

1 JAMES A. DiBOISE, State Bar No. 83296  
 Email: jdiboise@wsgr.com  
 2 LEO P. CUNNINGHAM, State Bar No. 167637  
 Email: lcunningham@wsgr.com  
 3 COLLEEN BAL, State Bar No. 167637  
 Email: cbal@wsgr.com  
 4 MICHAEL A. BERTA, State Bar No. 194650  
 Email: mberta@wsgr.com  
 5 TRACY TOSH LANE, State Bar No. 184666  
 Email: ttosh@wsgr.com  
 6 WILSON SONSINI GOODRICH & ROSATI  
 Professional Corporation  
 7 One Market Street  
 Spear Tower, Suite 3300  
 8 San Francisco, CA 94105

9 Attorneys for Plaintiffs and  
 Counterclaim Defendants  
 10 REALNETWORKS, INC. and  
 REALNETWORKS HOME  
 11 ENTERTAINMENT, INC.

12 UNITED STATES DISTRICT COURT  
 13 NORTHERN DISTRICT OF CALIFORNIA

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

16 Plaintiffs,

17 v.

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

24 Defendants.

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**REALNETWORKS' AMENDED  
 PROPOSED FINDINGS OF FACT AND  
 CONCLUSIONS OF LAW**

**Date: May 21, 2009  
 Time: 9:30 am**

**[PUBLIC REDACTED VERSION]  
 [PART 2]**

26 AND RELATED CASES  
 27

28 AMENDED PROPOSED FINDINGS OF FACT AND  
 CONCLUSIONS OF LAW  
 C-08-4548 MHP; C08-4719 MHP

1 Specifications to Real prior to Real's signing the CSS Agreement and paying membership fees.  
2 Nelson Ex. 6 (Pak Dep.) at 73:12-74:3. *Chan*, 178 Cal. App. 3d at 641.

3 23. The Technical Specifications are also not incorporated into the agreement  
4 between Real and the DVD CCA because it is undisputed that the Technical Specifications were  
5 not made available to Real prior to signing the CSS Agreement and paying the requisite fees.  
6 Nelson Ex. 6 (Pak Dep.) at 73:12-74:3; *Chan*, 178 Cal. App. 3d at 641; *Baker v. Osborne Dev.*  
7 *Corp.*, 159 Cal. App. 4th 884, 896 (2008)

8 24. Because the Technical and General Specifications were not properly  
9 incorporated into the CSS Agreement, they impose no restrictions on Real. *Chan*, 178 Cal.  
10 App. 3d at 645. Even if RealNetworks were aware at the time it signed the CSS Agreement that  
11 the DVD CCA planned to provide a copy of the Technical Specifications after RealNetworks  
12 entered into the CSS License Agreement, the Technical Specifications still could not impose  
13 contractual obligations on RealNetworks because those specifications were not made available to  
14 Real prior to signing the CSS Agreement and paying the requisite fees. *Id.* at 641 ("For the terms  
15 of another document to be incorporated into the document executed by the parties . . . the terms of  
16 the incorporated document must be known or easily available to the contracting parties.")

17 25. The fact that RealNetworks worked to comply with all of the CSS  
18 documentation, including the General and Technical Specifications, after receiving them does not  
19 rectify the DVD CCA's failure to have properly incorporated those documents by reference into  
20 the CSS Agreement as executed by RealNetworks. The cases relied upon by the DVD CCA in  
21 their P.I. briefing (*see* DVD CCA Responsive PI Br. at 15) stand only for the proposition that the  
22 meaning of disputed terms in a contract may be ascertainable from the parties' subsequent efforts  
23 to comply with those terms. No case cited by the DVD CCA provides that a party may be bound  
24 to terms to which it had no access or knowledge prior to execution of an agreement.

25 **D. Under The Terms of The CSS License, The General Specifications Are Not**  
26 **Part of The CSS License**

27 [REDACTED]

28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

**E. The RealDVD Products Comply With The CSS License Agreement**

**1. CSS License Permits The Manufacture of the RealDVD Products**

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 **2. The RealDVD Products Comply With The Requirements of The**  
 7 **Technical, Procedural and General Specifications**

8 37. The RealDVD Products conform to the CSS specifications. Hearing Tr.  
 9 (Bishop) at 669:19-670:10, 632:17-17-633:20; Hearing Tr. (Bishop) at 757:8-15, 793:14-18;  
 10 Bishop Decl. in Opp. to PI, Ex. A at ¶¶ 29-226; Felten Decl. in Opp. to PI, Ex. A ¶¶ 42-149.

11 38. James Bielman, the Real software engineer who implemented the CSS  
 12 specifications for the Facet product, has ten years of experience in software development and  
 13 software specification implementation. He made the effort to understand the specifications and  
 14 their requirements, attempted to implement them correctly, and had a reasonable belief that he  
 15 implemented the CSS specifications correctly. Hearing Tr. (STIPULATION) 1043:18-1044:12;  
 16 Hearing Tr. (Bielman) at 1004:3-1005:6, 1005:14-19, 1044:15-1045:5. The Real software  
 17 engineer who implemented the CSS Specifications for Vegas also followed the specifications  
 18 rigorously. Buzzard Dep. at 138:10-139:3, 195:22-198:10, 86:22-87:1.

19 39. Because the CSS License is a contract of adhesion, Real’s engineers’ belief that  
 20 they implemented correctly the CSS specifications is sufficient to conclude that the RealDVD  
 21 products do, in fact, comply with the CSS specifications. *See supra*, ¶¶ 11-12.

