something
18 that the studios lawyers told you about?

19 **MR. WILLIAMS:** Excuse me. Object to form of the
20 question. It's argumentative, with the preface.

21 **THE COURT:** Well, there was a little bit of testimony
22 at the beginning of that question.

23 Can you rephrase the question?

24 **MR. SCOTT:** I certainly can.

25

1 **BY MR. SCOTT:**

2 Q If you've not read the phrase "no digital-to-digital
3 copying" --

4 A I have read the phrase.

5 Q Can you tell us where you've found -- where you've seen
6 that?

7 A It was long ago, and there were a lot of documents. So I
8 don't know if I remember it from reading technical
9 specifications, whether they were procedural or general, or
10 whether I remember it from documents in the negotiation.

11 But I knew that was a general premise that was part of the
12 agreement.

13 Q So you have seen that phrase somewhere, at some time?

14 A Absolutely.

15 Q All right.

16 **MR. SCOTT:** Bear with me, Your Honor. I'm shortening
17 up some things right here.

18 **THE COURT:** Okay.

19 **BY MR. SCOTT:**

20 Q Now, do you recall that in your deposition -- again, I'll
21 show it if you wish -- you told us that there was some
22 negotiation on the question whether the CSS agreement should
23 prohibit copying of a DVD to the hard drive, that that was
24 discussed. Negotiated.

25 **MR. WILLIAMS:** Objection, Your Honor. Calls for

1 hearsay. It's not proper impeachment.

2 **THE COURT:** Objection is overruled.

3 You may answer.

4 **THE WITNESS:** Could you show me where I say that in
5 the deposition?

6 **BY MR. SCOTT:**

7 Q Sure. In fact, I can quickly put it on the screen, but
8 I'll just let you look it up on Page 76 --

9 **MR. SCOTT:** May I approach, Your Honor?

10 **THE COURT:** Yes, you may. And you don't have to
11 repeat the request.

12 **MR. SCOTT:** Thank you.

13 **BY MR. SCOTT:**

14 Q I think you will find it on Page 76. Let me look at that
15 with you.

16 (Witness examines document)

17 Q Yes, on Page 76, at Line 19 -- and I'm just refreshing you
18 here, I'm not seeking to contradict anything you have said.

19 Do you remember that you agreed that there were
20 negotiations as to whether the CSS interim license agreement
21 shall prohibit copying of DVDs to the hard drive?

22 A Yes.

23 Q So, that was discussed. Did a provision about whether or
24 not to copy to the hard drive ever make it into the CSS interim
25 or final agreement?

1 A Without looking at my own testimony, the studios were
2 adamant, especially in the computer environment, that there
3 would never be a copy made to the hard drive, because these
4 were perfect copies that could be distributed -- we used to use
5 the term "to your millions of your best friends around the
6 world."

7 And so, no copy was allowed to be made to the hard drive.
8 I mean, that was the whole purpose of the license agreement.
9 That was the whole purpose of the encryption. I mean, it was
10 the basic premise.

11 Q I understand the studios were adamant.

12 A And, and, and, if you were to ask the -- the other people
13 who were involved, they would say that they agreed to it, I
14 mean, because that was the premise.

15 **MR. SCOTT:** Your Honor, I move to strike. No
16 foundation for that.

17 **THE COURT:** The last sentence is stricken.

18 **MR. SCOTT:** Thank you.

19 **BY MR. SCOTT:**

20 Q Now, I understand, you say the studios were adamant.

21 A Uh-huh.

22 Q Did a provision on the subject of copying DVDs to hard
23 drive appear in the interim agreement that you worked on?

24 A Yes. It's not authorized.

25 Q Is it -- is there a discussion you can show us, any

1 provision in the interim agreement?

2 A Yes. Their first recital.

3 Q Okay. You are referring, then, to Recital A against
4 unauthorized consumer copying?

5 A Yes.

6 Q Is there any further explanation of that, as to hard drive
7 or otherwise that you know of, in this interim agreement?

8 A It was never authorized. So it's not authorized within
9 the agreement.

10 Q Can you answer my question?

11 A It's unauthorized.

12 Q Can you answer my question, please?

13 Is there any further discussion in this interim agreement
14 of what's authorized or unauthorized, beyond Recital A?

15 A I don't know.

16 Q Is there any discussion in the interim agreement beyond
17 Recital A on the subject of copying to hard drive?

18 A Could you repeat that question?

19 Q Yes.

20 A I'm sorry.

21 Q Is there any further discussion in the interim agreement
22 beyond Recital A on the subject of whether or not copies can be
23 made to hard drive?

24 A Not that I know, but if you're asking me other than
25 Recital A is there anything in the agreement, it's kind of like

1 saying "Other than the First Amendment, where does it talk
2 about free speech?"

3 I mean, it was the first recital in the agreement that the
4 studios had to authorize any kind of copying. Never was it
5 authorized.

6 It's -- the fundamental issue of copy protection is that
7 it's protected unless it's authorized.

8 Q Do you know why the reference to recitals in Recital A,
9 unauthorized copying, is not explained or discussed again in
10 the terms of the agreement (Indicating)?

11 A I -- I can't -- I can't relate to certain provisions,
12 because I just don't know them by heart.

13 Q So, if I understand, then, the provisions of the interim
14 agreement, to your knowledge, don't discuss copies to hard
15 drive or copies to cache anywhere within their terms.

16 A I don't know that it doesn't do that.

17 Q But you don't remember any provision that does it.

18 A Well, caching probably -- I would think would be in the
19 technical specifications. I don't remember one that gives
20 authorization to copy to a hard drive anywhere in here
21 (Indicating).

22 Q The reason I'm staying with the subject, Ms. King, is
23 because you said it was actually discussed whether or not there
24 could be copies to hard drive.

25 And I just was hoping you could help us on the subject of

1 whether it made it into the agreement.

2 A Well, the reason -- the reason -- the reason the word
3 "authorized" was used is I know that at least Warner Brothers
4 -- I can speak for my own company at the time -- was looking in
5 the future, and said, "Well, some day we may authorize this."

6 You know, as the computer companies say, "Well, maybe
7 you'll want to have a consumer make a copy."

8 I mean, the times have really changed. We are sitting
9 here in 2009, and an electronic distribution is much -- is
10 coming into play, just as we thought it would back then. But
11 we didn't authorize it.

12 Q Uh-huh.

13 A The only thing we authorized was playback of the movie.
14 No persistent copies on a hard drive or anywhere else.

15 Q Is there anything you know of, in the interim or final
16 license agreement, talking about no persistent copies?

17 A Well, since the exception was caching, what was not an
18 exception was no persistent copies.

19 Q And is there any exception written in the agreement for
20 caching?

21 A I -- I answered that. I don't know. I think there is. I
22 don't know. I don't recall.

23 Q Changing subjects, in fact, the studios are now marketing
24 products that will provide copies of DVDs in other formats.

25 Isn't that true?

1 A Do you mean the digital copy?

2 Q Digital copy is one. You're familiar with that?

3 A Yes, I am.

4 Q And the studios, a number of the studios are selling discs
5 now at a premium price with a second copy of a disc?

6 A Yes. The key word is "premium price." So it has become a
7 business model for the studios.

8 Q And, this kind of digital copy, provides an extra disc
9 that can be copied onto the PC or on to the iPod, is that
10 right?

11 A Yes, that was -- that was contemplated as a future way in
12 which the studios recoup their investment in their movies.

13 Q Uh-huh. Did you have reason to believe that a person who
14 buys one DVD disc to play in a PC would actually buy a second
15 one to play in iTunes? Any market research or knowledge on
16 that?

17 **MR. WILLIAMS:** Objection. Vague and ambiguous, Your
18 Honor. Pardon me.

19 **THE COURT:** Well, that objection is not well taken,
20 so objection is overruled.

21 **BY MR. SCOTT:**

22 Q Ms. King?

23 A That -- the question is hard for me to understand.
24 Because --

25 **THE COURT:** Then maybe it is vague and ambiguous.

1 **MR. SCOTT:** That's what I was waiting for the witness
2 to tell me, Your Honor.

3 **THE COURT:** There are other bases for objecting, but
4 it's not up to me to do that.

