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11 REALNETWORKS HOME
ENTERTAINMENT, INC.

12 (additional counsel listed on following page)

13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA

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

18 Plaintiffs,

19 v.

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

Defendants.

Case Nos. C08 04548 MHP;
C08 04719 MHP

**[PROPOSED] SECOND AMENDED
COMPLAINT FOR DECLARATORY
RELIEF AND VIOLATION OF
SHERMAN ACT AND STATE LAW**

JURY TRIAL DEMANDED

27 AND RELATED CASES
28

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1 1. This is an action for (1) a declaratory judgment pursuant to 28 U.S.C. § 2201 and
2 28 U.S.C. § 2202, brought by RealNetworks, Inc. (“RealNetworks”) and RealNetworks Home
3 Entertainment, Inc. (“RealNetworks Home”) (together, “Plaintiffs”) by and through counsel,
4 against defendants Disney Enterprises, Inc., Paramount Pictures Corp., Sony Pictures
5 Entertainment, Inc., Twentieth Century Fox Film Corp., NBC Universal, Inc., Warner Bros.
6 Entertainment, Inc., Viacom, Inc. (collectively the “Studio Defendants”) and DVD Copy Control
7 Association (“DVD CCA”) (where the Studio Defendants and the DVD CCA shall be referred to
8 collectively as “Defendants”) for the purpose of determining a question of actual controversy and
9 the rights and obligations between the parties (“Declaratory Relief”); and (2) a judgment against
10 Defendants for violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, the California
11 Cartwright Act, Bus. & Prof. Code § 16700 *et seq.*, and the California Unfair Competition Law,
12 Bus. & Prof. Code § 17200 *et seq.* (“Antitrust Claims”), as follows:

13 **JURISDICTION, VENUE AND INTERSTATE COMMERCE**

14 2. This court has jurisdiction over the claims asserted for declaratory relief because
15 the underlying action concerns a federal question. The Defendants in this matter would be filing a
16 claim against one or more of Plaintiffs under the DMCA. Because the crux of this matter involves
17 a federal right, this court properly maintains jurisdiction over this action for declaratory relief
18 under the DMCA under 28 U.S.C. § 1331. This court has jurisdiction over the claims for violation
19 of Section 1 of the Sherman Act under 28 U.S.C. § 1331 and 1337(a). This court has
20 supplemental jurisdiction of all other claims under 28 U.S.C. § 1367.

21 3. Venue is proper in this court pursuant to 28 U.S.C. § 1391(a)(2), because a
22 substantial part of the events or omissions giving rise to the claims occurred in this District.
23 Additionally, pursuant to § 10.4 of the CSS License Agreement, exclusive jurisdiction and venue
24 over any dispute arising out of the agreement exists in the federal and state courts of Santa Clara
25 County, California.

26 4. The actions complained of have occurred in and substantially affect interstate
27 commerce.

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INTRADISTRICT ASSIGNMENT

5. Pursuant to Civil Local Rule 3-2(c), this action may be assigned on a district-wide basis.

THE PARTIES

6. RealNetworks is a Washington corporation with its principal place of business in Seattle, Washington. It is engaged in the business of, among other things, developing, manufacturing, and selling platforms for the delivery of digital media. Consumers use RealNetwork’s services and software to find, play, purchase and manage free and premium digital content, including music, games and video. Broadcasters, network operators, media companies and enterprises use RealNetwork’s products and services to create and deliver digital media to PCs, mobile phones and other consumer electronics devices. RealNetwork’s RealPlayer product is an innovative award-winning technology that was one of the first media players capable of streaming media over the Internet.

7. RealNetworks Home Entertainment, Inc. is a Delaware corporation with its principal place of business in Seattle, Washington. It is a subsidiary of RealNetworks, and it is the entity that distributes the RealDVD product, also known as Vegas, and is developing and will distribute the New Platform, also known as Facet.

8. The DVD CCA is a Delaware nonprofit corporation, having offices located in Morgan Hill, California. According to the allegations of its Amended Answer and Counterclaims, the DVD CCA is responsible for developing, evaluating and licensing copy control and related technologies to participants at various levels in the DVD industry. DVD CCA is the licensor of the Content Scramble System. DVD CCA licenses the Content Scramble System technologies to companies that manufacture hardware and software products that play back to viewers CSS-protected DVDs, recordable discs and related products, and to motion picture studios and other companies whose audio-visual works are encrypted using the Content Scramble System. DVD CCA granted a license in the CSS technology to RealNetworks in the form of a written CSS License Agreement. The Studio Defendants are members of the DVD CCA. Upon information and belief, the other members of the DVD CCA are consumer electronics companies and

1 computer manufacturers. Upon information and belief, there are twelve seats on the DVD CCA's
2 board of directors and the Studio Defendants hold six of them. The remaining seats are held by
3 representatives of the computer electronics industries and computer companies.

4 9. Disney Enterprises, Inc. is a Delaware corporation with its principal place of
5 business in Los Angeles, California. It is engaged in the business of, among other things, making
6 motion pictures. It is a member of the DVD CCA.

7 10. Paramount Pictures Corp. is a Delaware corporation with its principal place of
8 business in Los Angeles, California. It is engaged in the business of, among other things, making
9 motion pictures. It is a member of the DVD CCA.

10 11. Sony Pictures Entertainment, Inc. is a Delaware corporation with its principal place
11 of business in Culver City, California. It is engaged in the business of, among other things,
12 making motion pictures. It is a member of the DVD CCA.

13 12. Twentieth Century Fox Film Corp. is a Delaware corporation with its principal
14 place of business in Los Angeles, California. It is engaged in the business of, among other things,
15 making motion pictures. It is a member of the DVD CCA.

16 13. NBC Universal, Inc., is a Delaware corporation with its principal place of business
17 in Universal City, California. It is engaged in the business of, among other things, making motion
18 pictures. It is a member of the DVD CCA.

19 14. Warner Bros. Entertainment, Inc. is a Delaware corporation, with its principal place
20 of business in Los Angeles, California. It is engaged in the business of, among other things,
21 making motion pictures. It is a member of the DVD CCA.

22 15. Viacom, Inc. is a Delaware corporation, with its principal place of business in
23 New York, New York. It is engaged in the business of, among other things, making motion
24 pictures. It is a member of the DVD CCA.
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1 **DECLARATORY RELIEF CLAIMS**

2 **NATURE OF CLAIMS FOR DECLARATORY RELIEF**

3 16. Plaintiffs' claims for declaratory relief arise as a result of a legal dispute between
4 Plaintiffs and Defendants relating to two of Plaintiffs' innovative new products: a new software
5 product known as Vegas and marketed as "RealDVD," and a yet-to-be-named product in the
6 final stages of development that Plaintiffs herein refer to as the "New Platform" or "Facet." The
7 two products are collectively referred to hereafter as "RealDVD." Vegas has a variety of
8 different functions, including the playback of DVDs placed into a computer's DVD drive,
9 looking up information about the DVD from Internet databases, providing links to various
10 information websites relevant to the chosen DVD, and storing an image of the copy-protected
11 DVD to a computer hard drive for safekeeping and later playback purposes. Facet has similar
12 planned functionality.

13 17. When Vegas and Facet are used to make a personal copy of a DVD, they not only
14 preserve the Content Scramble System ("CSS") encryption the Studio Defendants use to encrypt
15 DVDs, but also incorporate an additional level of protection.

16 18. The Studio Defendants are members of the DVD Copy Control Association, a not-
17 for-profit association that licenses the CSS technology to, among others, manufacturers of DVD
18 hardware and software, such as RealNetworks, pursuant to a standard license agreement ("CSS
19 License Agreement"). The Studio Defendants assert that the CSS License Agreement grants the
20 Studio Defendants, as third-party beneficiaries, the right to enforce its terms against licensees, and
21 in particular the right to prohibit the sale of Vegas and products with similar functionality such as
22 Facet. *See* CSS License Agreement § 9.5.