22 **3. The RealDVD Products Comply With the Authenticator Module**  
 23 **for CSS Decryption Module Technical Specification**

24 40. The RealDVD products conform to the CSS specifications, including correctly  
 25 performing bus authentication and bus-decryption. Hearing Tr. (Bielman) at 1034:13-1035:9;  
 26 Hearing Tr. (Bishop) at 652:12-15; *see also* Hearing Tr. (Bishop) at 669:19-670:10, 632:17-  
 27 633:20, 757:8-15, 793:14-18; Bishop Decl. in Opp. to PI, Ex. A at ¶¶ 42-50, 62-70 and Ex. B at ¶  
 28 28.

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28



1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

1 [REDACTED]  
2 [REDACTED]  
3 [REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]



1 99. The fact that the CSS specifications do not proscribe the functionality of the  
2 RealDVD products is confirmed by the *Kaleidescape* decision where the same functionality was  
3 held not to violate the CSS specifications at issue.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED]  
15 [REDACTED]

16 **III. COVENANT OF GOOD FAITH AND FAIR DEALING**

17 103. The CSS Agreement was a negotiated compromise among various industry  
18 participants, including the Studios, various consumer electronics companies and various  
19 technology companies. Nelson Ex. 40. The drafting efforts of these different industries yielded a  
20 very detailed and specific set of requirements and prohibitions that cannot be modified by implied  
21 terms. *Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 349-50 (2000) (implied covenant “cannot  
22 impose substantive duties or limits on the contracting parties beyond those incorporated in the  
23 specific terms of their agreement.”).

24 104. An implied covenant cannot be invoked to impose obligations that add to or vary  
25 the parties’ agreement. *Guz*, 24 Cal. 4th at 327; *Bionghi v. Metro Water Dist.*, 70 Cal. App. 4th  
26 1358, 1368-69 (1999).

27 105. The Studios’ purported desire that the CSS Agreement prohibit even a single  
28 digital copy of DVD content by the DVD owner is not proof that the Agreement prohibits such a

1 copy. To the contrary, the purported adamancy of the Studios' desire, combined with the lack of  
 2 such a restriction in the express language of the Agreement, indicates that the Studios were  
 3 unsuccessful in their efforts to achieve their objective.

4 106. That the DVD CCA's interpretation of the CSS Agreement was advocated (and  
 5 rejected) in the *Kaliedescape* case was publicly known prior to Real's entry into the CSS License  
 6 Agreement does not require that the Court adopt the DVD CCA's interpretation of that  
 7 Agreement. Additional obligations may not be imposed upon a licensee based on that licensee's  
 8 supposed knowledge at the time of entering into the CSS Agreement. That would result in a  
 9 contract that was not "uniform" and that discriminated against certain licensees by imposing  
 10 additional obligations not imposed on other licensees. By the DVD CCA's own admissions, the  
 11 CSS Agreement cannot properly be interpreted to impose additional, unagreed obligations on  
 12 Real because *every CSS licensee must enter the same agreement*. See Nelson Ex. 78 (Pak Dep.)  
 13 at 72:10-73:4; Nelson Ex. 80 at MPAA-DIS-0001578; Nelson Ex. 77 at 4. Thus, even if Real  
 14 were aware of the DVD CCA's interpretation at a specific point in time, that could not impose  
 15 additional obligations on Real or revise the actual language of the CSS Agreement.

16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED]  
 19 *Oritani Sav. & Loan Ass'n. v. Fid. & Deposit Co. of Maryland*, 744 F. Supp. 1311, 1315 (D.N.J.  
 20 1990) ("[T]he subjective intent of a person drafting a contract is not, by any means, determinative  
 21 as to the meaning of the contract especially where, as here, the contract is one of adhesion."). If  
 22 intent is to be considered at all, the CSS Agreement must be interpreted in light of the reasonable  
 23 expectations of Real as the *adhering* party, and not according to the expectations of the DVD  
 24 CCA. *State Farm Fire and Cas. Co. v. Keenan*, 171 Cal. App. 3d 1, 14 (1985) (contract of  
 25 adhesion interpreted in light of the reasonable expectations of the adhering party and not "from  
 26 the subjective intent of the people who drew up those policies of adhesion.").

27 108. While the covenant of good faith and fair dealing is implied by law in every  
 28 contract, it "exists merely to prevent one contracting party from unfairly frustrating the other

1 party's right to receive the *benefits of the agreement actually made.*" *Guz v. Bechtel Nat'l, Inc.*,  
2 24 Cal. 4th 317, 349 (2000) (emphasis in original) (approving denial of summary judgment on  
3 implied covenant claim). The covenant is not a vehicle for implying additional terms on which  
4 the parties never agreed. Hence, the covenant "cannot impose substantive duties or limits on the  
5 contracting parties beyond those incorporated in the specific terms of their agreement." *Id. at*  
6 349-50; *see also Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 222 Cal. App. 3d 1371, 1395  
7 (1990).