5 **BY MR. SCOTT:**

6 Q Do you know of any market research on the subject of
7 whether people who buy one DVD to play on their PC are also in
8 the market to buy a second DVD for other devices like iPods?

9 **MR. WILLIAMS:** Objection. Relevance.

10 **THE WITNESS:** No.

11 **THE COURT:** I'll allow the answer.

12 **MR. SCOTT:** Thank you.

13 **THE COURT:** Objection is overruled.

14 **BY MR. SCOTT:**

15 Q And, if I --

16 A But --

17 Q If I could confirm, we were talking about managed copy.
18 When this -- a DVD is purchased from the studios through
19 managed copy, for iPod, can other copies be made?

20 A Each -- for iPod. When I was at Paramount, they did an
21 agreement with Apple, and it was -- and I had responsibility
22 for the legal and business affairs for the video-on-demand
23 group that did electronic distribution as well.

24 From my recollection, they can play it on a few different
25 devices. At least through the Paramount agreement. And that's

1 a confidential agreement. But, it does give some flexibility.
2 Without getting into more detail.

3 Q In the marketing of managed copy for iPod, it can be
4 played on -- copied to five different devices, can't it?

5 A Correct.

6 Q Then again changing subjects --

7 **MR. SCOTT:** And coming to a conclusion, Your Honor --

8 **BY MR. SCOTT:**

9 Q -- are you aware of any analysis done by the studios on
10 the harm they expect to face if RealDVD is released?

11 A I was not in the studios when this issue came up. No.

12 Q And you have been working with the lawyers since October
13 of 2007?

14 A No. Since -- in 2008. You mean, these lawyers for this
15 case?

16 Q Since you retired in 2007.

17 A I haven't been working with them since 2007.

18 Q Okay. I agree. You didn't say that, that was my mis- --
19 mishearing of you.

20 A No, it's more recent than that.

21 Q But you are not aware of any study done by the studios, or
22 in fact, by anyone, of harm the studios face from a release of
23 RealDVD. Isn't that true?

24 A No, but I can tell you what I know of the harm.

25 Q Well, would you agree that you're not aware of any study

1 done of harm?

2 A I'm not aware of the study done.

3 Q By yourself or anyone.

4 A By myself or anyone.

5 Q And what you would want to tell us would be your belief,
6 your theory of how harm would happen. Is that right? Is that
7 true?

8 A Due to my 20 years of experience in the video industry.

9 **MR. SCOTT:** Your Honor, I pass the witness.

10 **THE COURT:** Do you have anything further,
11 Mr. Williams?

12 **MR. WILLIAMS:** Very briefly, Your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MR. WILLIAMS:**

15 Q Ms. King, you were asked some questions about whether you
16 were aware of any documents that reflected a reference to
17 digital-to-digital copying.

18 Do you recall that line of questioning?

19 A Yes.

20 Q Was your knowledge about language referring to
21 digital-to-digital copying based upon anything that I said to
22 you?

23 A No.

24 Q What was it based upon?

25 A It was based upon, first of all, my experience in all

1 those meetings of the CPTWG, and negotiating this agreement,
2 and all my conversations that I had with Chris Cookson, who is
3 our chief technology officer at Warner Brothers. Plus my
4 review of just certain materials from that time period.

5 Q You were asked a series of questions about whether you
6 were aware of any provision in the license that expressly
7 prohibited copying to hard drive.

8 Do you recall that line of questioning?

9 A Yes.

10 Q Are you aware of any provision in this license that
11 expressly authorizes copying a movie to a hard drive?

12 A There is no -- no express authorization of copying a movie
13 to a hard drive.

14 Q With respect to the discussions that did happen, that
15 you've testified to on direct examination, on the topic of
16 caching or buffering, were there members of the -- strike that.

17 With respect to the discussions that you had regarding
18 caching and buffering, what was the connection, if any, between
19 those discussions and authorization or non-authorization of
20 copying?

21 What was the link?

22 A No copying was authorized.

23 **MR. SCOTT:** Object to form, Your Honor. We need some
24 foundation on this. Is he talking about discussions now? Or
25 documents? What connection is ambiguous, and we don't know

1 what foundation they have for this.

2 **THE COURT:** Are you asking about the working group?
3 Or are you asking about in some other context?

4 **MR. WILLIAMS:** I was asking about the discussions.
5 And I believe I prefaced it with "discussions," but yes, of the
6 working group.

7 **THE COURT:** Yeah. We need to take make it clear.

8 **MR. SCOTT:** Thank you, Your Honor.

9 **THE COURT:** Thank you.

10 You may answer the question.

11 **THE WITNESS:** What I recall, and it's my
12 recollection, is that the studios felt I can't tell you how
13 strongly that no copy should be made of this new technology
14 which had perfect copies for generations and generations. So,
15 there was a mantra of "No copies."

16 The lawyers for the computer industry said -- you
17 know, lawyers are very careful about wording. And when you're
18 saying, you know, "No copies," "Okay, well, there's something
19 that's called caching." And I remember talking to someone from
20 one of the computer companies, who explained it to me at the
21 time. And they said, that's kind of an exception.

22 And we said, "Okay, we will authorize" -- the studio
23 said, "We will authorize your ability to cache, because that's
24 the only way you can see it on the monitor."

25 So, that's how it relates to authorization. But

1 that's the only authorization there ever was.

2 **BY MR. WILLIAMS:**

3 Q Final questions. You were asked a few questions about how
4 studios now are permitting -- or selling, excuse me -- copies
5 that can be downloaded to hard drives.

6 Do you recall that line of questioning?

7 A Yes.

8 Q Are studios paid for -- by consumers, for that right?

9 A Yes, they are.

10 Q How are they paid?

11 A They are paid -- if you download it, and you download it
12 for -- there's lots of models, at least when I was still with
13 the studios.

14 If you're downloading for a 24-hour period, you pay a
15 certain amount, whether it's \$2, three -- I don't know the
16 amounts the studios are charging. If you download it
17 permanently, you're charged a different amount.

18 And, there's various ways you can do this. The Apple way
19 is one way.

20 Q Throughout the entire period that you were involved in
21 discussions with the members of the working group, was there
22 ever any discussion about permitting a consumer to use some
23 kind of device to make a copy of a movie without paying the
24 content on your own?

25 A Never.

1 **MR. WILLIAMS:** No further questions, Your Honor.

2 One further question. Pardon me.

3 (Off-the-Record discussion)

4 **BY MR. WILLIAMS:**

5 Q Based upon your conversations with the working group
6 members, was there ever a time when the working group members
7 discussed that making a single copy, as opposed to multiple
8 copies, would be okay?

9 A No. I -- well -- we knew at the time that -- that the
10 computer industry -- the music industry had allowed one copy.
11 The studios really did not want to go down that path.

12 Q You were asked some questions about whether a disc was
13 required -- whether there was any specific provision requiring
14 that a disc be included in the tray.

15 Do you recall that line of questioning?

16 A Yes.

17 Q Was there any discussion about being able to play the DVD
18 without putting a disc in a tray?

19 A Yes. You weren't -- you couldn't make a copy, so you
20 could never play it without the DVD being there.

21 Don't forget, a DVD is portable. I mean, you can take
22 your DVD and watch it on a television set. And then you can
23 take it and put it into your computer.

24 So, you know, it was a very multi-use friendly,
25 user-friendly product, priced inexpensively, and usable in both

1 computers. There's never been a product like that.

2 As a matter of fact, it's the most successful consumer
3 electronics product ever.

4 **MR. WILLIAMS:** Thank you. No further questions, Your
5 Honor.

6 **MR. SCOTT:** I have one.

7 **THE COURT:** Yes.

8 **REXCROSS EXAMINATION**

9 **BY MR. SCOTT:**

10 Q Ms. King, you were asked whether there was discussion
11 about being able to play the DVD without putting a disc in the
12 tray.

13 And you answered, "Yes, you weren't -- you couldn't make a
14 copy," so you could never play it without" -- you take your own
15 DVD and watch it on your television set.

16 Let me ask you this. There was discussion about being
17 able to play with a disc not in the tray. Did the license
18 agreement or the interim agreement ever discuss that subject?