23 19. Despite the fact that a California court concluded over a year ago that the same type
24 of copying methodology employed by RealDVD do not violate the CSS License Agreement (*see*
25 *DVD Copy Control Association, Inc. vs. Kaleidescape, Inc.*, Superior Court Santa Clara County
26 (No. 1:04 CV 031829), Judgment dated Apr. 13, 2007), the Studio Defendants, on their own behalf
27 and on behalf of the DVD CCA, nonetheless have asserted that products with functionality like that
28 in the RealDVD products violate the CSS License Agreement and the anti-circumvention

1 provisions of the Digital Millennium Copyright Act (“DMCA”). On information and belief, the
2 DVD CCA has asserted similarly.

3 20. Accordingly, there exists an actual and justiciable controversy between Plaintiffs
4 and the Defendants relating to their respective rights and legal duties under the CSS License
5 Agreement and the DMCA. Plaintiffs seek a judgment declaring, among other things, that the
6 CSS License Agreement permits Plaintiffs to manufacture and offer for sale the RealDVD
7 products and that the Plaintiffs do not violate the DMCA.

8 **FACTUAL ALLEGATIONS FOR DECLARATORY RELIEF CLAIMS**

9 **A. The CSS License Agreement and The DVD CCA**

10 21. The Studio Defendants sell DVD discs that contain movies, and such discs use the
11 CSS technology to encrypt the content on the DVDs. Consequently, the content must be
12 decrypted before the movie can be displayed. Thus, the manufacturers of hardware and software
13 that permit DVD movies to be used (the consumer electronics and computer industries) must
14 likewise have access to the CSS technology.

15 22. To facilitate their mutual interests in the use of the CSS technology, the motion
16 picture, consumer electronics, and computer industries formed the DVD CCA. The DVD CCA
17 licenses the CSS technology to, among others, manufacturers of devices and software used to
18 decrypt images on DVDs pursuant to a standard form CSS License Agreement (a copy of which is
19 attached hereto as Exhibit 1).

20 23. The CSS License Agreement imposes certain restrictions on its licensees, including
21 the requirement that the licensees “comply with the version of the CSS Specifications which is in
22 effect at the time such DVD Product is manufactured” CSS License Agreement § 4.2. The
23 Studio Defendants assert that the CSS License Agreement grants them the right to enforce certain
24 of its provisions, including Section 4.2. *See* CSS License Agreement § 9.5.

25 24. On or about August 13, 2007, RealNetworks signed the CSS License Agreement.
26 It is thereby entitled to use the CSS technology under the terms of that Agreement.

1 **B. Development of the RealDVD Products**

2 25. Both Vegas and Facet provide DVD users with, among other things, the ability to
3 save a personal copy of a DVD they own on a secure hard drive for their own personal use. The
4 copy preserves the CSS encryption. The RealDVD products thus protect the user from, among
5 other things, damage or loss of a DVD, while ensuring that the encryption protection in the
6 original DVD is maintained. Further, Vegas and Facet enhance the original protection by
7 incorporating an additional layer of protection at a level beyond that required by the CSS License
8 Agreement. The RealDVD products also provide a number of other desirable features, such as
9 parental controls that ensure children access only entertainment that is appropriate for their age,
10 central storage that permits users to keep all the motion pictures they own in one easily accessible
11 location, and the capability for users to watch their movies on a variety of devices they own for
12 greater ease of use and convenience.

13 26. Plaintiffs made known to the Defendants that Vegas would be released on
14 September 30, 2008. By October 20, 2008 or earlier, Plaintiffs made known to the Defendants the
15 fact of the existence of Facet and that it would be brought to market shortly.

16 **C. The Legal Dispute with the Studio Defendants**

17 27. The Studio Defendants, on their own behalf and on behalf of the DVD CCA of
18 which they are members, have advised Plaintiffs that they believed that products with
19 functionality like that in the RealDVD products violate the CSS License in that neither product
20 conforms to the CSS Specifications. The Defendants further claimed that products with
21 functionality like that in the RealDVD products violate the anti-circumvention provisions of the
22 DMCA.

23 28. Plaintiffs do not believe that the RealDVD products violate the CSS License
24 Agreement or the DMCA or any rights of the Defendants, and have so advised the Studio
25 Defendants.

26 29. Efforts to resolve this dispute have failed.
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1 **FIRST CAUSE OF ACTION**

2 (Declaratory Relief under Contract Claim)

3 30. Plaintiffs reallege and incorporate by reference the allegations contained in
4 Paragraphs 1 through 29 as if fully set forth herein.

5 31. There is an actual and justiciable controversy relating to the legal rights and duties
6 of Plaintiffs and Defendants under the CSS License Agreement in that the Defendants have
7 advised Plaintiffs that they believe that products with functionality like that in the RealDVD
8 Products violate the CSS License Agreement. This controversy is of sufficient immediacy and
9 reality to warrant the issuance of a declaratory judgment.

10 32. Thus, a declaration of Plaintiffs' rights under the CSS License Agreement is
11 necessary to protect Plaintiffs from uncertainty and insecurity, which is causing Plaintiffs injury
12 by, among other things, damaging its goodwill and disrupting its business. Without the requested
13 declaration of its rights, the Defendants will continue to jeopardize Plaintiffs' interests.

14 **SECOND CAUSE OF ACTION**

15 (Declaratory Relief under the Digital Millennium Copyright Act, 17 U.S.C. § 1201)

16 33. Plaintiffs reallege and incorporate by reference the allegations contained in
17 Paragraphs 1 through 32 as if fully set forth herein.

18 34. RealNetworks is a licensee of CSS technology, and the RealDVD products were
19 designed to conform to the CSS Specifications. As a result, the RealDVD products are authorized
20 by the Defendants to utilize CSS technology to access the content of DVDs to which the Studio
21 Defendants own the copyrights.

22 35. Neither Vegas nor Facet is primarily designed or produced for the purpose of
23 circumventing a technological measure that effectively controls access to a copyrighted work, or
24 that protects the right of a copyright owner. Rather, both of the RealDVD products ensure that the
25 encryption protection in the original DVD is maintained and enhanced by incorporating an
26 additional layer of protection at a level beyond that required by the CSS License Agreement.

27 36. Both the RealDVD products have commercially significant purposes and uses other
28 than to circumvent a technological measure that effectively controls access to a copyrighted work,

1 or that protects the right of a copyright owner. By way of example only, the RealDVD products
2 provide the owners of DVDs with the ability to save a personal copy of a DVD on a secure hard
3 drive for private use, and protect the DVD owner against damage or loss of a DVD that he or she
4 has obtained through legitimate means.

5 37. Neither Vegas nor Facet has been marketed for use in circumventing a
6 technological measure that effectively controls access to a copyrighted work, or that protects the
7 right of a copyright owner. Rather, Vegas has been marketed as licensed software that “saves a
8 secure copy of a DVD to the hard drive without removing or altering the CSS encryption.” Facet
9 will be marketed similarly upon release.

10 38. Plaintiffs request a judicial determination and declaration as to whether the
11 RealDVD products violate the provisions of 17 U.S.C. § 1201. Such a judicial determination and
12 declaration is necessary to protect Plaintiffs from uncertainty and insecurity, which is causing
13 Plaintiffs injury by, among other things, damaging its goodwill and disrupting its business.
14 Without the requested declaration of its rights, the Defendants will continue to jeopardize
15 Plaintiffs’ interests.

16 **ANTITRUST CLAIMS**

17 **INTRODUCTION**

18 39. The Studio Defendants and the DVD CCA have sought to enjoin RealNetworks
19 from distributing products that provide the technology to add features to DVD content by saving
20 the content to a personal hard drive. RealNetworks’ technology products compete with products
21 offered by the Studios. The position of the DVD CCA and the Studios about the CSS License
22 Agreement was confirmed during the hearing on the preliminary injunction motion. They
23 acknowledge that the CSS License Agreement results from collective action by the Studios
24 through the DVD CCA to prohibit all copying to a hard drive unless the Studios jointly authorize
25 the making of such a copy. Pursuant to their interpretation of the CSS License Agreement, each
26 Studio has ceded its individual authority to authorize the use of its movie content through
27 *individual* copyright licenses in favor of a *joint agreement* to grant or withhold the use of such
28 content– the CSS License Agreement.