8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]  
13 [REDACTED]

14 110. The DVD CCA is not entitled to an injunction based on alleged implied terms in  
15 the CSS Agreement. To enjoin an alleged breach of contract, the moving party must show that it  
16 is entitled to specific performance of the obligation(s) to be enforced. Cal. Civ. Code § 3423(e).  
17 An injunction must be denied if it goes beyond the parties' agreement or if the terms of the  
18 obligation sought to be enforced cannot be ascertained with certainty. *Berry v. Moulie*, 180 Cal.  
19 137, 140-41 (1919) (affirming vacatur of judgment granting specific performance where  
20 agreement to transfer undefined secret formulas failed to identify precise act to be done); *see also*  
21 *Tamarind Lithography Workshop, Inc. v. Sanders*, 143 Cal. App. 3d 571, 577-78 (1983) (specific  
22 performance available "to permit enforcement of the respondent's performance as promised");  
23 *Hernandez v. Bd. of Educ.*, 126 Cal. App. 4th 1161, 1176 (2004) ("The court is powerless to  
24 impose on the parties more restrictive or less restrictive or different terms than those contained in  
25 their settlement agreement;" discussing enforcement of settlement under California Code of Civil  
26 Procedure § 664.6).

27 111. Real did not obtain its CSS License under "false pretenses" by failing to inform  
28 the DVD CCA of the intended functionality of the RealDVD Products. The DVD CCA offered

1 no evidence that it asked, received or relied upon any statement about Real's intent when Real  
2 applied for a CSS License. Real chose between a finite number of pre-defined "membership  
3 categories" and selected the categories it believed were necessary for building RealDVD. *See*  
4 Nelson Ex. 77 at 4. Further, according to the DVD CCA's statements to the FTC, the DVD CCA  
5 would have been obligated to offer Real the opportunity to become a CSS licensee even if Real  
6 had disclosed the details of the products that it intended to make. Nelson Ex. 80 at MPAA-DIS-  
7 0001578.

8 **IV. THE STUDIO DEFENDANTS CANNOT SHOW A LIKELIHOOD OF**  
9 **SUCCESS UNDER THE DMCA**

10 **A. The RealDVD Products Are Licensed To Use and Comply With The CSS**  
11 **Requirements**

12 112. The RealDVD Products do not circumvent CSS because they implement and  
13 comply with the requirements and prohibitions set forth in the CSS documentation. 17 U.S.C.  
14 § 1201.

15 113. A DMCA claim is unavailable to the Studio Defendants against a co-licensee to  
16 CSS technology. The CSS Agreement granted to Real a license to use all intellectual property  
17 held by the DVD CCA, including all patent rights, copyrights and trade secret rights, to "use and  
18 implement CSS to develop, design, manufacture and use DVD Products that are in the  
19 Membership Categories selected by Licensee . . ." and "to distribute, offer to sell, sell, import and  
20 otherwise transfer DVD Products made in accordance with this Agreement . . . ." Nelson Ex. 8  
21 (CSS License Agreement) at § 2.1 (a)-(b). Thus, even if Real did not strictly comply with each of  
22 the requirements of the CSS Specifications, it would at most be subject to a claim for breach of  
23 contract, and not a claim for circumvention of the DMCA, as a licensee acting within the scope of  
24 its license. *See, e.g., Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F.3d 1115, 1121 (9th Cir.  
25 1999) ("Generally, a 'copyright owner who grants a nonexclusive license to use his copyright  
26 material waives his right to sue the licensee for copyright infringement' and can sue only for  
27 breach of contract."); *see also Sun Microsystems, Inc. v. Microsoft Corp.*, 81 F. Supp. 2d 1026,  
28 1032 (N.D. Cal. 2000) (license compatibility requirements constitute separate covenants and not

1 conditions of, or restrictions on, the license grant); *Jacobsen v. Katzer*, 535 F.3d 1373, 1380 (Fed.  
2 Cir. 2008) (where terms of license are “merely covenants,” they are “governed by contract law.”).

3 114. No case has ever held that a licensee to technology may be held liable for  
4 circumventing the same technology, as opposed to merely breaching its license agreement, under  
5 any circumstances, much less in a case like the present where RealNetworks plainly sought to  
6 comply with the hundreds of pages of documents comprising the CSS documentation.

7 115. Section 1201(a) of the DMCA provides that “[n]o person shall circumvent a  
8 technological measure that effectively controls access to a work protected under this title.” As  
9 defined in § 1201(a), “to ‘circumvent a technological measure’ means to descramble a scrambled  
10 work, to decrypt an encrypted work, or otherwise to avoid, bypass, remove, deactivate, or impair  
11 a technological measure, without the authority of the copyright owner.” 17 U.S.C.  
12 § 1201(a)(3)(A).

13 116. Section 1201(a) is analogous to a prohibition against breaking and entering.  
14 H.R. Rep. No. 105-551, pt. 1, at 17 (1998). It does not apply to situations where even  
15 unauthorized persons use a technology, so long as they do not break or impair the technology.  
16 *See, e.g., Egilman v. Keller & Heckman, LLP*, 401 F. Supp. 2d 105, 113-14 (D.D.C. 2005)  
17 (“using a username/password combination as intended-by entering a valid username and  
18 password, albeit without authorization-does not constitute circumvention under the DMCA.”);  
19 *I.M.S. Inquiry Mgmt. Sys. Ltd. v. Berkshire Info. Sys.*, 307 F. Supp. 2d 521 (S.D. N.Y. 2004)  
20 (same); *see also Healthcare Advocates, Inc. v. Harding, Early, Follmer & Frailey*, 497 F. Supp.  
21 2d 627, 646 (E.D. Pa. 2007) (“lack of permission is not a circumvention under the DMCA”).