19 A I don't believe so, because it was never authorized.

20 Q To be clear, the question of whether or not there needs to
21 be a disc in the tray for playback is a subject that is not
22 touched upon in the interim agreement that you worked upon.

23 Isn't that true?

24 A I don't recall it being there.

25 **MR. SCOTT:** Thank you.

1 Nothing further, Your Honor.

2 **MR. WILLIAMS:** Nothing, Your Honor.

3 **THE COURT:** Okay. May this witness be excused --

4 **MR. SCOTT:** Yes.

5 **THE COURT:** -- without being subject to being
6 recalled?

7 **MR. SCOTT:** Yes, Your Honor.

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

9 **THE COURT:** You are excused, Ms. King. But do not
10 discuss your testimony with any other persons who may be
11 witnesses until the trial is over.

12 And if you have any exhibits up there, you can just
13 leave them and the court reporter will get them.

14 **THE WITNESS:** Oh, okay. Thank you.

15 **THE COURT:** Thank you.

16 (Witness excused)

17 **THE COURT:** Is this a good time to take lunch? And
18 return at 1:30?

19 Now, to sum up here, a little quickly and
20 perfunctorily, is it sort of a theme here, or theory, that the
21 contract has to say "Thou shalt not copy," and it doesn't say
22 "Thou shalt not copy"? And then, we're relying upon
23 "unauthorized copying" in the recital over here?

24 Is that a little bit of what's going on?

25 **MR. SCOTT:** Yes, Your Honor. If I could perhaps

1 clarify from my point of view, the CSS agreement and
2 specifications are about the implementation of the CSS
3 protection. They are not addressing the question of hard drive
4 copies by licensees, one way or another.

5 And, the -- they're dealing with a different subject,
6 which is unauthorized, non-licensee people getting digital
7 copies of the data or the keys, for distribution in the clear.

8 The -- the studios, I do understand, are contending
9 that, "Well, we can't make it -- 'we,' Real Networks, violate
10 the CSS license, although it's silent on hard drive copies, we
11 violate it unless there's express authorization for consumers
12 who buy DVDs to make copies," which they don't grant, because
13 -- and that means they claim the right to withhold or grant
14 fair use, if it's fair use.

15 So, I believe, I believe that the idea that the CSS
16 license or specifications bar copying or suggest it should not
17 be done onto hard drive by a CSS licensee is not present in
18 that agreement. That's not what it's about.

19 **THE COURT:** Yes.

20 **MR. WILLIAMS:** Your Honor, if I may, I know that
21 Mr. Steer would like to be heard on this, as well.

22 It's not just the license, though. It's -- under the
23 DMCA. It is, our point is that under *S.O.S. v. Payday* and
24 other authorities, there has to be an express authorization in
25 order for a licensee to make such a use.

1 And so, that's why we believe that in the absence of
2 an express authorization to make a copy, it is not permissible
3 for Real to use a license that says "You may make a player, if
4 you follow these steps," it's not appropriate for them -- not
5 legal for them to make a copy of it.

6 That's the essence of our claim. It's almost like if
7 you had a person who's a security officer at a home, who can go
8 into the home if he does certain steps under certain
9 circumstances, if you've got an alarm going or something, he
10 can go inside, check the perimeter, turn off the alarm, check
11 to make sure there are no intruders, and then leave. And if he
12 follows those steps, okay, he's doing his job.

13 But there's nothing that permits the security officer
14 to go in the home and then do all those steps, but then walk
15 out with a safe, the family's safe, out the front door.

16 Under their theory, that's perfectly okay, because
17 the --

18 **THE COURT:** Aren't you better off without analogies?

19 **MR. WILLIAMS:** Right.

20 **THE COURT:** It's pretty clear.

21 **MR. WILLIAMS:** Under their theory, they'd be okay.

22 But as a legal matter, as a legal matter, under the DMCA, if
23 you traffic in a device that circumvents, there's a violation.

24 That's the point I want to make, Your Honor.

25 **THE COURT:** Okay. And I just wanted to see if I

1 understood what was going on here, a little bit.

2 And I know what your position is also, right?

3 **MR. STEER:** Well, I say at the time, Your Honor, the
4 point is there is that supervening provision, no copying. And
5 then the agreement says you must obey --

6 **THE COURT:** What supervening --

7 **MR. STEER:** The introductory --

8 **THE COURT:** The recital.

9 **MR. STEER:** The recital to the license agreement, and
10 other provisions, as we have discussed.

11 And then it says, if you're a licensee, you have to
12 follow the specifications. You have to adhere to them.

13 And our position is this, and that's what Dr. Kelly
14 is going to talk about. It's like a recipe for engineers.
15 When they open those specifications, they're required to take
16 Step A, B, C, D. And if they do that, they cannot copy.

17 **THE COURT:** Okay.

18 **MR. STEER:** That's what it's about.

19 **THE COURT:** Okay. So, there we are.

20 And after lunch, we are coming back to hear -- let's
21 see, who was it here?

22 **MR. SCOTT:** Dr. Kelly, Your Honor.

23 **THE COURT:** Dr. Kelly? Dr. Kelly? Okay, fine.

24 Thank you.

25 So, what did I say? 1:30? Well, let's say 1:45.

1 What time is that? 12:30?

2 **THE CLERK:** 12:41.

3 **THE COURT:** Okay, 1:45.

4 **MR. SCOTT:** Thank you, Your Honor.

5 **THE COURT:** Okay, thank you.

6 (Recess taken from 12:41 to 1:48 p.m.)

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P R O C E E D I N G S

1
2 **APRIL 24, 2009**

1:48 P.M.

3
4 **THE COURT:** Are you ready to call your next witness?

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

6 **THE COURT:** And that is? And who is calling that
7 next witness?

8 **MR. STEER:** We are calling Dr. Kelly, Your Honor, but
9 we do have to address the issue of highly confidential
10 information that I raised this morning.

11 **THE COURT:** Well, how long is it going to take before
12 you get into that?

13 **MR. STEER:** Not long. I think, from the standpoint
14 of the clarity of the presentation and the narrative, it would
15 be better to address the issue in advance. And we're prepared
16 to do that.

17 **THE COURT:** Well, why don't we just order the
18 courtroom cleared, and we'll see what happens.

19 Who is in the courtroom that it's appropriate that
20 they be privy to this?

21 (Multiple people in the audience stand.)

22 **MR. STEER:** The attorneys who have -- attorneys and
23 parties who have been authorized under the protective order --

24 **THE COURT:** Well, there are a bunch of people
25 standing up, but I have no idea who they are.

1 **MR. STEER:** Neither do I.

2 **THE COURT:** Well, if that's going to be everybody in
3 the courtroom, why don't we just, you know --

4 **THE CLERK:** There's a couple of reporters in the back
5 row.

6 **MR. SANDOVAL:** Judge, my name is Greg Sandoval. I'm
7 a reporter with cnetnews.com. We are a division of CBS.

8 **THE COURT:** Yes. Well, good for you.

9 **MR. SANDOVAL:** And we respectfully ask you to
10 consider that the Ninth Circuit has procedural and substantive
11 requirements must be met before you close the court.

12 We also would like to remind you that the MPAA, the
13 encryption, has been cracked years ago in the public domain.
14 And also remind you that the Kaleidescape trial was open to the
15 public, the entire trial, with just a couple of exhibits that
16 were sealed.

17 **THE COURT:** Thank you.

18 **MR. LAMBERT:** DVD CCA is prepared to address those
19 procedural issues, if you would like to hear from us.

20 **THE COURT:** Yes, please.

21 **MR. LAMBERT:** Your Honor, we can proceed with this in
22 two ways. Just for the record, I'm Mark Lambert for the DVD
23 CCA.

24 We have a motion with supporting testimony from the
25 former president of the DVD CCA, Mr. John Hoy, which was

1 submitted in the Kaleidescape case to prevent the documents,
2 the confidential specification documents, from being unsealed
3 from nonpublic filing in that case.

4 We're prepared to submit that motion. And I'm
5 prepared to tell you what is in the contents of that motion and
6 the contents of that declaration that addresses the core point
7 here, which is that certain documents which are -- I think you
8 have a spiral bound copy of Mr. Pak's declaration.