1 40. If true, this is an antitrust violation for two reasons: (1) As described below,
2 because of their interpretation of the CSS License Agreement, no individual Studio can authorize
3 the use of its own content consistent with the claimed provisions of the CSS Agreement; (2) the
4 CSS Agreement is being used to extend a legally granted monopoly over content into separate
5 markets – to prevent competition from technologies that would allow a copy of content for fair
6 use purposes. But the making of a copy of a Studio DVD is authorized fair use under the
7 Copyright Act, so the Studios have no “authority” to grant or withhold with respect to that
8 content. Nevertheless, the DVD CCA and the Studios claim that the CSS Agreement grants such
9 authority, and that anyone seeking to compete with them in that separate market violates not only
10 the CSS Agreement, but is also subject to criminal penalties under the Digital Millennium
11 Copyright Act (“DMCA”).

12 41. The average consumer owns over 75 DVDs. DVDs cost approximately \$10 -
13 \$15. Thus the average household may have an investment of well over \$1,000 in its DVD
14 collection.

15 42. Market research shows that consumers’ main complaints about DVDs are
16 twofold: (1) they get damaged; and (2) they get lost. It is common to open the DVD case of a
17 favorite video only to find an empty slot; the wrong DVD in the case; or a DVD covered with
18 scratches or gunk.

19 43. In 2007, RealNetworks sought to meet strong consumer demand among DVD
20 owners for technology that would enable them to save a secure copy of their DVDs to a hard
21 drive for safekeeping, portability, easy retrieval, and later playback. It developed two
22 innovative products – a software product code-named “Vegas” and a device code-named
23 “Facet.” Both products will be referred to hereafter as “RealDVD.” RealDVD allows users to
24 save and play a secure backup copy of the DVDs they own and to organize their favorite movies,
25 TV shows, scenes and actors so that they are all just a click away.

26 44. There were good reasons the Studio Defendants should have been excited about
27 RealDVD: products that make DVDs easier for consumers to use make DVDs more valuable to
28 their owners, and so are likely to increase the number of DVDs that consumers want to buy.

1 RealNetwork's innovative products thus stood to benefit everyone: consumers, who would get
2 more value out of the DVDs they own; the Studio Defendants, who would sell more DVDs; and
3 RealNetworks, from the sale of its new products.

4 45. Before RealNetworks released Vegas, RealNetworks approached the Studio
5 Defendants to notify them of the product, and to explore mutual marketing opportunities.
6 RealNetworks answered detailed questions about its product and the extensive safeguards it
7 provided against piracy. Negotiations ensued with two of the Studios, Fox and Paramount.

8 46. Underlying the negotiations between RealNetworks and the Studio Defendants
9 was the question of whether a consumer who had purchased a DVD had a fair-use right to make
10 a secure copy of the DVD on his computer hard drive. RealNetworks believed then, as it does
11 now, that a consumer who has purchased, for example, an *Iron Man* DVD, does not need further
12 permission from Paramount to copy that DVD onto her hard drive so as to get the benefit of
13 additional features that can only be provided by the saving to a hard drive. Those features
14 include the protection of DVD content, the ability to automatically organize and search DVD
15 content, bookmarking and parental control features, and the benefits of efficient portability for an
16 individual's DVD collection. Nonetheless, RealNetworks was eager to negotiate these issues
17 with the Studio Defendants, in the expectation it would be possible to reach marketing
18 agreements that would benefit all of the parties.

19 47. Ultimately RealNetworks was unable to conclude a deal with any of the Studios.
20 The Studio Defendants recognized that consumers would value the DVD playback and storage
21 capability. The Studios, however, wanted their customers to pay substantial sums to the Studios
22 themselves for this functionality. In essence, the Studio Defendants wanted to charge consumers
23 who have already purchased the DVDs for their exercise of their fair-use rights to make a second
24 backup copy.

25 48. Any individual Studio could have decided not to enter into an agreement with
26 RealNetworks and to sue to prevent its customers from using RealDVD to make copies of that
27 Studio's titles. Doing so individually, however, risked the possibility that another Studio might
28 reach an agreement with RealNetworks to promote its titles in connection with the release of a

1 popular new product. The litigating Studio then would face what could be a legal and public
2 relations nightmare.

3 49. The Studio Defendants agreed that they would claim that they cannot enter into
4 individual agreements with RealNetworks – in other words, they agreed collectively not to deal
5 with RealNetworks. So, for example, they claim that, because of the CSS Agreement,
6 Paramount cannot grant a license to make an archival copy of its own *Iron Man* DVD without
7 the permission of Fox, Disney, and the rest. This is a horizontal group boycott, and it is a
8 horizontal group boycott even though the Studios in fact have no right to grant or withhold
9 authority to make fair use copies and RealNetworks does not need their consent.

10 50. According to the Studios, this boycott is required by the terms of a license issued
11 through an entity that they effectively control called the DVD CCA. The DVD CCA was created
12 to license the encryption technology (CSS) that any company needs in order to make products to
13 play a DVD. According to the Studios, under the CSS license, unless amended (which requires
14 their collective approval through DVD CCA), they are prevented from individually granting
15 RealNetworks a license that would make clear that customers of any particular Studio can make
16 an archival copy of that Studio’s DVDs (as long as the customer owns the DVD).

17 51. Testimony at the preliminary injunction hearing confirmed that the Studios
18 entered into this collective agreement that, according to their interpretation, prohibits any
19 individual studio, without the action of the group, from authorizing any copies of their content
20 (for fair use or otherwise). Ms. King, a former Studio lawyer characterized by the Studios’
21 outside counsel as “a framer” of the CSS license (Tr. 19:9-17), unequivocally testified that the
22 motion picture studios got together as a group to determine the terms of the CSS license. (Tr.
23 74:1-12; 76:14-19; 83:14-84:6; 110:19-111:10). Their concerted action is illegal because they
24 agreed that there would be “no copies at all” of each individual Studio’s content made without
25 the authority of the group acting in concert. According to Ms. King, this agreement is
26 memorialized in the CSS License Agreement. (Tr. 74:1-12; 79:22-80:3). According to Ms.
27 King, the right of the Studios to authorize the use of their content flows through the CSS License
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1 Agreement, which allows only what the Studios “authorized could be done.” (Tr. 87:16-88:4;
2 98:10-23; 111:22-112:5).

3 52. Testimony from the expert from the DVD CCA, Dr. Kelly, further made clear that
4 the Studios and the DVD CCA intend the CSS agreement to prohibit any copies of DVD content
5 to a hard drive without the authority of the Studios. (Tr. 152:20-153:8). Dr. Kelly’s theory is
6 that the CSS agreement, by its terms, requires that a physical DVD disc be in a drive during
7 playback. (Tr. 149:10-23). According to this interpretation, no individual studio could possibly
8 give authority to create a product allowing for the copying of the individual studio’s content
9 without having that product run afoul of the group CSS Agreement. In other words, in order for
10 an individual studio to grant such authority, the group acting as a whole through the DVD CCA
11 would need to amend their agreement. The CSS Agreement, which is a product of the joint
12 conduct of the DVD CCA and the Studios, therefore memorializes the illegal horizontal
13 agreement to boycott any potential competitor.

14 53. Consistent with their agreement, the Studios have never authorized anyone to
15 make a playable copy of their content. (Tr. 100:14-20). Mr. Dunn, speaking for 20th Century
16 Fox Entertainment, confirmed the same thing: “The Studios have never licensed any third party
17 to offer a lawful product that would allow the copying of DVDs onto hard drives (and to my
18 understanding, the encryption technology we use on our DVDs does not even permit for such a
19 license).” (Dunn Decl., ¶ 28.)