22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

28

1 118. As defined in § 1201(a), one can only circumvent a technological measure if it  
2 does so “without the authority of the copyright owner.” 17 U.S.C. § 1201(a)(3)(A). As a CSS  
3 licensee, Real has the authority to “use and implement” CSS on DVD Products, which expressly  
4 includes the DVDs with Studio content. Nelson Ex. 8 (CSS License Agreement) at §§ 2.1(a),  
5 1.15. Accordingly, Real also does not circumvent CSS under § 1201(a) because it has “the  
6 authority of the copyright owner.” See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*,  
7 387 F.3d 522, 547 (6th Cir. 2004) (“[O]ne would not say that a lock on any door of a house  
8 ‘controls access’ to the house after its purchaser receives the key to the lock.”); compare *321*  
9 *Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085, 1096 (N.D. Cal. 2004) (“321’s software  
10 does not have [a CSS] license, and therefore does not have the authority of the copyright  
11 owner.”).

12 119. Real does not need permission from the Studios to implement CSS technology in  
13 a way that allows consumers to make a backup copy of the DVDs that they own in order to avoid  
14 liability under § 1201(a). Real already has the authority to use and implement CSS from the  
15 DVD CCA pursuant to its CSS license. Nelson Ex. 8 (CSS License Agreement) at §§ 2.1(a),  
16 1.15.

17 120. The Studios’ reliance on federal copyright cases such as *S.O.S., Inc. v. Payday,*  
18 *Inc.*, 886 F.2d 1081 (N.D. Cal. 1999) and *LGS Architects, Inc. v. Concordia Homes of Nevada,*  
19 434 F.3d 1150 (9th Cir. 2006) – to argue that the CSS Agreement must expressly authorize  
20 copying of the Studios’ movie content – is misplaced. The fact that the CSS Agreement neither  
21 authorizes nor prohibits copying of the Studios’ movie content is irrelevant to the issue of  
22 whether the RealDVD Products circumvent CSS. The separate copyright question of whether  
23 users can make a backup copy of their DVDs is answered by the doctrine of fair use.

24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED] That Agreement is intended to govern CSS  
2 use and implementation, and **not** to provide comprehensive protection for all rights of copyright  
3 holders. The entire body of copyright law addresses such protection.

4 122. Section 1201(b) of the DMCA prohibits persons from making products that are  
5 “primarily designed or produced for the purpose of circumventing protection afforded by a  
6 technological measure that effectively protects a right of a copyright owner.” “To ‘circumvent  
7 protection afforded by a technological measure’ means avoiding, bypassing, removing,  
8 deactivating, or otherwise impairing a technological measure.” 17 U.S.C. § 1201(b)(2)(A).

9 123. Real does not violate § 1201(b) because the RealDVD Products implement CSS  
10 technology as required and do not avoid, bypass, remove, deactivate, or impair CSS. 17 U.S.C.  
11 § 1201(b)(2)(A).

12 124. Section 1201(b) only addresses the circumvention of “a technological measure  
13 that effectively protects a right of a copyright owner.” 17 U.S.C. § 1201(b)(1)(A-C). The  
14 RealDVD Products do not circumvent any “right of a copyright holder. [REDACTED]

15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

[REDACTED]



1           129. *Studios v. Metro-Goldwyn-Mayer Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D. Cal.  
2 2004) is distinguishable from the current case and does not provide a basis for liability here. 321  
3 Studios was not licensed to use CSS and its software product therefore circumvented CSS under  
4 §1201(a) when it provided unlicensed access to DVD content. *Id.* at 1096 (“321’s  
5 software does not have such a [CSS] license, and therefore does not have the authority of the  
6 copyright owner.”). For the same reason, 321 Studios was also found to circumvent §1201(b).  
7 *Id.* at 1098 (“[W]hile 321’s software does use the authorized key to access the DVD, it does not  
8 have the authority to use this key, as licensed DVD players do, and it therefore avoids and  
9 bypasses CSS. For these reasons, §1201(b)(1) does apply to 321’s DVD copying software.”). In  
10 contrast, because RealNetworks is licensed to implement and does in fact implement CSS, under  
11 the reasoning of *321 Studios*, RealNetworks cannot be found liable under either circumvention  
12 provision.

13           130. For similar reasons, *Universal City Studios, Inc. v. Reimerdes*, 82 F. Supp. 211  
14 (S.D.N.Y. 2000) (appealed as *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2nd Cir.  
15 2001)) also does not support a finding of liability here. In *Reimerdes*, the defendants were  
16 enjoined pursuant to §1201(a) from posting DeCSS – an unlicensed ripper program used to defeat  
17 CSS and decrypt copyrighted works without the authority of the copyright owner. *Id.* at 217.  
18 Once again, that case has no application here, since RealNetworks is licensed to and implements  
19 CSS technology. *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002).

20           **B. CGMS**

21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]  
24 [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]

1 [REDACTED]  
2 [REDACTED]

3 133. Copy flags do not control access to DVDs or protect copying or any other rights  
4 held by copyright owners. Standing alone, copy flags therefore cannot form the basis of a  
5 circumvention claim. *Agfa Monotype Corp. v. Adobe Sys., Inc.*, 404 F. Supp. 2d 1030, 1036  
6 (N.D. Ill. 2005) (rejecting claim that 2-bit embedding bit “similar to a Copy Switch” constituted  
7 technological measure under 1201(a)(2)(A) because imbedding bits were a “passive entity” that  
8 did nothing by themselves); *see also RealNetworks, Inc. v. Streambox, Inc.*, No. 2:99CV02070,  
9 2000 WL 127311, at \*7 (W.D. Wash. Jan. 18, 2000) (finding that “[i]n conjunction with the  
10 Secret Handshake, the Copy Switch is a ‘technological measure’ that effectively protects the right  
11 of a copyright owner to control the unauthorized copying of its work.”) (emphasis added).