9 **THE COURT:** Yes.

10 **MR. LAMBERT:** It would be the testimony, the
11 confidential testimony from DVD CCA's standpoint, that
12 Dr. Kelly would be presenting addresses with respect to Exhibit
13 L, Exhibit M, and Exhibit N. Exhibit O is also a confidential
14 document, but it is not the topic of Dr. Kelly's testimony.

15 These are specification documents, Your Honor, that
16 are maintained by the DVD CCA and its license administrator.
17 They are the subject of section 5.2 of the CSS license
18 agreement, which is Exhibit J to the Pak declaration, which
19 constitutes a nondisclosure agreement that every licensee must
20 sign and be bound to with respect to CSS confidential
21 information, which these documents, Exhibits L, M, and N, which
22 are the subject of Dr. Kelly's testimony, are.

23 They're labeled as confidential. Each one has a
24 unique serial number. There is no other source except the DVD
25 CCA, through its license administrator, to obtain these

1 documents.

2 These are not documents that have ever appeared on
3 the Internet. The information that a member of the press
4 mentioned a moment ago, that did appear on the Internet, is not
5 these documents.

6 It is other information about CSS, that was hacked by
7 a user who was able, one way or another, to pry into a device
8 and obtain some information about CSS that he or she then
9 posted on the Internet. That is not these documents.

10 These documents have never been on the Internet.
11 They are trade secrets, and they are closely guarded by the DVD
12 CCA, and not given to anybody without a nondisclosure
13 agreement, which RealNetworks, in its licensing procedure, has
14 signed.

15 So that is the foundation for the motion that I'm
16 prepared to file. Your Honor asked for a witness. We've been
17 able to, in the few hours before -- well, since this morning,
18 to have an officer of the DVD CCA, who is the secretary, who
19 also works with LMI, who is the license administrator, to go
20 through the points that are in Mr. Hoy's declaration, if you
21 think that indulgence is necessary.

22 But we submit there is a huge distinction, a
23 fundamental distinction, between the information and the
24 hacking code called DeCSS, that is on the Internet, and the
25 confidential official technical specifications that are in

1 documentary form, that are provided to licensees upon their
2 signing of an NDA.

3 **THE COURT:** Do you have a copy of the motion that you
4 say you have?

5 **MR. LAMBERT:** Yes.

6 **THE COURT:** Was that filed or presented?

7 **MR. LAMBERT:** We prepared this this morning, since --

8 **THE COURT:** I see.

9 **MR. LAMBERT:** Yes.

10 **THE COURT:** Now, has Dr. Kelly's deposition been
11 taken?

12 **MR. STEER:** It has, Your Honor.

13 **MR. LAMBERT:** Here's a proposed order (indicating).

14 **THE COURT:** Is there any reason why his deposition
15 couldn't be used, without his live testimony?

16 **MR. LAMBERT:** Well, I think that it's very
17 important -- DVD CCA thinks it's crucially important that
18 Dr. Kelly testifies directly. He's submitted an extensive
19 declaration. But we think that his explanation of the
20 technology is essential to a full understanding of the
21 specifications which are a -- which are an essential and
22 critical part of the agreement.

23 **THE COURT:** Yes.

24 **MR. STEER:** That's right, Your Honor.

25 We didn't take his deposition. We did submit his

1 declaration in support of our motion for a preliminary
2 injunction. But even that is not, I think, as helpful to the
3 Court as his live testimony would be. Of course, all of that
4 was under seal. And the deposition was highly confidential,
5 without any dispute.

6 **THE COURT:** And was there any review of the order
7 that you submitted?

8 **MR. LAMBERT:** Yes. In an unpublished opinion, in the
9 Sixth Circuit Court of Appeal upheld the lower court's
10 decision. I have a copy of that order.

11 **THE COURT:** Do you have a copy of that?

12 **MR. LAMBERT:** Yes, I do.

13 I seem to have lost it in the pile of emergency
14 motion papers. Here it is, Your Honor.

15 **THE COURT:** And, Mr. Cunningham, does RealNetworks
16 wish to be heard on this issue?

17 **MR. SCOTT:** I would.

18 **MR. CUNNINGHAM:** Yes.

19 **MR. SCOTT:** Yes, we will.

20 **THE COURT:** Go ahead, Mr. Scott.

21 **MR. SCOTT:** Yes, Your Honor. Perhaps I could just
22 begin with a question for Mr. Lambert, so I know where we are
23 in terms of the factual representation and factual record.

24 It's my understanding I've been hearing that the
25 technical and general specifications are not on the Internet,

1 even though the keys and the algorithms have been for some
2 time.

3 **MR. LAMBERT:** The first part is true. None of the
4 general specifications -- notwithstanding the debate over their
5 status, the specifications are still confidential information
6 under the agreement. So for purposes of trade secrecy, the
7 same confidentiality applies to those.

8 With respect to the second thing that Mr. Scott says,
9 about the keys and the algorithms being all over the Internet,
10 we don't think there's any support for saying -- there are
11 hundreds of keys. A small number of them have been -- have
12 been disclosed on the Internet. It is still -- the
13 technology -- even years after that, the technology has been
14 ruled by courts as an effective copy protection technology.

15 We're not disputing that -- that information has been
16 either reverse engineered or hacked out of devices that use
17 CSS, and then published on the Internet. But to say that the
18 keys and the algorithms is a collective statement is simply not
19 accurate.

20 And there's much more information that's inside the
21 technical specifications that is not among the information
22 that's been disclosed.

23 And, Your Honor, this is critical to -- this is
24 critical to our ability to be heard on this, because our
25 argument is that section 4.2 of the agreement, which I think

1 you have seen, says you must follow the CSS specifications.

2 To understand what the licensees obligations really
3 are with respect to this technology and its implementations, a
4 full understanding of the specifications, which dictate how the
5 technology is implemented, is necessary to be presented. And
6 we that it is essential to our ability to be heard on this
7 important issue to our client.

8 **MR. STEER:** It's not just limited to this particular
9 study, Your Honor.

10 Dr. Bishop, RealNetworks' expert, opines at length
11 about the very same things. Is there compliance with the
12 technical specifications? Et cetera, et cetera.

13 So it would completely change this hearing if we were
14 not able to continue with the security -- with the certainty
15 that these things will be protected.

16 **THE COURT:** Yes, Mr. Scott.

17 **MR. SCOTT:** Yes, Your Honor. Again, as
18 Mr. Cunningham said, I don't want to see anyone prejudiced. We
19 oppose the closing of the courtroom, but not adamant, is just
20 to provide the other side of the story.

21 Two things. One is that the California Court of
22 Appeals for the Sixth District in **DVD Copy Control Association**
23 **vs. Bunner**, B-u-n-n-e-r, 2004 116 Cal.App 4th 241, at page 255,
24 in its conclusion, was reversing a preliminary injunction. And
25 in its conclusion I want to say acknowledged it had a limited

1 record.

2 But with that caveat, it said, and I quote,
3 Furthermore, there is a great deal of evidence to show that by
4 the time DVD CCA sought the preliminary injunction prohibiting
5 disclosure of the DeCSS program, DeCSS had been so widely
6 distributed that the CSS technology may have lost its trade
7 secret status. There is no evidence at all to the contrary.
8 Closed quote.

9 Now, I recognize the Court acknowledges on a limited
10 record. But that's what the Court had before it at that time,
11 speaking of CSS technology.

12 It is my understanding that the algorithms of CSS,
13 and at least some keys sufficient for getting into it, have
14 been cracked and on the Internet for a long time.

15 And as to the distinction between algorithm and keys
16 on the one hand and the CSS specs on the other, which is the
17 reason I asked Mr. Lambert the question I did, I'm looking at
18 the general specifications, which is here in Exhibit 1, you
19 already have, Your Honor, from this morning's testimony,
20 section 1.5, at page GEN4. And section 1.5, subsection 2,
21 says --

22 **MR. LAMBERT:** Again --

23 **MR. SCOTT:** It's just one sentence about the
24 security.

25 **MR. LAMBERT:** I understand that. But I think

1 there's -- we don't want to fall into a path of incrementalism,
2 where some of the contents of the specs are read in open court.