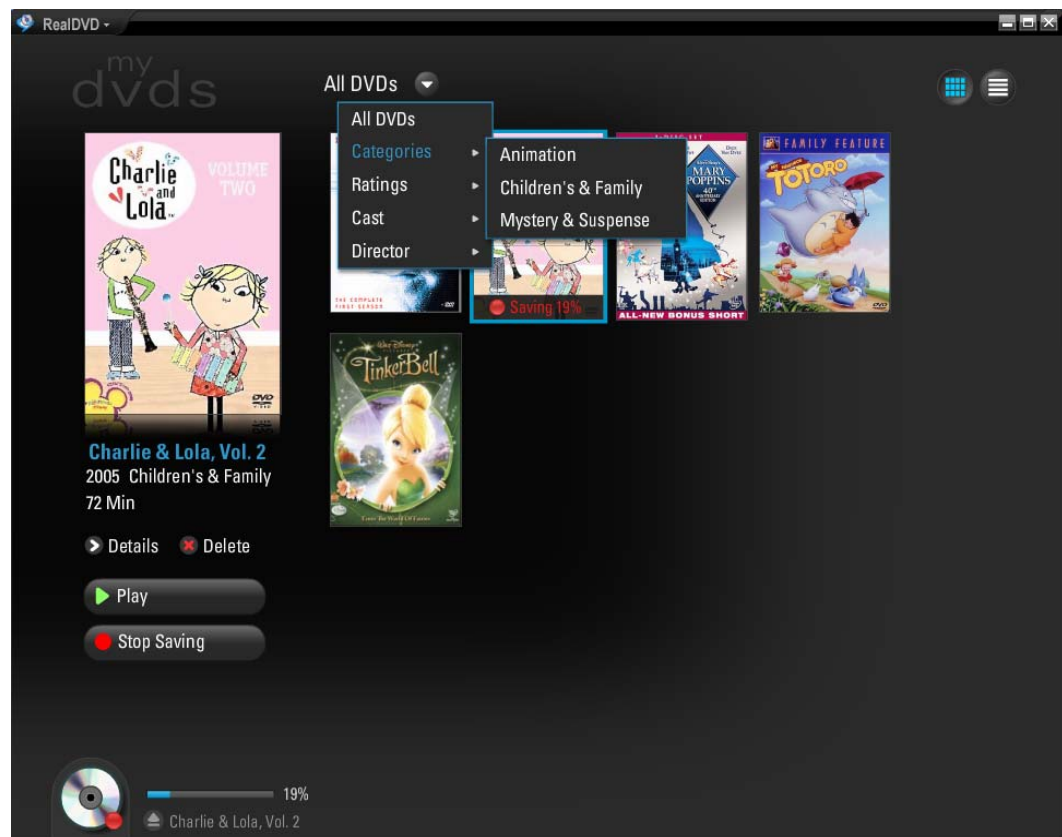
20 54. Consumers are directly harmed by the Studio Defendants’ and the DVD CCA’s
21 conduct. The risk the Studio Defendants faced – that some one of them would do a deal with
22 RealNetworks or any other of their potential competitors – is the risk created by a competitive
23 marketplace. Consumers would have obtained a new technology to gain more value from their
24 DVDs, without having to pay again for a backup copy of the DVDs they had already purchased.
25 The Studio Defendants decided to short-circuit this outcome so that they could appropriate all of
26 the extra value themselves, through the means of a group boycott. The DVD CCA is the
27 instrumentality that they used to effectuate the boycott. A group boycott is, indeed, a very
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1 effective means of achieving this objective. Not coincidentally, that is also why it is per se
2 illegal under the antitrust laws.

3 NATURE OF ANTITRUST CLAIMS

4 **A. The RealDVD Products**

5 55. The RealDVD products give consumers the ability to save DVDs they own to
6 their computers or, in the case of Facet, a separate hardware box, where the DVDs are
7 catalogued in a library that displays covers of the DVDs so that they are easily retrievable for
8 playback. A user's screen in the Vegas product will look like this:



23 56. Once the DVDs are stored in RealDVD, they can be retrieved for playback at the
24 user's convenience, without having to search for the physical copy of the DVD.

25 57. RealDVD offers many features that consumers want, including:

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- The ability to keep consumers' DVDs safe, without scratches, gunk, skips, blips, or lost titles.
 - Through the Vegas product, the ability to take an owner's DVD collection on the road to view from a hard drive. Many consumers watch the DVDs they

1 own from their personal computer on airplanes and during vacations, but do
2 not want to carry along multiple DVDs from their collection.

- 3 • RealDVD remembers where the consumer is in the movie, so he can stop, shut
4 down and come back later without losing his spot.
- 5 • RealDVD provides additional features, such as detailed plot synopses and cast
6 lists for the movies; parental controls; and the ability to browse the collection
7 by cover art, genre, title, rating, or actor.

8 58. The product designers at RealNetworks saw the potential demand for products
9 like RealDVD based partly on the popularity of a product from a company named Kaleidescape.
10 As described on the Kaleidescape website, “The Kaleidescape System simplifies the way you
11 collect, manage and enjoy movies and music. Once your personal entertainment collection is
12 stored on the Kaleidescape System's fault-tolerant Servers, you can say goodbye to DVD and CD
13 clutter and the frustration of storing and organizing your movies and music.”

14 59. With a price tag that can reach over \$ 10,000, however, Kaleidescape is not
15 accessible to the general public. Kaleidescape makes the point quite well: “the Kaleidescape
16 System, is an entertainment server that has changed the way movies and music are collected and
17 enjoyed in a home, yacht or private jet.” See <http://www.kaleidescape.com/news/>.

18 60. The DVD CCA sued Kaleidescape on the ground that Kaleidescape was barred by
19 the terms of its license agreement to DVD encryption technology (the CSS license) to provide
20 consumers with technology that would allow them to make personal copies of the DVDs they
21 own.

22 61. The DVD CCA lost that case. Thereafter, RealNetworks determined that it could
23 make products that provided this capability while complying with the CSS agreement and the
24 law.

25 62. RealNetworks wanted to make a product with similar functionality that could be
26 used by the average DVD customer. The price tag for the Vegas software, for example, is
27 \$50.00 (and was offered at an introductory price of \$29.99).
28

1 **B. The Studio Defendants Seek to Maintain the Profits from the Fair Use Copy**

2 63. The Studio Defendants themselves have been attempting to develop a product that
3 would allow consumers to make a copy of the DVDs they purchase for use on a personal
4 computer or portable video player like an iPod. The Studio Defendants call this “digital copy”,
5 “managed copy,” and “second session copy.” “Digital copy” is a separate disc that allows for the
6 making of a copy of the content on a DVD onto a consumer’s computer hard drive. The copy
7 may be made directly from a DVD or could be delivered over the Internet as a download. Upon
8 information and belief, one or more of the Studio Defendants have approached a company called
9 Sonic to help them build a product with functionality similar to RealDVD.

10 64. The critical difference between RealDVD and the Studios’ plan for “digital” and
11 “managed copy” is that the Studios intend to charge DVD purchasers an additional sum for the
12 “managed copy” of each and every DVD they have purchased. Having already purchased the
13 digital content on their DVDs, however, DVD owners have the fair-use right to make a backup
14 copy for these purposes without buying the content a second time. In fact, average consumers
15 have over 75 DVDs that they have already purchased and for which they already own the rights
16 to make a fair use copy without making an additional payment to the Studios. The Studio
17 Defendants are motivated by their own financial gain. Indeed, the longer that they are able to
18 hinder the development and release of products that provide consumers with the ability to make
19 fair-use copies of DVDs that they own, the Studios’ own ability to market such a product is
20 aided. The illegal scheme thus delays competitors while leaving the Studio Defendants free to
21 market their own products and to charge consumers for the fair-use copy that the law already
22 gives consumers the right to make.

23 65. Consumers are harmed by this conduct. To start, charging consumers to exercise
24 their fair-use rights, as the Studio Defendants would like to do, reduces the value of the DVDs
25 consumers already own or would buy and improperly extends the narrow exclusivity that the
26 copyright laws provide to a content owner (here, the Studio Defendants). The effect is the same
27 as if the Studios had agreed to increase the prices of the DVDs themselves. RealNetwork’s
28

1 products threaten the Studio Defendants’ attempts to monetize the non-infringing digital copies
2 consumers already are entitled to create.