12 **C. ARccOS and RipGuard**

13 134. Sections 1201(a) and (b) of the DMCA prohibit the “circumven[tion]” of any  
14 technological measure that “effectively controls access” to a copyrighted work or “effectively  
15 protects a right of a copyright owner” in a copyrighted work, respectively. 17 U.S.C.  
16 § 1201(a)(2)(A-C) and § 1201(b)(1)(A-C).

17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23 **1. ARccOS and RipGuard Are Not Effective Technological Measures**  
24 **under §1201(b)**

25 136. A technology that “restricts one form of access, but leaves another route wide  
26 open” cannot and does not “effectively” control access to a work. *Lexmark Int’l., Inc. v. Status*  
27 *Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004) (vacating the grant of preliminary  
28 injunction, stating “[j]ust as one would not say that a lock on the back door of a house ‘controls

1 access' to a house whose front door does not contain a lock and just as one would not say that a  
2 lock on any door of a house 'controls access' to the house after its purchaser receives the key to  
3 the lock, it does not make sense to say that this provision of the DMCA applies to otherwise-  
4 readily-accessible copyrighted works.”).

5 137. A technology that permits the “ability to [] obtain’ a copy of the work” does not  
6 support a circumvention claim under § 1201(b). *Id.* No material difference between the  
7 “effectively controls” requirements of § 1201(a)(2) and § 1201(b) can distinguish *Lexmark* from  
8 the present case.

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED] The legislative history confirms:

5 “[T]hose measures that cause noticeable and recurring adverse effects on the authorized display

6 or performance *should not be deemed to be effective* ... [because] such measures may cause

7 severe ‘playability’ problems . . . . The Committee has a strong, long-standing interest in

8 encouraging the introduction in the market of exciting new products.” Nimmer, Melville B.,

9 *Nimmer on Copyright*, CR1:6-55 (Vol. CR1 2000).

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 144. It is standard practice to include error-correction mechanisms in computer  
 12 software, and it is a best-practice to address all errors in the same fashion, with the same code.  
 13 *See Supra* Proposed Findings of Fact at ¶ 159. To hold that error correction software is a  
 14 “circumvention” device under the DMCA would extend the statute far beyond its intended  
 15 purpose, and would introduce an intolerable and unwarranted measure of uncertainty into the field  
 16 of software design and programming.

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27

28

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**5. The Studios Have Not Carried Their Burden to Establish the Existence of Any Particular ARccOS or RipGuard Error, or the Means That the RealDVD Products Use to Circumvent That Error**

146. There is insufficient evidence to support the Studios' ARccOS and RipGuard DMCA claims.

[REDACTED]

**6. ARccOS and RipGuard Do Not Protect "A Right Of A Copyright Owner" With Respect to Products That Enable Fair Use**

149. Neither ARccOS nor RipGuard "effectively protects a right of a copyright owner" under § 1201(b)(1). A technological measure "effectively protects a right of a copyright owner" if "the measure, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a right of a copyright owner under this title." 17 U.S.C. § 1201(b)(1) (emphasis added). [REDACTED]

[REDACTED] The rights of copyright owners are expressly defined to exclude rights preserved to others under the doctrine of fair use. 17 U.S.C. § 106, § 107.

150. While fair use is an affirmative defense to copyright infringement, which must be proven by the party accused of infringement, it is the moving party which must prove each of

1 the elements of a DMCA claim. *See Chamberlain Group, Inc. v. Skylink Technologies, Inc.*, 381  
2 F.3d 1178, 1203 (Fed. Cir. 2004). The Studios therefore have the burden of demonstrating that  
3 ARccOS and RipGuard “effectively protect[] *a right of a copyright owner*” under §1201(b)(2)(B)  
4 in order to prevail on their DMCA claim.

5 151. Section 1201(b) does not ban devices whose primary purpose is to enable “fair  
6 use.” Nelson Ex. 82 (S. Rep. No. 105-190 (1998)); *Sony Corp.*, 464 U.S. at 442; 17 U.S.C.  
7 1201(c) To the extent *United States v. Elcom, Ltd.*, 203 F. Supp. 2d 1111 (N.D. Cal. 2002) rules  
8 to the contrary, it is based on a misreading of the legislative history. *Id.* at 1124-25; Nelson Ex.  
9 82 at 89 (S. Rep. No. 105-190 (1998)). Because *321 Studios* relies largely on *Elcom* for the same  
10 point, *see* 307 F. Supp. 2d at 1097, it suffers from the same problem. *Universal City Studios, Inc.*  
11 *v. Corley*, 273 F.3d 429 (2nd Cir. 2001) (and the district court *Reimerdes* decision) do not directly  
12 address this issue because that *Corley/Reimerdes* was limited to claimed violation of §1201(a)  
13 and not §1201(b).