3 **MR. SCOTT:** May I show it to the Court?

4 **THE COURT:** Well, we have it here, I assume, don't
5 we?

6 **MR. SCOTT:** It's the first sentence, "General
7 Specifications," which is hearing Exhibit No. 1.

8 **THE COURT:** You have it on yours, but we don't
9 have --

10 **MR. LAMBERT:** If you have Mr. Pak's spiral bound --

11 **THE COURT:** Yes.

12 **MR. LAMBERT:** If you take a look at Exhibit --

13 **THE COURT:** M?

14 **MR. LAMBERT:** Exhibit L.

15 **THE COURT:** L.

16 **MR. LAMBERT:** And it would be section 1.5, I think --

17 **MR. SCOTT:** Yes.

18 **MR. LAMBERT:** -- is what Mr. Scott is referring to.

19 **MR. SCOTT:** There are page numbers in the center of
20 the bottom, Your Honor, that begin "GEN." This is GEN4.

21 **THE COURT:** Right.

22 **MR. SCOTT:** Just the very bottom paragraph of the
23 page, the first sentence.

24 **THE COURT:** "The security of ..."

25 **MR. SCOTT:** "The security of ..." That's what I'm

1 referring to. And I don't pretend any special knowledge of
2 this. I'm just calling that to your attention.

3 **THE COURT:** Well, I think to some extent you know
4 that, for example, with this paragraph, that argument may be
5 overstated.

6 But I certainly understand your argument,
7 Mr. Lambert, with respect to the actual specification, those
8 kinds of things, that -- but this is more of a general
9 statement, this paragraph that Mr. Scott has referred to.

10 And to the extent that there may be some of those
11 general statements, I don't think that that necessarily would
12 be foreclosed.

13 I know you are talking about incrementalism. But in
14 looking through a lot of what is in this Exhibit L, I would say
15 that there are a number of general statements. And then, you
16 know, there's much else that I'm sure is in fact clearly
17 protected.

18 The question is: Parsing out what is clearly
19 protected from what is more generalized, you know, information
20 that even though it's in a protected document, is in and of
21 itself somewhat innocuous.

22 **MR. LAMBERT:** I understand the distinction
23 intellectually.

24 As a practical matter, Dr. Kelly will be testifying
25 about some of these general, overarching -- overarching

1 provisions of the general specifications.

2 There are some overarching, broadly stated provisions
3 in the other technical specifications as well. But he will be
4 doing so at the same time, while he illuminates the details of
5 what a compliant system is required to do in implementing the
6 processes that are very detailed. And which is, essentially,
7 where the rubber hits the road on whether or not the
8 RealNetworks device complies.

9 And in order for -- so, logistically, I'm not quite
10 sure how Dr. Kelly testifies in the first part of the sentence
11 about an overarching policy statement or broadly stated
12 requirement and then has a subordinating clause that
13 illuminates that in a very detailed and technical portion of
14 the document that is the secret.

15 **THE COURT:** I will tell you what I think we need to
16 do. And it may sort of interfere in some respects with how you
17 intended to conduct the examination. But you're a lawyer.
18 You're supposed to figure out how to overcome those problems
19 when either the other side or the judge throws you a curve.
20 Right?

21 So I think that to the extent that there's some
22 governing principles in these documents that are sort of -- you
23 refer to them as overarching, or whatever, and I would say
24 general enough that you would expect those kinds of things to
25 be in such a document, that you examine him -- first, I assume

1 you're going to examine him on his credentials and so forth,
2 and go through that. And there may be some other material you
3 can -- you were going to cover with him that is nonprivileged
4 or nonconfidential. And then you can ask him about those
5 overarching principles or general principles that are set forth
6 in the document, without going into any of the details that
7 would clearly be what the trade secret protection is all about,
8 is for.

9 And then we will excuse any people who are not -- you
10 know, have not signed on to a protective order and are entitled
11 to access to this, and let him testify about those overarching
12 principles and how they link up with what's in the document,
13 the specifics and details.

14 Can we do something like that?

15 **MR. STEER:** Your Honor, I'm sorry, but I don't think
16 that's practical. And I'll explain the way I have structured
17 his examination.

18 **THE COURT:** I really don't -- with all due respect, I
19 don't care how you have structured it. There are other rules
20 we have to play by, as well.

21 **MR. STEER:** The point is that the great bulk of his
22 testimony has to do with the details.

23 **THE COURT:** Well, then the rest -- that's what he
24 will testify to, without having other people who don't have
25 access to that in the courtroom.

1 And the person who stood up, you tell me why that
2 doesn't satisfy your purposes.

3 **MR. SANDOVAL:** Judge, all we're asking for is to make
4 the MPAA, file a motion and so we have a chance to respond. We
5 don't get a chance to respond. We don't get a chance to see if
6 what they are saying is on the Internet or not.

7 **THE COURT:** And you may never know, right? That's
8 for you to figure out. It's not for me to broadcast it to the
9 world on their behalf, when they have a secret that they --
10 trade secret that they have kept trade secret.

11 And with respect to the Bunner case, I mean, it
12 didn't get very far, in seeing the review of the Kaleidescape
13 case. By that time, the plaintiff had voluntarily dismissed
14 that action, apparently. So the real issue of whether or not
15 there were secrets there apparently, you know, was not really
16 governing. Correct?

17 **MR. SCOTT:** It was not finally decided, from what I
18 have seen, Your Honor.

19 **THE COURT:** Yes. Right. Right.

20 **MR. LAMBERT:** Your Honor, it's the same six appellate
21 panel who issued the Bunner -- I think it's the same panel,
22 certainly the same court that issued the Bunner decision that
23 Mr. Scott referred to early in the decade. And then in 2006,
24 whatever -- whatever they had decided previously, it was
25 separate from the specifications.

1 There's -- in fact, that's profound that whatever the
2 court was opining on, or whatever that dicta was about the
3 limited record and what -- and sort of its feel for the case,
4 it was distinguishable and had no impact whatsoever on keeping
5 the documents and the contents of the documents that we're
6 talking about here under seal, out of the public record.

7 **THE COURT:** Okay. So what I'm going to let you do is
8 call the witness and go forward in the manner I have described.
9 And then when you get to the point where the matters that
10 follow thereafter are the trade secrets, the guts of the trade
11 secrets I was talking about, as opposed to some overarching
12 principles that probably nobody would be surprised about, then
13 I will exclude from the courtroom any persons who are not
14 parties to the protective order.

15 But, I mean, this is a fairly large group of people
16 who stood up. Who are all these people? Protective order is
17 spread pretty thin.

18 **MR. LAMBERT:** Or, Your Honor, nondescript people who
19 have signed -- people who are with companies who are authorized
20 through the execution of a nondisclosure agreement.

21 But the press, at least with respect to a trade
22 secret, is -- you know, is -- we have -- there's --

23 **THE COURT:** I know. I know.

24 **MR. LAMBERT:** That's a problem for us.

25 **THE COURT:** That's the purpose of publishing, right?

1 Which is exactly the opposite of what you're trying to do with
2 a trade secret.

3 And they are legitimate trade secrets. And I am not
4 going to try to parse out, at this point, what is a trade
5 secret and what is not, bit by bit by bit. That's excruciating
6 detail.

7 There has been no briefing, no submissions by any
8 third parties, et cetera. And I'm not going to hold up this
9 proceeding for that purpose.

10 I mean, this case has been set on this calendar for a
11 long time, and would be quite apparent, from any review of the
12 docket, for anybody who was interested in investigating at all,
13 that there are a lot of documents that are characterized as
14 highly confidential and have been -- have been sealed for the
15 reasons as stated in a nonconfidential document that they
16 reflect trade secrets.

17 So with that, when you get to that part of the
18 examination, you tell me, and then I will order that everybody
19 else leave the courtroom.

20 **MR. STEER:** And that's how we'll proceed, Your Honor.
21 Thank you.

22 **THE COURT:** Yes.

23 **MR. STEER:** Before we do begin, I've had prepared a
24 print-out of the slides that we plan to use with Dr. Kelly.
25 And the great majority of them come from the general

1 specifications and other technical specifications which are
2 before Your Honor as exhibits to the Pak declaration.