3 66. But whether or not a consumer has a fair-use right to make backup copies of the
4 DVDs they already have purchased, the Studios’ collective agreement not to negotiate individual
5 licenses for their content with RealNetworks or any other potential competitor is nothing more
6 than an illegal scheme between horizontal competitors to eliminate a competitive threat and to
7 charge higher prices. The harm to consumers from such a scheme is obvious—they will pay
8 higher prices for the privilege of making digital copies of their DVDs.

9 67. The Studio Defendants’ and the DVD CCA’s unlawful conduct ensures that –
10 until they are stopped by a court – the Studios will be free from competition in the market for
11 technology that enables a consumer to make a secure backup copy of a DVD that she already
12 owns. Competition and consumers alike will suffer as a result of this unlawful conduct.

13 **C. RealDVD’s Protection Against Unauthorized Copying**

14 68. RealNetworks has put into place significant protections against unauthorized
15 copying, including:

- 16 • RealDVD stores DVD content securely on a hard drive in the original CSS
17 encrypted form.
- 18 • RealDVD adds a layer of security to the CSS protection by further encrypting
19 the CSS encrypted content and the keys to unlock the content with AES
20 encryption. AES encryption is a quintillion times more secure than the CSS
21 encryption. It is the encryption system used by the U.S. Government for
22 classified information.
- 23 • RealDVD is a “closed system” that does not allow DVD content to be sent
24 through a network or uploaded to an Internet site and viewed by any other
25 person. The backup copy made by RealDVD cannot be copied in playable
26 form to any other hard drive or other device as a result of the AES encryption.
- 27 • The backup copy made by RealDVD cannot be played from any storage
28 device other than the storage device onto which it was originally copied. It is
impossible to transfer playable DVD content onto a device like an iPod or to
“burn” a new playable DVD disc using RealDVD. RealDVD cannot be used
to create pirate or counterfeit DVDs.
- When Facet saves a DVD to its hard drive, that DVD is locked to that hard
drive and may only played on the Facet machine that saved the copy.

- 1 • Facet does not allow a user to do anything with the saved DVD other than
2 play it. It cannot be sent over the Internet or even over a home network.
- 3 • Vegas prevents making a copy of the DVDs that are on the computer hard
4 drive. A user can make a copy only from the physical DVD. The user cannot
5 then make a copy of the copy.
- 6 • Vegas allows the playback of the saved DVD on only five registered playback
7 devices. The intended and probable use is for sharing of a single archival
8 hard drive among a family's multiple computers (*e.g.*, within a house or on
9 vacation). The playback is accomplished by taking the single physical hard
10 drive on which the DVDs are saved and plugging it in one at a time into one
11 of five registered devices. In order to play the DVDs, the hard drive needs to
12 be present. Thus with the removable hard drive, a family can view their saved
13 DVDs on television (so long as it is attached to hard drive on which the saved
14 DVDs are located); a laptop in the bedroom if the television is being used by
15 other members of the family; a laptop during travel; or a personal computer
16 located, for example, in the kitchen.

12 **D. The Studio Defendants' Rejection of Efforts to Implement Further Technical** 13 **Controls Against Unauthorized Copying**

14 69. Before RealNetworks released Vegas, it approached the Studio Defendants to
15 notify them of the product, to answer any questions they had regarding the product's piracy
16 safeguards, and to explore mutual marketing opportunities.

17 70. During these talks, two of the Studios, Fox and Paramount, expressed concern
18 over the potential problem of people renting DVDs, copying them, and then returning them – so-
19 called “rent, rip, & return.” The Studios do not currently mark rental DVDs in any way that
20 would make it possible for RealDVD to distinguish them from purchased DVDs.

21 71. During their talks with Real, the Studios acknowledged that it was solely within
22 their power to prevent “rent rip & return” by marking rental DVDs with, for instance, certain
23 watermarks. The Studios currently mark their rental DVDs in Europe and could do so in the
24 United States as well. RealNetworks indicated that it would do anything it could to ensure that
25 the RealDVD product could not be used to save DVDs with such markings.

26 72. The Studios also discussed the concept of providing a unique mark for each DVD
27 sold, so that they could track how many copies were made of that DVD. Again, RealNetworks
28

1 agreed that it would support any industry standard way to prevent its product from being used to
2 save DVDs that had been copied too many times.

3 73. RealNetworks delayed its long-planned and scheduled product release to try to
4 reach an accommodation with the Studios to address their concerns.

5 **E. The Studio Defendants' Decision to Engage in an Illegal Cartel**

6 74. The negotiations for a potential solution and a business deal went the furthest with
7 Paramount. RealNetworks and Paramount exchanged numerous term sheets, and had even
8 agreed upon preliminary dollar amounts to enter into a marketing arrangement whereby
9 Paramount would include Vegas on its DVDs and receive some payment in return. At the last
10 minute, however, Paramount indicated that it was not prepared to break with the Studio cartel
11 without substantial compensation for doing so. The compensation demanded by Paramount was
12 an exorbitant sum, not at all tethered to the business value of the deal under negotiation.

13 75. The importance of a deal with one Studio, such as Paramount, cannot be
14 overstated. Whether or not there is a fair-use right for consumers to make secure backup copies
15 of DVDs that they own, any Studio should have the unilateral ability to agree to allow its
16 customers to use RealNetworks to make such copies. In fact, that is precisely what
17 RealNetworks was attempting to procure, and what some of the Studio Defendants were
18 involved in negotiating, so as to avoid the legal controversy over infringement versus fair use. If
19 one major Studio had entered into a deal with Real, legitimizing the product and allowing the
20 product to be used to copy that Studio's content, it would have made it difficult for the rest of the
21 Studios to charge consumers supra-competitive prices for their own "managed copy" products,
22 and so eventually many would likely have entered into their own agreements with Real. Such a
23 deal also would have demonstrated the clear lack of irreparable harm required for an injunction.

24 76. Because of the significance of one Studio entering into a deal with Real, the
25 Studios decided that they could not break ranks. Instead, hiding under the umbrella of an
26 organization that they control – the DVD CCA – the Studio Defendants jointly campaigned to
27 eliminate the possibility of any entity other than themselves competing in this market. They also
28 agreed collectively to refuse to enter into individual licenses with Real.

1 **1. The Studio Defendants’ and the DVD CCA’s Use of the CSS License**
2 **Agreement to Prevent Competition**

3 77. Defendant DVD CCA is a joint venture trade association. Its member movie
4 Studios compete against one another and others in the industry to provide content to users in
5 various formats. As a joint venture of horizontal competitors, the DVD CCA must have
6 circumscribed powers necessary to achieving a lawful purpose.

7 78. The stated purpose of the DVD CCA is to license the Content Scramble System
8 (CSS) to manufacturers of DVD hardware, discs and related products. As described by
9 Defendant DVD CCA, “CSS prevents movies from being *illegally* duplicated, protecting the
10 intellectual property of the manufacturers, producers and writers from *theft*.” (Emphasis added).
11 Indeed, the DVD CCA has represented to the United States government in connection with its
12 application under the National Cooperative Research and Production Act (NCRPA) that “[t]he
13 nature and objectives of the venture are to provide an encryption technology designed to prevent
14 unlawful or unauthorized copying by encrypting digital files that can be decrypted only on
15 licensed equipment. DVD CCA also intends to research, evaluate, adopt and license related
16 technologies designed to protect CSS against unauthorized or unlawful copying and to prevent
17 the unauthorized or unlawful copying and playback of DVD discs.” (Fed. Reg. Vol. 66, No. 150,
18 at 40729 (8/3/2001).)

19 79. The DVD owner’s ability to save his/her *own* DVDs for storage and later
20 playback, however, is neither illegal duplication nor theft, but the exercise of his/her legitimate
21 fair-use rights with respect to a product already purchased.