14 152. *Elcom* states that “Congress sought to ban all circumvention tools because most  
15 of the time those tools would be used to infringe a copyright.” *Id.* at 1124-25. That statement  
16 reflects confusion between the Senate report’s discussion of sellers’ liability for *devices* of  
17 circumvention and its separate discussion of users’ potential liability for *acts* of circumvention.  
18 The court’s quoted sentence from the Senate report is the one appearing below between the two  
19 italicized sentences:

20 Unlike subsection (a), which prohibits the circumvention of access control  
21 technologies, *subsection (b) does not, by itself, prohibit the circumvention of*  
22 *effective technological copyright protection measures.* It is anticipated that most acts  
23 of circumventing a technological copyright protection measure will occur in the  
course of conduct which itself implicates the copyright owners [sic] rights under  
Title 17. *This subsection is not intended in any way to enlarge or diminish those*  
*rights.* Nelson Ex. 82 at 29 (S. Rep. No. 105-190 (1998)).

24 The Senate report was not speaking of devices or tools of circumvention. Instead, it was  
25 explaining that §1201(b) did not create standalone liability for *users* who commit acts of  
26 circumvention with such devices, since their liability was controlled by the existing law of  
27 copyright infringement and fair use.

1           153. Interpreting §1201(b) to ban devices whose primary purpose it to enable “fair  
2 use” cannot be reconciled with *Sony*. Such an interpretation would deliver a new property right  
3 and power to copyright owners to use the DMCA to limit fair use, which belongs to the public.  
4 Section 1201 did not expand the copyright owner’s rights, or take away consumers’ rights. *See*  
5 *Chamberlain Group, Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1202 (Fed. Cir. 2004) (“The  
6 DMCA does not create a new property right”) (emphasis omitted).

7           154. Nor does the DMCA impose liability on entities, like Real, whose products do  
8 not facilitate infringement but are rather designed to facilitate fair use rights. *Chamberlain Group,*  
9 *Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1195 (Fed. Cir. 2004) (“defendants whose  
10 circumvention devices do not facilitate infringement are not subject to § 1201 liability”); *see also*  
11 *Storage Tech. Corp. v. Custom Hardware Eng’g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed.  
12 Cir. 2005) (explaining that the DMCA does not create a new source of liability where underlying  
13 copyright law is not at risk; “[C]ourts generally have found a violation of the DMCA only when  
14 the alleged access was intertwined with a right protected by the Copyright Act.”); *Lexmark*, 387  
15 F.3d at 562 (concurring opinion) (“[I]f the district court on remand were to find that the merger,  
16 scenes a faire, or fair use doctrine supplied an adequate defense to infringement, given the copying  
17 that went on in this case, I do not believe Plaintiff could meet its burden to show likelihood of  
18 success under 17 U.S.C. § 1201(b), because there would be no “right of a copyright owner” to  
19 prevent the [toner loading program's] use in this fashion.”).

20           155. To the extent ARccOS or RipGuard interfere with a consumer’s exercise of a fair  
21 use right, they are not “effectively protect[ing] a right of a copyright owner under this title” and  
22 therefore cannot be circumvented under § 1201(b)(1).

23           156. Judicial estoppel “prevents a party from prevailing in one phase of a case on an  
24 argument and then relying on a contradictory argument to prevail in another phase.” *Pegram v.*  
25 *Herdrich*, 530 U.S. 211, 227, n. 8 (2000). It is designed to maintain the integrity of the judicial  
26 process, and to prevent the party who prevails on a prior inconsistent argument from obtaining a  
27 later unfair advantage. It applies where a party assumes a position and *succeeds in maintaining*  
28 *that position*. *New Hampshire v. Maine*, 532 U.S. 742, 749-51 (2001).



1 157. RealNetworks is not judicially estopped from arguing that §1201(b) does not ban  
2 devices whose primary purpose is to enable “fair use.” The Studios argue that judicial estoppel  
3 should apply here based on the decision in *RealNetworks, Inc. v. Streambox, Inc.* The *Streambox*  
4 court found that the particular product at issue in that case, which circumvented a secret handshake  
5 (unauthorized access) to allow for the stealing of content, was not entitled to fair use protections in  
6 the first instance. See *RealNetworks v. Streambox, Inc.*, 2000 WL 127311, at \*8. The *Streambox*  
7 court then turned to the separate question of whether there was a substantial non-infringing use for  
8 the product. In that context, and coupled with the finding that Streambox had no authorized  
9 access, the court found that the *Sony* decision recognizing a defense of *substantial non-infringing*  
10 *use* did not apply to the DMCA. *Id.* The *Streambox* court did not adopt the broad legal  
11 proposition that fair use is never a defense to a §1201 violation, as the Studios apparently contend.  
12 Hence, RealNetworks did not argue for and prevail upon that broad legal proposition, as is  
13 required for judicial estoppel to apply, and is therefore not estopped from arguing that the intended  
14 fair uses of its products preclude a finding of circumvention. See *New Hampshire v. Maine*, 532  
15 U.S. at 749-51.

16 **7. ARccOS and RipGuard Cannot Form the Basis of a Preliminary**  
**Injunction of the RealDVD Products Because they Are Rarely Used**

17  
18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28

1           159. It is, likewise, impossible to enjoin the RealDVD products as a whole when they  
2 can be used to (and will almost certainly be used to) backup the thousands of DVDs that were  
3 released prior to the advent of ARccOS and RipGuard in 2004 and 2005. Nelson Ex. 27.

4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED] *See Supra* Proposed Findings of Fact at ¶ 173. Under these  
9 real-world conditions, an injunction would be unduly burdensome to craft, and almost certainly  
10 mooted (or at least rendered ambiguous and confusing) soon after it was entered. It would also,  
11 one might fairly surmise, serve as a windfall to Sony DADC and Macrovision (as the studios  
12 rushed to employ ARccOS and RipGuard to qualify their products for injunctive protection)—and  
13 the courts are not in the business of creating windfalls.