3 I would like to provide this to the Court because it
4 will ease your task in following along with Dr. Kelly's
5 testimony. But, of course, my plan had been to show these on
6 the video system. And we can limit that.

7 **THE COURT:** But you don't have to.

8 **MR. STEER:** Well, actually, some of these include
9 animations, if I may.

10 **THE COURT:** Well, I've got an imagination, okay.
11 I'll try to use it.

12 **MR. STEER:** I don't doubt that. But, still --

13 **THE COURT:** Oh, I see. I have a follow-up question
14 to that?

15 **MR. LAMBERT:** Your Honor, before we proceed --

16 **THE COURT:** Yes.

17 **MR. LAMBERT:** -- is it okay if I -- if I tell
18 Ms. Johnson, who came here in the event you needed live
19 testimony about the treatment and the handling of the
20 documents -- can she go?

21 **THE COURT:** Well, let's hold on until we've got into
22 Dr. Kelly's testimony.

23 **MR. LAMBERT:** Okay.

24 **THE COURT:** Hold on for a little while. We will
25 review that request a little later.

1 Q. And what does the Kelly Technology Group do?

2 A. We are a high-technology consulting firm. And we consult
3 in matters of computer hardware and software.

4 Q. Do you -- would you please summarize your educational
5 history.

6 A. Certainly. I was born and raised in England. I have a
7 bachelor's and master's degree in mathematics from the
8 University of Cambridge in England. And I have a Ph.D. in
9 computer science from UCLA.

10 Q. And when did you obtain those degrees?

11 A. I was at -- the bachelor's degree was in 1975. The
12 master's degree in '77. And Ph.D. in 1982. Twenty-seven years
13 ago, I guess.

14 Q. And have you taught?

15 A. Yes. After I finished my -- I taught as a graduate
16 student. But I was a professor in the computer science
17 department at UCLA for four years, after I finished my Ph.D.
18 And then I transferred to UC Santa Barbara, to the electrical
19 and computer engineering department. And I received tenure
20 there. I left the University in 1997.

21 Q. Is it accurate to say that you've spent your adult life in
22 high-technology?

23 A. Yes, in terms of my professional career, certainly.

24 Q. And have you had experience with DVD technology before
25 becoming involved in this litigation?

1 A. Yes, I have.

2 Q. And would you describe it, please.

3 A. Yes. I was involved in -- in analysis of DVD drives and
4 the firmware and hardware in them. And I was also involved in
5 another project that involved the computer side of playing DVD
6 movies. And I've done work with DVD drives as an optical
7 storage mechanism from time to time.

8 Q. And you have been hired in connection with this matter to
9 act as a consultant and testifying witness by the attorneys for
10 DVD CCA, correct?

11 A. That's correct.

12 Q. When did you begin your assignment?

13 A. Last September.

14 Q. And what assignment were you given, more specifically?

15 A. I was asked to examine the CSS specifications and look at
16 the RealNetworks RealDVD products, the Facet product, and the
17 Vegas product, and then determine if those products complied
18 with the specifications.

19 Q. And what sorts of materials and devices have you reviewed
20 and examined in connection with your work?

21 A. Well, in terms of the CSS specifications, I've looked at
22 the general specification, the procedural specification, and
23 then the more detailed module specifications, the authenticator
24 and the descrambler. And I've also looked at the license
25 agreement.

1 And, then, in terms of the RealDVD products, Facet and
2 Vegas, I have looked at various internal documents. And I have
3 analyzed the source code, the actual computer source code for
4 both of those products.

5 I've operated the Vegas product. That's the one that you
6 could download onto a Windows PC. And I have also examined
7 and run a prototype of the Facet product.

8 **Q.** And did you reach any conclusions from your analysis of
9 the RealDVD products?

10 **A.** Yes, I did. And I prepared a slide to show those
11 conclusions.

12 And the first one is that the -- the CSS specifications
13 prohibit interception and copying of the content on a DVD disc,
14 including the keys required to descramble the A/V content, for
15 the purpose of playing back the movie without the presence of
16 the DVD.

17 That, I believe, is what the specifications say you cannot
18 do. You cannot play back the movie without the presence of the
19 DVD. And, in fact, the RealDVD products, Facet and Vegas, do
20 in indeed intercept and copy the contents of a DVD. And they
21 do it for the purpose of playing it back without the presence
22 of the DVD disc. And I believe that, therefore, they don't
23 comply with the CSS specifications.

24 **THE COURT:** When you're using the term "CSS
25 specifications" are you referring to this whole array of

1 specifications you mentioned earlier, the technical, the
2 procedural and the module specifications?

3 **THE WITNESS:** Yes, I am. There are --

4 **THE COURT:** And the general ones, as well, excuse me,
5 yes.

6 **THE WITNESS:** That's correct. I'm considering all of
7 the specifications. There are specific parts of each
8 individual specification that -- that they don't comply with.
9 But when I say "CSS specifications" I'm thinking of all of
10 them.

11 **THE COURT:** Now, for my information, are these
12 specifications in separate documents, like the general and then
13 the technical specifications, procedural specifications, each
14 of them is in a separate document.

15 **THE WITNESS:** Yes, Your Honor. There is a -- there
16 is -- each one has a set of pages with a different page
17 numbering system. So they are separate documents.

18 **THE COURT:** And how many such separate documents are
19 there with specifications in them?

20 **THE WITNESS:** There are five that I reviewed. And
21 there are four that I described a moment ago. And there's a
22 fifth one that -- as I'll describe a little bit later on,
23 there's an authentication mechanism that occurs both on the DVD
24 drive and in the computer. So there's a specification for each
25 one of those.

1 And I didn't mention the DVD drive specification, but
2 if you add that one in that would be a total of five that I
3 reviewed.

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

5 **MR. STEER:** And, Your Honor, just for the Court's
6 ease of reference, again, those specifications to which Real
7 signed on are exhibits to the Pak declaration. And, of course,
8 I showed this morning the receipt referencing the three
9 confidential packages or booklets that RealNetworks received.

10 **THE COURT:** Yes, Exhibit L?

11 **MR. STEER:** I think that's right.

12 **THE COURT:** N, O, P, and so forth.

13 **MR. STEER:** You read that.

14 **THE COURT:** Okay.

15 **MR. STEER:** Good.

16 **BY MR. STEER:**

17 **Q.** So I would like to turn, then, to a basic overview of CSS.
18 And I think we can continue with this. Before we get into the
19 details of your opinions, Doctor, can you describe for me in
20 general terms what CSS is?

21 **A.** It's a -- CSS stands for Content Scramble System. And it
22 is a system that is intended to protect the contents of a DVD
23 disc from being copied.

24 **MR. STEER:** Your Honor, at this juncture, my plan was
25 to turn to Pak declaration Exhibit L, and bring back up section

1 1.2 for the general specifications. And if the monitors can
2 simply be turned so that the public doesn't see them, we can
3 handle it the same way we did this morning.

4 **THE COURT:** Yes. Do you have -- Rowena, do you know
5 how to do that?

6 **THE CLERK:** I believe I do.

7 **THE COURT:** Try it. What's up there now, can you
8 turn off the public display monitors.

9 **MR. STEER:** Done. Good. Thank you.

10 **THE COURT:** You've got the others up, though? That's
11 easy. Now the question is, can you turn on our monitors? Now
12 can you turn that one off, the public ones off, and keep ours
13 on? There is a way to do this somehow.

14 You did it.

15 **MR. STEER:** Now it's done.

16 **THE COURT:** You did it.

17 **MR. STEER:** Good.

18 **THE COURT:** Okay.

19 **BY MR. STEER:**

20 **Q.** So let's talk about the purposes of CSS, Dr. Kelly. And
21 forgive me for intruding on your control over the slides, but I
22 thought we ought to take care of that confidentiality issue
23 first.

24 Can you tell us what this first page of the general
25 specifications lays out?

1 **A.** Sure. This is -- this is -- this is page 1. And you can
2 tell that because at the bottom it says, "GEN1." And it
3 clearly states on the very first page what the objectives of
4 the DVD video Content Scramble System are.

5 Number one, to make playback of copyrighted material on a
6 DVD ROM disc possible only on devices subject to license terms
7 that protect certain rights to the copyrighted owner of that
8 material.