22 80. Whether or not the DVD owner already has this fair-use right, a Studio Defendant
23 could license the ability to make such copies. Achieving any limited legitimate purpose of the
24 DVD CCA does not require a licensing agreement that prohibits individual Studios from
25 granting licenses to copy their content from DVDs. Yet this is exactly what the DVD CCA and
26 the Studio Defendants claim that the CSS License prohibits. As such, the legitimate purpose of
27 the DVD CCA has been subverted to serve as a means through which the Studio Defendants act
28

1 as, and enforce, a cartel with respect to the licensing of their content by different, lawful copying
2 technologies.

3 81. Indeed, the CSS License specifically contemplates with respect to “secure
4 managed recording” (essentially, burn-to-DVD), another type of copying technology, that
5 collective action is not required for a license to a given Studio’s content (assuming such a license
6 is necessary at all). The Studios’ approach to “secure managed recording” illustrates that the
7 terms under which a particular movie or television program can be licensed for the creation of a
8 digital copy is (at most) a matter for negotiation with the individual Studio.

9 82. Nonetheless, the DVD CCA and the Studio Defendants claim that the CSS
10 Agreement prevents the Studios from entering into individual licenses granting the right to make
11 digital copies of DVDs previously purchased by customers. To try to enforce the illegal and
12 unjustified terms in the CSS License Agreement, they demand that in order to license the CSS
13 technology, RealNetworks and other potential competitors to the Studio Defendants must agree
14 not to compete in the provision of technology that would enable DVD owners to create and store
15 a secure digital copy of DVDs that they own.

16 83. If the DVD CCA and the Studio Defendants are right in their collective
17 interpretation of the CSS License Agreement — that the agreement conditions access to the CSS
18 technology on a promise not to enable DVD owners to create and store a secure copy of DVDs
19 that they own, except upon terms collectively dictated by the Studio Defendants and the DVD
20 CCA — then the agreement itself is illegal and would have been illegal since its inception. It
21 would simply function as the vehicle by which the Studio Defendants unlawfully extend the
22 narrow monopoly afforded to them by the copyright laws.

23 84. If the Studio Defendants and the DVD CCA are wrong in their interpretation of
24 the CSS License, then their attempt to use the License to impose post-hoc terms that were not
25 included in the License amounts to an illegal group boycott.

26 85. The Noerr Pennington doctrine does not insulate their collective agreement to
27 interpret the CSS License in this manner. It is not the litigation through which the Studio
28 Defendants and the DVD CCA seek to persuade a court to adopt their interpretation of the CSS

1 License Agreement that has the anti-competitive effect. Rather, it is the interpretation of the
2 Agreement in the manner advocated by the Studio Defendants and the DVD CCA that causes the
3 harm, by turning the CSS Agreement into an exclusionary agreement that requires anyone who
4 executes it to give up the right to compete with the Studio Defendants. It is thus the CSS License
5 Agreement itself, or the Studio Defendants' and the DVD CCA's collective interpretation of it,
6 that violates Section 1. Litigation is merely a manifestation of their illegal agreement.

7 **2. The Studios' Collective Refusal to Deal**

8 86. As part of their collective response to RealNetworks, the Studio Defendants have
9 also agreed not to enter into individual business deals with RealNetworks regarding the
10 marketing or release of RealNetwork's products.

11 87. When RealNetworks came close to such a deal with Paramount, Paramount at the
12 last minute indicated that it would require a substantial payment to break ranks and do a deal
13 with RealNetworks individually. There is no place under the antitrust laws of the United States
14 for competitors to agree with one another that they will not enter into individual business deals
15 with another potential competitor, for fear that such a deal would undermine their collective
16 position in the Courts or in the marketplace. Such an agreement constitutes a group boycott, and
17 is illegal under Section 1 of the Sherman Act.

18 88. The collective agreement is further evidenced by the fact that none of the Studios
19 would individually enter into a tolling agreement with RealNetworks, allowing for time to
20 negotiate before litigation was commenced. Instead, the Studios insisted on a group agreement.
21 There is no place under the antitrust laws of the United States for competitors to agree with one
22 another that they will only negotiate with a potential competitor as a group. Such an agreement
23 constitutes a group boycott, and is illegal under Section 1 of the Sherman Act.

24 89. There is nothing about the CSS technology that requires the Studio Defendants to
25 act collectively with respect to the terms on which they will grant to RealNetworks the additional
26 rights they claim are required for RealNetworks to enable consumers to make a digital backup
27 copy of a DVD purchased from a particular studio.

28

1 90. Indeed, some of the Studio Defendants already independently have begun to
2 compete with RealNetworks by selling “new” (and more expensive) versions of DVDs that
3 include a second disc from which the consumer can copy the movie onto a computer’s hard
4 drive. The price the Studios can charge for these discs, however, would drop quickly if one or
5 more of the other Studios negotiated a license with RealNetworks that would confirm the right of
6 consumers to make digital copies of that Studios’ movies without having to pay an exorbitant
7 sum to buy a second disc.

8 **F. Harm to Consumers from the Studio Defendants’ Illegal Cartel**

9 91. In making these agreements, the Studio Defendants are motivated by their own
10 financial gain. There are two distinct ways, both illegal, in which the Studios hope to profit from
11 their illegal scheme. Consumers will be harmed in either event.

12 92. To begin with, despite the fact that their customers have a fair-use right to make
13 backup copies of the DVDs they already have purchased, the Studios would like to force DVD
14 owners to pay a second time to obtain that copy. In other words, the Studios want to charge
15 consumers to exercise their fair-use rights. If the Studio Defendants and the DVD CCA succeed
16 in imposing this illegal surcharge, they will have reduced the value of the DVDs consumers
17 already own or would buy. Consumers will get less value for the same price.

18 93. The Studio Defendants perceive the new products developed by RealNetworks as
19 a significant threat to their ability to monetize the non-infringing digital copies consumers
20 already are entitled to create, a stream of revenue to which the Studio Defendants purport they
21 are entitled but as to which the copyright laws, in fact, give them no right.

22 94. Moreover, whether or not customers have a fair-use right to make backup copies
23 of the DVDs they already have purchased, the Studios’ collective agreement not to negotiate
24 individual licenses for their content with RealNetworks, under the guise that the CSS Agreement
25 would preclude such deals anyway, is nothing more than an illegal price fixing scheme between
26 horizontal competitors. The harm to consumers from such a scheme is obvious—they will pay
27 higher prices for the privilege of making digital copies of their DVDs.

1 95. By their illegal agreement, the Studio Defendants have ensured that – unless a
2 court intervenes – they will face *no* competition in the market for technology that enables a
3 consumer to make a secure backup copy of a DVD that she already owns. With no competitors
4 to challenge them, the Studios will face less pressure to make the technology available to
5 consumers sooner rather than later, or to develop consumer-friendly features. Competition and
6 consumers alike will suffer as a result of this unlawful conduct.

7 **FACTUAL ALLEGATIONS FOR ANTITRUST CLAIMS**

8 ***RealNetwork's CSS License and the Introduction of the RealDVD Product***

9 96. RealNetworks entered into a CSS License Agreement with DVD CCA on or
10 about August 13, 2007, for the purpose of obtaining the technology needed for its RealDVD
11 product to play back encrypted DVD content on personal computers. RealNetworks is therefore
12 entitled to use the CSS technology under the terms of that Agreement.

13 97. In September, 2008, RealNetworks informed the DVD CCA and the Studio
14 Defendants that its RealDVD technology would be released to the public on September 30, 2008.
15 After unsuccessful attempts to resolve the ensuing dispute between RealNetworks and the DVD
16 CCA and the Studio Defendants, described above, RealNetworks sued both the DVD CCA and
17 the Studio Defendants in this Court on September 30, 2008. RealNetwork's complaint seeks a
18 declaration that RealNetworks has neither breached the terms of its CSS License nor engaged in
19 conduct in violation of the DMCA. At the same time, in the Central District of California, the
20 Studio Defendants filed their own Complaint, together with an *ex parte* application for a
21 temporary restraining order and an order to show cause why a preliminary injunction should not
22 issue to prevent RealNetworks from marketing or selling its RealDVD product.