14 **V. THE BALANCE OF HARSHIPS**

15           161. No presumption of irreparable harm is applicable in this case. The presumption  
16 of irreparable harm formerly applied by some courts in copyright infringement cases has never  
17 applied in circumvention cases. *See, e.g., RealNetworks, Inc. v. Streambox, Inc.*,  
18 No. 2:99CV02070, 2000 WL 127311, at \*6 (W.D. Wash. Jan. 18, 2000). Even with respect to  
19 copyright cases, the presumption is no longer valid after the Supreme Court decision in *eBay*  
20 *Inc. v. MercExchange*, 547 U.S. 388, 392-93 (2006). *eBay* rejected the notion that a presumption  
21 could substitute for a careful analysis of the four equitable factors relevant to entry of an  
22 injunction in copyright cases. *Id.* at 392-93 (noting that the Court “has consistently rejected  
23 invitations to replace traditional equitable considerations with a rule that an injunction  
24 automatically follows a determination that a copyright has been infringed.”) (citing cases).

25           162. Although *eBay* concerned a permanent injunction, its rationale applies in the  
26 context of preliminary injunctions too. The *eBay* Court relied on the *Amoco* case, which held that  
27 presumption of irreparable harm for a preliminary injunction is “contrary to traditional equitable  
28 principles.” *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987). In *MGM v.*

1 *Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1214 (C.D. Cal. 2007) the court applied *eBay* and *Amoco* to  
2 conclude “there is no language in the text of the Copyright Act that would permit a departure from  
3 traditional equitable principles such that a presumption of irreparable harm would be allowed in  
4 any injunctive context.” 518 F. Supp. 2d at 1214 (*emphasis added*).

5 163. There is no presumption of harm to prevent the “violation of a federal statute”  
6 that “specifically authorizes a district court to grant injunctive relief . . .” as the Studios’ contend.  
7 *eBay* itself involved the violation of a federal statute that authorizes injunctive relief (the Patent  
8 Act. 35 U.S.C. § 283) and rejected the very presumption the Studios’ advocate. *See also*  
9 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (“Unless a statute in so many words, or  
10 by a necessary and inescapable inference, restricts the court’s jurisdiction in equity, the full scope  
11 of that jurisdiction is to be recognized and applied.”).

12 164. To be entitled to the extraordinary relief of a preliminary injunction, the Studios  
13 and DVD CCA must establish “a significant threat of irreparable injury.” *Oakland Tribune, Inc. v.*  
14 *The Chronicle Publ’g Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985); *Los Angeles Mem’l Coliseum*,  
15 634 F.2d 1197 at 1201. Speculation that harm may occur does not satisfy the standard.  
16 *Carribbean*, 844 F.2d at 674 (“Speculative injury does not constitute irreparable injury sufficient  
17 to warrant granting a preliminary injunction.”).

18 165. The Studios have not provided evidence of imminent irreparable harm caused by  
19 the RealDVD Products.

20 166. The Studios cannot claim harm resulting from the use of RealDVD to make a  
21 backup copy of a user’s purchased DVDs. Any such harm is “fair use” and is not cognizable. *See*  
22 *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417 (1984).

23 167. The fact that the Studios have refused to take steps to prevent “rent-rip-and  
24 return” supports the conclusion that it is not a significant concern.

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

1 [REDACTED]  
2 [REDACTED] See *supra* Proposed Findings of Fact at ¶ 164-174; *Belushi v. Woodward*, 598  
3 F. Supp. 36, 37 (D.C.D.C. 1984) (denying TRO for lack of irreparable injury where one photo in  
4 defendant's book infringed copyright); *Miller Harness Co. v. Arcaro & Dan's Saddlery, Inc.*, 142  
5 F. Supp. 634, 635 (E.D.N.Y. 1956) (denying injunction where only 25 of over 2000 items in a  
6 catalog possibly infringed plaintiff's copyright); see also *z4 Techs., Inc. v. Microsoft Corp.*, 434  
7 F. Supp. 2d 437 (E.D. Tex. 2006) (money damages suffice where infringing component only small  
8 portion of product).

9 169. The ability to quantify damages precludes a preliminary injunction. See, e.g.,  
10 *Cotter v. Desert Palace, Inc.*, 880 F.2d 1142, 1145 (9th Cir. 1989) ("Injuries compensable in  
11 monetary damages are not normally considered irreparable") (internal quotation marks and  
12 citation omitted); *Reilly v. Medianews Group, Inc.*, No. C 06-04332, 2006 WL 2419100, at \*5  
13 (N.D. Cal. July 28, 2006) ("It is well established, however, that an injury that is solely financial  
14 and that is compensable by monetary damages cannot constitute irreparable injury.").

15 170. In this case, damages – if any – could be calculated. This would involve  
16 considering the following factors: (1) the differential in price received between the lost product  
17 sales attributable to RealDVD and the actual product sales; (2) costs associated with lost product  
18 sales and actual product sales to compute lost profits; (3) the size of the population subset that  
19 engages in behavior leading to diverted sales; and (4) the quantity of sales diverted by this  
20 population subset. Klein Decl. in Opp. to PI, ¶¶ 8-11, 13-16.