9 Number two, to prevent digital-to-digital copying in a
10 personal computer environment.

11 **Q.** And can you identify the various components?

12 **MR. STEER:** And now, Your Honor, what I had proposed
13 to turn to is a slide that is a graphic from the general
14 specifications, which I believe is highly confidential and
15 should not be publicly shared.

16 And from here on in, I think Dr. Kelly's testimony is
17 going to get into the details of implementation in a way that
18 makes it really impossible to talk about higher-level
19 principles without, you know, getting into trade secrets.

20 **THE COURT:** And are there any other -- in any of
21 these other documents that he may be referencing, any other
22 generalized principles?

23 **MR. STEER:** Well, we return, Your Honor, to his
24 conclusions. But if you -- if you page through the slides that
25 I've provided, you'll see that almost all of them are diagrams

1 either from the general specifications or from the
2 authenticator module, so on and so forth. In other words --

3 **THE COURT:** Yes.

4 **MR. STEER:** -- the -- the trade secrets.

5 **THE COURT:** Yes.

6 **MR. STEER:** There is a little bit of text here or
7 there, but, frankly, it would not make sense to skip to that
8 text and then come back to this, in my opinion, because it
9 would not be as illuminating as I would hope and as I'd like it
10 to be.

11 **THE COURT:** I can understand that. And I can follow
12 along. But I think, for example, as I look through this -- and
13 I'm using it as a guide without having, you know, the benefit
14 of hindsight, but, for example, I know it's taking it out of
15 order but perhaps with respect to what's on page 18 he can
16 testify as to the general purposes of, et cetera. And then
17 maybe there's some more general. He probably knows even
18 better. These are his slides.

19 Well, in this page 19, they are a summary of
20 conclusions. For example, page 26, 27, which looks very much
21 like the earlier page I saw, and --

22 **MR. STEER:** Well, in fact, Your Honor --

23 **THE COURT:** Those kinds of things, if he can testify
24 to those general matters, and then we can get back to plugging
25 in the actual specifications.

1 **MR. STEER:** He can do that. And I'll ask him some
2 questions about those particular graphics. But it takes them
3 out of sequence.

4 **THE COURT:** I understand that.

5 **MR. STEER:** And we'll have to return to that.

6 **THE COURT:** I understand that. Very quickly. There
7 isn't that much, I think.

8 **MR. STEER:** Right.

9 **BY MR. STEER:**

10 **Q.** So, Dr. Kelly, can you turn to what we had identified as
11 slide number 18, which talks about the purposes of bus
12 authentication and bus decryption, please.

13 And maybe you should stay on the nonpublic version of
14 this, if possible.

15 **A.** If I may, I would like to ask the video operator to do
16 that. I can page through them, but then I'll have to display
17 the intermediate slides.

18 **Q.** Right. That's good. Thank you.

19 First of all, if you wouldn't mind just explaining briefly
20 what bus authentication and bus decryption are.

21 **A.** The DVD data is read from the DVD disc by a drive, by a
22 DVD drive. And then that drive transfers the information to
23 the computer. And there is -- there is a -- two processes that
24 are used to make that transfer more secure. They're called bus
25 authentication and bus decryption.

1 And bus authentication, the basic idea is that the drive
2 and the computer exchange some handshakes to say that they
3 understand that each one is ready to proceed and knows what
4 they're doing.

5 And then bus decryption, basically, the idea there is that
6 now that these two devices are communicating, they can add a
7 layer of encryption on the bus. And that's called "bus
8 encryption" at the drive, and "bus decryption" at the computer
9 side.

10 And that's basically what they are. I can explain the
11 details a little bit later.

12 **THE COURT:** Yes. Thank you.

13 **MR. STEER:** Well, going on to what I think is the
14 next logical slide that can be discussed publicly, it's number
15 26. Your Honor, if you think there's something else you would
16 like to hear about that meets the -- you know, that can be
17 disclosed or, in your view, may be --

18 **THE COURT:** No, I think that's fine.

19 **MR. STEER:** We'll go on to number 26.

20 **BY MR. STEER:**

21 **Q.** And, Dr. Kelly, if you wouldn't mind explaining what
22 that's all about.

23 **A.** Sure. The -- we just -- I just mentioned that the --
24 there is this authentication and bus encryption/decryption
25 process between the DVD drive and the computer. And the piece

1 that does this in the computer is called the "authenticator."
2 And it's in something called the "CSS decryption module." And
3 the section 6.2.3 in the procedural specification says that the
4 authenticator in a CSS decryption module shall correctly engage
5 in and complete the authentication process with the DVD drives,
6 and ensure that the CSS keys are received by the descrambler
7 only if the authentication process is successful.

8 So the descrambler, which is actually going to make sense
9 out of these keys and descramble the movie, should only get the
10 keys that it needs to do that job after the authenticator has
11 engaged in and completed the authentication process.

12 **THE COURT:** In your parlance, what is the difference
13 between scrambling and encrypting or, you know, descrambling
14 and decrypting?

15 **THE WITNESS:** In terms of the algorithms that are
16 used, in terms of the actual steps and the way that the keys
17 are used, actually, there's not that much difference.

18 And so we talk about scrambling and descrambling the
19 audio/video content, and we talk about encrypting and
20 decrypting the keys.

21 But, in reality, the operations are very similar.

22 **MR. STEER:** Your Honor, if I turn to slide 36 in the
23 packet that you have, it's all about Vegas and Facet, and what
24 they do that violates the CSS agreement, and how they -- the
25 things they fail to do, that they should do in order to comply

1 with it.

2 And I'm happy to have Dr. Kelly state those
3 conclusions, but we'll come back to it as we go through an
4 explanation.

5 **THE COURT:** We'll to the conclusions later on.

6 **MR. STEER:** We'll get to the conclusions later. So I
7 don't know how helpful it would be to anybody to have these
8 conclusions stated now.

9 **THE COURT:** And --

10 **MR. STEER:** Before the conclusions you'll see a slide
11 that says, "Demonstration of Vegas." And we had intended to
12 show you the actual operation.

13 **THE COURT:** Okay. Should I assume that what is on
14 page 33 -- I mean, certainly, what you refer to, page 33, 34,
15 and 36, probably fall in the category of documents I was
16 talking about before. But, but, at least the last two of those
17 tend to be more the conclusions that are more appropriate at
18 the end of Dr. Kelly's testimony.

19 Is there any reason why page 33 -- is that a problem?
20 It's pretty much what he has already testified to. A great
21 deal of that anyway, I think.

22 **MR. STEER:** No, I think we can disclose that
23 information without much risk.

24 Page 34, as you know, is simply a repeat of the two
25 conclusions that he's already testified to.

1 **THE COURT:** Yes. Right. I saw that.

2 **MR. STEER:** And that's just because it was a logical
3 thing to state at that point in his testimony.

4 **THE COURT:** The end.

5 **MR. STEER:** Not quite the end. The demo comes just
6 before the end. Spice it up a little bit.

7 **BY MR. STEER:**

8 **Q.** So, Dr. Kelly, turning to page 33, or slide 33, which is
9 entitled, "Protections CSS Provides for Encrypted Data," it
10 lists some examples.

11 And if you would explain those principles to the Court, in
12 as general terms as possible, I would appreciate it.

13 **A.** Certainly.

14 The first example is that the various keys that -- some of
15 the keys that we've been talking about are stored on the DVD
16 disc itself. They're stored in encrypted form. But they're
17 also stored in hidden areas of the disc. That's the first
18 point.

19 The second point is that the -- as I mentioned, there
20 are -- keys are transferred from the DVD drive to the computer.
21 And they're transferred in not only their encrypted form but
22 also with this further level of encryption called bus
23 encryption. And, again, we'll, I hope, talk about the details
24 a little bit.

25 And then the last bullet point discusses the fact that

1 when the computer receives the bus encrypted title keys, it
2 removes the bus encryption. It decrypts that part. But what
3 remains is still an encrypted key. And it sends that encrypted
4 key directly to the descrambler, without it appearing on a user
5 accessible bus. That's what the specifications called for.

6 **THE COURT:** Okay.