23 98. Following transfer of the Studio Defendants' Complaint and pending TRO motion
24 to the Northern District of California, this Court granted the Studio Defendants' renewed request
25 for a temporary restraining order barring the sale of RealDVD on October 7, 2008. On
26 November 10, 2008, the DVD CCA filed Counterclaims against RealNetworks, including a
27 claim that RealNetworks has breached the CSS License Agreement by developing and
28 distributing RealDVD, accompanied by DVD CCA's own motion for preliminary injunction.

1 RealNetworks moved for and was granted leave to amend its Complaint to include Facet on
2 December 23, 2008. The DVD CCA has subsequently amended its Counterclaims to allege that
3 RealNetworks' development of Facet also constitutes a breach of the CSS License Agreement.

4 *The Relevant Market*

5 99. The relevant product market is the provision of technology that enables
6 consumers to (a) create or otherwise obtain digital copies of movies and TV shows that they own
7 on DVDs and (b) store and manage those copies electronically (e.g., on a hard drive) for
8 subsequent playback. Only firms that enable consumers to obtain digital copies of movies and
9 TV shows that they own and to store them electronically for subsequent playback have the
10 ability to take significant amounts of business away from each other. A hypothetical monopolist
11 of such technology would be able profitably to impose a small but significant and nontransitory
12 increase in price. Manufacturers of conventional DVD players do not compete in this market, in
13 that they do not constrain pricing by firms in the relevant market, but they do lose sales and
14 income to firms that succeed in the relevant market.

15 100. The relevant geographic market is the United States.

16 101. The principal competitors in the relevant market are RealNetworks, AMX,
17 Telestream, Kaleidescape, and the Studio Defendants.

18 102. As elaborated in the declaration of Fox's Michael Dunn, the Studios are actively
19 working on a number of products designed to provide consumers with the ability to obtain a
20 second digital copy of DVDs that they purchase. The Studio Defendants acknowledge that
21 RealNetworks is a competitor to at least two of these products: "digital copy," which is already
22 available for many movie titles, and so-called "managed copy" — which the Studios are working
23 to define in the context of a multi-industry agreement.

24 103. Digital copy is a product that the Studios are marketing where a DVD is sold with
25 an additional "digital copy" version of the content (a second disc), where the second disc can be
26 copied onto the consumer's computer hard drive (without CSS encryption). As Mr. Dunn
27 declares: "'Digital Copy' versions of DVD movies are sold – at a higher cost than the regular
28 version of the same movie – with an extra disc containing additional features. One of the

1 features of the second disc is the ability to place it in a computer's DVD drive and copy the
2 movie to a computer's hard drive." Mr. Dunn continues: "*Digital Copy is particularly relevant*
3 *because it allows consumers to purchase from the Studios that which RealDVD is trying to sell*
4 *for its own benefit.*" (Dunn Decl., para 17.) The cost for this "second disc"? Roughly \$4.00 for
5 each individual disc.

6 104. Managed copy is simply the ability to make a copy of the content on a standard
7 definition DVD (as opposed to high-definition Blu-ray discs) onto a consumer's computer hard
8 drive. As Mr. Dunn again declares: "This capability, referred to (sic) 'Managed Copy' is, once
9 again, similar to RealDVD's functionality, in that it allows consumers to have content both on a
10 DVD and on their computer's hard drive. The critical difference is that (a) Managed Copy will
11 be authorized by the content owners and (b) *it will allow the content owners to capture the extra*
12 *value that it brings to the consumer.*" (Dunn Decl., para 19.)

13 105. Mr. Dunn also mentions "Burn-to-DVD," which is another technology that will
14 allow a consumer to create a DVD after purchasing a download of a movie or television show.
15 (Dunn Decl., para. 18.) The DVD CCA recently approved an amendment to the CSS
16 Specifications that permits each Studio to decide independently whether and whom it will
17 authorize to enable the creation of such DVDs.

18 ***The Studio Defendants' Market Power***

19 106. The Studio Defendants comprise the largest and most powerful collection of
20 motion picture companies in the United States and compete with each other in the market for
21 motion picture content. The audio-visual works that the Studio Defendants create and own make
22 up a predominate percentage of the content suitable for family viewing available to consumers
23 on DVD. These competing Studio Defendants dominate the market for copyrighted motion
24 picture content, which is an essential input into not only the RealDVD and the Facet products,
25 but also other products that have similar functionality to RealNetwork's products. The Studio
26 Defendants thus not only compete in the relevant market but also collectively control an element
27 essential to effective competition in the relevant market.

28

1 ***The Group Boycott: Refusing to Deal with Real***

2 107. The Studio Defendants have entered into a “contract, combination, or
3 conspiracy,” within the meaning of Section 1, among the Studio Defendants. This is so in two
4 respects.

5 108. First, should the DVD CCA and Studio Defendants’ interpretation of the CSS
6 License Agreement prevail, then the contract stands as a binding (until declared unlawful)
7 agreement among them to boycott RealNetworks until RealNetworks assents to their
8 collectively-imposed terms. If the DVD CCA and the Studio Defendants are incorrect in their
9 interpretation, as RealNetworks submits, their joint attempt to block competition in the market
10 for these “new digital products” by collectively refusing to deal with RealNetworks similarly
11 violates Section 1.

12 109. Second, as explained in paragraphs 69-76, *supra*, one Studio Defendant has
13 represented to RealNetworks that there is an agreement, upon which the Studio Defendants have
14 acted, not to enter into individual business deals with RealNetworks.

15 ***The Group Boycott Has Harmed RealNetworks***

16 110. RealNetworks initially planned to launch Vegas upon the announcement of the
17 product at a technology conference on September 8, 2008. RealNetworks made an ambitious
18 and expensive public relations and advertising effort to prepare for the initial launch. When
19 RealNetworks delayed the launch of Vegas to September 30, 2008 while it attempted to address
20 the Studio Defendants’ concerns regarding the product, RealNetworks attempted to recreate as
21 much as possible the initial public interest that surrounded the product at the time of the planned
22 initial September 8 launch. However, despite RealNetwork’s efforts, many of the publications
23 that had already generated press regarding Vegas were not willing to run second articles on the
24 product.

25 111. In the event that DVD CCA’s and the Studio Defendants’ efforts to keep its
26 products from the market are unsuccessful, RealNetworks will most certainly not be able to
27 successfully execute a “third” publicly acclaimed launch of RealDVD after having been tainted
28 with the mislabel of an illegal product following two aborted launches.

1 116. Moreover, whether or not consumers have a fair-use right to make back up copies
2 of DVDs they already have purchased, by agreeing not to negotiate in good faith individually
3 with RealNetworks (while claiming that they are prohibited from doing so by the CSS
4 Agreement), the Studio Defendants have effectively agreed to fix the price at which they will
5 license their content. As a consequence, consumers will pay more than they otherwise would
6 have to make digital copies of their DVDs.

7 117. Second, by using the DVD CCA to impede or thwart the efforts of firms like
8 RealNetworks to develop and distribute products that would permit them to compete in the
9 relevant market, the Studio Defendants have been and will continue to be able to retard the pace
10 at which such products become available to consumers, as well as the features that they offer to
11 consumers. The concerted actions of the Studio Defendants and the DVD CCA alleged herein
12 directly and intentionally impede the introduction of viable, lawful new technologies. Indeed,
13 the Studio Defendants' assertions about how quickly consumers would adopt RealDVD
14 illustrates the adverse effect that DVD CCA's and the Studio Defendants' conduct has had and
15 will continue to have in slowing the introduction of technology for which there is substantial
16 consumer demand.

17 **THIRD CAUSE OF ACTION**

18 ***Group Boycott in Violation of Section 1 of the Sherman Act***

19 ***(Construction of CSS License Agreement)***

20 118. RealNetworks incorporates the allegations of paragraphs 1 through 117 as if fully
21 set forth herein.