7 **MR. STEER:** With that, Your Honor, I think the rest
8 of Dr. Kelly's testimony really does get into details of trade
9 secrets.

10 **THE COURT:** That's what I can see. First of all, for
11 the record, it should be clear that by allowing this testimony,
12 even though a couple of the areas of his testimony get into the
13 language of the document that we've been referring to as
14 containing the trade secrets, that that does not -- because it
15 was under order of the Court, it does not constitute a waiver
16 with respect to what is contained, you know, in that document
17 or any reference documents that do contain trade secrets.

18 I'm satisfied that what is now being pursued, about
19 to be pursued, does, in fact, meet the requirement for trade
20 secrets, absent some further showing by someone that, in fact,
21 there has been some disclosure that's something other than
22 inadvertent or the result of hacking or unlawful access, and
23 that proceeding in the manner in which we are proceeding is
24 sufficiently narrowly tailored to meet the requirements and
25 protect what needs to be protected. And without that

1 protection, then, the meaning of "trade secrets" is essentially
2 meaningless. So -- and there would be undue prejudice.

3 So with that, unless there is something further from
4 one of the parties, I'm going to order that anybody who is
5 not -- has not signed off on a disclosure, nondisclosure
6 agreement or confidentiality agreement with respect to these
7 matters, is ordered to leave the court. So you know who you
8 are.

9 And then I think it's up to the parties to determine
10 whether there are other persons remaining in the court who
11 should be ordered to leave the court.

12 Do you know? We still have a large number of people
13 in the court. Is somebody taking a look around? Okay.

14 Rowena, do you have a sign you can put on the door,
15 something to make sure people don't come in? I'll keep an eye,
16 but you need to keep an eye also.

17 Yes, sir. You're Mr. Lambert.

18 **MR. LAMBERT:** Yes. I was wondering if I could excuse
19 Ms. Johnson who has to travel down to the South Bay.

20 **THE COURT:** I think so. Does anyone know of any
21 reason why she needs to remain behind?

22 **MR. SCOTT:** No objection, Your Honor.

23 **THE COURT:** I just wanted to get this clarified on
24 the record. And I'm sure I'll hear about it later.

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

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THE COURT: Okay. Thank you. It's better than --
this is off the record.

(Discussion held off the record.)

(Pages 162 through 249 filed under seal. Nothing
omitted. Nothing deleted. Please see next page.)

PROCEEDINGS

1 (Nothing omitted. Nothing deleted.)
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23 **MR. SCOTT:** Nothing further, Your Honor.
24 **THE COURT:** Okay.
25 **MR. SINGLA:** If I could just follow up.

1 **THE COURT:** That's it.

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

3 **THE COURT:** That's it. That's it. The tennis match
4 stops, you know. And we have rules for when the tennis match
5 stops, and just doesn't keep going on. Not state court. I'm
6 sorry. Thank you.

7 (Laughter)

8 But I was one of those, and I saw these practices of
9 jumping up for just one more question. That's it.

10 Now, does Dr. Kelly need to be subject to being
11 recalled?

12 **MR. SCOTT:** No, Your Honor.

13 **MR. STEER:** No, Your Honor.

14 **THE COURT:** So you are excused, but do not discuss
15 your testimony with any other persons who may be witnesses --

16 **THE WITNESS:** Thank you, Your Honor.

17 **THE COURT:** -- until the proceeding is over.

18 Thank you.

19 **THE WITNESS:** Thank you.

20 **THE COURT:** And we resume here on Tuesday.

21 **MR. STEER:** Yes.

22 **MR. SCOTT:** Yes.

23 **THE COURT:** At 9:30, with Mr. or Dr. Schumann?

24 **MR. SINGLA:** Yes, Your Honor, with Mr. Schumann. But
25 we may -- and we told RealNetworks this. We may start with

1 Mr. Hollar. He is available on Tuesday.

2 **MR. SCOTT:** We have no objections.

3 **MR. SINGLA:** We may start with Mr. Hollar and then go
4 to Mr. Schumann.

5 **THE COURT:** And that's going to be the end of your
6 witnesses.

7 **MR. SINGLA:** That will be the end of our live
8 witnesses, yes, Your Honor.

9 **THE COURT:** Live witnesses. Okay.

10 And will we get to your witnesses then, at least one
11 of them, on Tuesday, one or more?

12 **MR. SCOTT:** We will be ready. Whether we get passed
13 the baton, I can't speak to.

14 **THE COURT:** You will have at least one here, or more,
15 so we can go?

16 **MR. SCOTT:** Absolutely.

17 **THE COURT:** I don't know how long they are going to
18 take.

19 You're going to give them your list of witnesses.
20 How many witnesses do you plan to call, live witnesses?

21 **MR. SCOTT:** It's a discussion I haven't had with
22 folks yet, to nail it down.

23 **THE COURT:** What's the hurry?

24 **MR. SCOTT:** Five or -- you know, five or six. I'd
25 like to reduce that, but five or six.

1 **THE COURT:** Okay.

2 So you anticipate we'll finish up with all of that by
3 Wednesday?

4 **MR. SCOTT:** No, I don't.

5 **THE COURT:** No?

6 **MR. SCOTT:** I hope so, but I don't -- video is going
7 to take quite a while, I guess. We'll see.

8 **THE COURT:** What is the video? Is that a witness
9 or --

10 **MR. SCOTT:** The defendants' video depositions will
11 take time.

12 **THE COURT:** How many of those are there?

13 **MR. SINGLA:** Well, Your Honor, what we would like to
14 do is take the weekend, given how much time this has taken, and
15 try to see if we can pare all the video down and just show the
16 Court the little bits that we think are worth showing you.

17 **THE COURT:** Yes. And I can spend my evening hours, I
18 guess, with nothing better to do, instead of watching protected
19 content.

20 (Laughter)

21 **MR. SINGLA:** Your Honor --

22 **THE COURT:** We'll have to watch stuff that should be
23 protected.

24 (Laughter)

25 **MR. SINGLA:** Your Honor, if I can make sure I

1 understand what the Court is suggesting.

2 One thought we had was maybe we could take some of
3 the video and provide it to the Court on a DVD or something,
4 non-CSS DVD.

5 **THE COURT:** Yes, absolutely. Okay. So then --

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

7 **THE COURT:** Anything else?

8 **MR. WILLIAMS:** I just wanted to raise the issue with
9 respect to time. I've talked with Mr. Scott about prospects
10 for closing. I think it's the expectation of both parties we
11 would like to do some closing. The prospects for doing that on
12 Wednesday seem a little --

13 **THE COURT:** Probably dim.

14 **MR. WILLIAMS:** -- a little dim. So we were going to
15 talk about schedules, and so forth, after that.

16 **THE COURT:** Okay. Fine.

17 **MR. WILLIAMS:** I just wanted -- the Court does intend
18 to hear some closing from the parties?

19 **THE COURT:** Yes. I said I prefer not to hear any
20 opening, but I'll hear closing. So maybe I'll take some of the
21 closing out of the amount of opening. But we'll figure that
22 out. At least when it's a bench trial it's easier to maneuver
23 all of that.

24 So we will see you, then, on Tuesday morning.

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

PROCEEDINGS

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MR. WILLIAMS: Thank you, Your Honor.

(Counsel thank the Court.)

THE COURT: Have a good weekend.

(Discussion held off the record.)

(At 5:25 p.m. the proceedings were adjourned until
Tuesday, April 28, 2009, at 9:30 a.m.)

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Direct Examination by Mr. Steer	146	1
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E X H I B I T S

JOINT EXHIBITS

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CERTIFICATE OF REPORTERS

We, KATHERINE POWELL SULLIVAN and BELLE BALL, Official Reporters for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in 08-4548 and 08-4719, RealNetworks, Inc., et al. vs. DVD Company Control Association, Inc., et al. were reported by us, certified shorthand reporters, and were thereafter transcribed under our direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by us at the time of filing.

s/b Katherine Powell Sullivan

Katherine Powell Sullivan, CSR #5812, RPR, CRR
U.S. Court Reporter

s/b Belle Ball

Belle Ball, CSR #8785, RPR, CRR
U.S. Court Reporter

Saturday, April 25, 2009