22 119. Under the DVD CCA's and Studio Defendants' interpretation of the CSS License
23 Agreement, any hardware or software manufacturer wishing to provide technology capable of
24 playing back copyrighted audio-visual works owned by the Studio Defendants is required at the
25 same time to agree to forebear from competing in the relevant market for technology that enables
26 consumers to (a) create or otherwise obtain digital copies of movies and TV shows that they own
27 on DVDs and (b) store and manage those copies electronically (e.g., on a hard drive) for
28 subsequent playback. The technology that makes up the relevant market permits consumers to

1 engage in non-infringing conduct relating to the Studio Defendants' copyrighted audio-visual
2 works. As such, the DVD CCA and Studio Defendants have no basis in copyright law to
3 exclude competition in this market. Moreover, even if licenses for digital copying were
4 necessary, the relevant copyrights relating to the underlying content are held by the individual
5 Studios, and there is no lawful basis for the Studio Defendants to negotiate for such licenses only
6 on collective terms.

7 120. The Defendants do not further any legitimate pro-competitive purpose by
8 adhering to their agreement. In fact, the DVD CCA and the co-conspiring Studio Defendants
9 entered into the collective boycott, and acted in furtherance of their conspiracy, with the intent to
10 harm competition for the provision of technology in the relevant market.

11 121. The DVD CCA's and the co-conspiring Studio Defendants' collective boycott and
12 conduct in furtherance of their conspiracy has had a direct and substantial effect on interstate
13 trade and commerce.

14 122. RealDVD competes with products currently offered by the Studio Defendants, as
15 well as with products that the Studio Defendants have stated they intend to offer in the near
16 future. Absent their unlawful agreement, the co-conspiring Studio Defendants would otherwise
17 have competed directly with one another, and with other Studios and technology providers like
18 RealNetworks, to develop technology in the relevant market.

19 123. The DVD CCA and its co-conspirators' unlawful contract, combination,
20 conspiracy and agreement in unreasonable restraint of interstate trade and commerce constitutes
21 a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

22 124. The DVD CCA and its co-conspirators' unlawful contract, combination,
23 conspiracy and agreement is an unreasonable restraint of interstate trade and commerce and
24 therefore also violates Section 1 of the Sherman Act, 15 U.S.C. § 1, under the Rule of Reason.
25 The market for technology that enables consumers to (a) create or otherwise obtain digital copies
26 of movies and TV shows that they own on DVDs and (b) store and manage those copies
27 electronically (e.g., on a hard drive) for subsequent playback, is a relevant product market within
28 the meaning of the antitrust laws. The relevant geographic market is the United States. The co-

1 conspiring Studio Defendants control an element essential to effective competition in the
2 relevant market and are using the control that they exert over that element to inhibit
3 RealNetwork's competition with them in the relevant market.

4 125. The anticompetitive and exclusionary effects of the DVD CCA and the co-
5 conspiring Studio Defendants' unlawful collective boycott have caused:

6 (a) A significant reduction in consumer welfare, by curtailing the ability of
7 consumers to play back and enjoy DVDs containing movies or TV shows those consumers
8 own or would buy. The value of those DVDs is thereby reduced, amounting to an increase
9 in price, and a reduction of competition in the relevant market.

10 (b) The retardation of innovation in the relevant market. As construed by the
11 Studio Defendants and the DVD CCA, and if that construction is adopted by this Court, the
12 CSS License Agreement allows the Studio Defendants collectively to retard innovation by
13 controlling and dictating the pace at which new products become available in the relevant
14 market and the features that they offer, rather than permitting the evolution of technology in
15 the relevant market to be driven by competition.

16 (c) The potential elimination of RealNetworks as a competitor in the relevant
17 market.

18 126. These anticompetitive and exclusionary effects are not offset by sufficient pro-
19 competitive effects or purposes. To obtain the efficiencies associated with an encryption system
20 it is not necessary or helpful to end competition in the market for providing consumers the
21 technology to make legal persistent copies of DVDs. Even if such a restriction furthers the
22 efficiency goals of the DVD CCA to some extent, which it does not, such benefits would be
23 outweighed by the competitive harms inflicted by this naked group boycott.

24 127. Moreover, as the "Managed Recording" sections of the Procedural Specifications
25 to the CSS License Agreement demonstrate, collective action relating to the licensing of a given
26 Studio's content was not required.
27
28

1 agreement that would have enabled RealNetworks to release its Vegas product for use with that
2 studio's copyrighted content. On the eve of the release, however, the studio indicated that it was
3 not prepared to break with the Studio cartel without substantial payment. The exorbitant sum
4 demanded by the studio bore no relationship to the commercial terms of the deal under
5 negotiation. These facts reveal the existence of an agreement among the Studio Defendants to
6 refuse to negotiate individually with Real.

7 133. The Studio Defendants entered into the collective boycott, and acted in
8 furtherance of their conspiracy, with the intent to harm competition for the provision of
9 technology in the relevant market.

10 134. The Studio Defendants' collective boycott and conduct in furtherance of their
11 conspiracy has had a direct and substantial effect on interstate trade and commerce.

12 135. RealDVD competes with products currently offered by the Studio Defendants, as
13 well as with products that the Studio Defendants have stated they intend to offer in the near
14 future. Absent their unlawful agreement, the Studio Defendants would otherwise have competed
15 directly with one another, and with other Studios and technology providers like RealNetworks, to
16 develop technology in the relevant market.

17 136. The Studio Defendants' unlawful contract, combination, conspiracy and
18 agreement in unreasonable restraint of interstate trade and commerce constitutes a *per se*
19 violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

20 137. The Studio Defendants' unlawful contract, combination, conspiracy and
21 agreement in unreasonable restraint of interstate trade and commerce also violates Section 1 of
22 the Sherman Act, 15 U.S.C. § 1, under the Rule of Reason. The market for technology that
23 enables consumers to (a) create or otherwise obtain digital copies of movies and TV shows that
24 they own on DVDs and (b) store and manage those copies electronically (*e.g.*, on a hard drive)
25 for subsequent playback, is a relevant product market within the meaning of the antitrust laws.
26 The relevant geographic market is the United States. The co-conspiring Studio Defendants
27 control an element essential to effective competition in the relevant market and are using the
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1 control that they exert over that element to inhibit RealNetworks' competition with them in the
2 relevant market.

3 138. The anticompetitive and exclusionary effects of the Studio Defendants' unlawful
4 collective boycott have caused:

5 (a) A significant reduction in consumer welfare. By refusing to negotiate
6 individual licenses for their content with RealNetworks, the Studio Defendants have
7 effectively agreed to fix the prices they will charge for that privilege, resulting in a
8 significant increase in the price consumers now pay and will pay to obtain digital copies of
9 the DVDs they already have purchased.

11 (b) The retardation of innovation in the relevant market. By refusing to
12 negotiate individual licenses for their content with RealNetworks, the Studio Defendants
13 have ensured their ability to control and dictate the pace at which new products become
14 available and the features that they offer, rather than permitting the evolution of technology
15 in the relevant market to be driven by competition.

17 (c) The potential elimination of RealNetworks as a competitor in the relevant
18 market.

19 139. These anticompetitive and exclusionary effects are not offset by sufficient pro-
20 competitive effects or purposes. To obtain the efficiencies associated with an encryption system
21 it is not necessary or helpful to end competition in the market for providing consumers the
22 technology to make legal, persistent copies of DVDs. Even if such a restriction further the
23 efficiency goals of the DVD CCA to some extent, which it does not, such benefits would be
24 outweighed by the competitive harms inflicted by this naked group boycott.

25 140. Moreover, as the "Managed Recording" sections of the Procedural Specifications
26 to the CSS License Agreement demonstrate, collective action relating to the licensing of a given
27 Studio's content was not required.

1 of Section 17200 of the California Business and Professions Code. Due to the DVD CCA's and
2 the co-conspiring Studio Defendants' unfair business practices, RealNetworks has been injured
3 in its ability to compete in the relevant market and has suffered and continues to suffer direct and
4 substantial injuries.

5 148. The DVD CCA and the Studio Defendants should be enjoined from engaging in
6 further unfair business conduct, and are liable to RealNetworks for costs and expenses, including
7 attorneys' fees.

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