21 171. Even if not precisely quantifiable, the availability of money damages precludes  
22 preliminary equitable relief. See, e.g., *ICU Med. Inc. v. Alaris Med. Sys., Inc.*, No. SA CV 04-689,  
23 2004 WL 1874992, at \*25 (C.D. Cal. July 30, 2004) ("[N]either the difficulty of calculating losses  
24 in market share, nor speculation that such losses might occur, amount to proof of special  
25 circumstances justifying the extraordinary relief of an injunction prior to trial."). *Thayer Plymouth*  
26 *Ctr. Inc. v. Chrysler Motors Corp.*, 255 Cal. App. 2d 300, 307 (1967) (reversing preliminary  
27 injunction where future damages were calculable).

1           172. The Studios claim harm from alleged displacement of Studio products, such as  
2 digital copies and digital downloads of their movies, that directly compete with the digital copy of  
3 DVDs made using the RealDVD Products. Nelson Ex. 63; Nelson Ex. 45 (Dunn Decl. in Support  
4 of TRO.) at 183:21-22; Nelson Ex. 62 (Dunn Decl.) ¶ 17. The fact that the Studios themselves can  
5 and do place a monetary value on their own digital copies proves that any injury suffered by the  
6 Studios would be compensable in damages at the time of trial, and precludes the entry of a  
7 preliminary injunction. *High Tech Med. Instruments, Inc. v. New Image Indus., Inc.*, 49 F.3d  
8 1551, 1557 (Fed. Cir. 1995) (where plaintiff routinely licensed and appraised the technology at  
9 issue, “any injury suffered by [plaintiff] would be compensable in damages as part of a final  
10 judgment in this case.”); *T. J. Smith & Nephew Ltd. v. Consol. Med. Equip., Inc.*, 821 F.2d 646,  
11 648 (Fed. Cir. 1987) (affirming denial of preliminary injunction motion where, *inter alia*, patent  
12 holder failed to show likelihood of irreparable harm based on its grants of licenses.).

13           173. The DVD CCA is not entitled to a presumption of irreparable harm based on  
14 Section 9.2 of the CSS Agreement. A contract provision addressing irreparable harm does not  
15 suffice to establish such harm; it is just one factor in the analysis. *Dominion Video Satellite,*  
16 *Inc. v. Echostar Satellite Corp.*, 356 F.3d 1256, 1266 (10th Cir. 2004) (“[w]hile courts have given  
17 weight to parties’ contractual statements regarding the nature of harm and attendant remedies that  
18 will arise as a result of a breach of a contract, they nonetheless characteristically hold that such  
19 statements alone are insufficient to support a finding of irreparable harm and an award of  
20 injunctive relief.”); *Markovits v. Venture Info Capital, Inc.*, 129 F. Supp. 2d 647, 661 (S.D.N.Y.  
21 2001); *Smith, Bucklin & Assocs., Inc. v. Sonntag*, 83 F.3d 476, 481 (D.C. Cir. 1996) (“Although there  
22 is a contractual provision that states that the company has suffered irreparable harm if the employee  
23 breaches the covenant and that the employee agrees to be preliminary enjoined, this by itself is an  
24 insufficient prop.”); *Firemen’s Ins. Co. of Newark v. Keating*, 753 F. Supp. 1146, 1154 (S.D.N.Y.  
25 1990) (“It is clear that the parties to a contract cannot, by including certain language in that contract,  
26 create a right to injunctive relief where it would otherwise be inappropriate.”).

27

28

1 174. It would be particularly inequitable to presume irreparable harm based on a  
2 contractual provision in the CSS Agreement since the Agreement was presented to RealNetworks  
3 on a take-it-or-leave-it basis and does not represent a negotiated agreement between the parties.

4 175. Real is not threatening to disclose any of the DVD CCA’s confidential  
5 information or doing anything else that would hurt the licensing entity, so the DVD CCA will not  
6 be irreparably harmed. The DVD CCA has not provided evidence of imminent irreparable harm.

7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]  
11 [REDACTED]  
12 [REDACTED]

13 [REDACTED] The California Superior Court’s decision in  
14 the *Kaleidescape* case at least calls into question the DVD CCA’s interpretation of the CSS  
15 Agreement – and with much greater authority than Real. So, too, do the other CSS-licensed  
16 products, currently on the market, which allow users to copy DVD content onto a hard drive,  
17 including products from Kaleidescape, AMX and Drive-in. That the DVD CCA has acquiesced to  
18 the continued presence of these products – without any apparent ill effects to its reputation or  
19 viability – supports the finding that Real does not threaten imminent irreparable harm to the DVD  
20 CCA. Nelson Ex. 6 (Pak Dep.) at 196:12-20, 200:12-22.

21 177. A preliminary injunction will cause Real imminent irreparable harm. It will delay  
22 the RealDVD products resulting in their likely termination and the termination of the employment  
23 of the engineers working on the RealDVD products.

24 178. A preliminary injunction will harm consumers by withdrawing innovative and  
25 relatively inexpensive products that enable consumers to exercise their fair use right to make a  
26 backup of a DVD without having to pay the Studios twice for the same content. A preliminary  
27 injunction would also eliminate competition to the Studio Defendants’ digital copy and similar  
28 products to the detriment of consumers.

1           179.    Permitting the Studios to appropriate fair use and sell it back to customers would  
2 be an improper extension of the copyright rights. *See, e.g., Lasercomb Am., Inc. v. Reynolds*, 911  
3 F.2d 970, 976 (4th Cir. 1990).

4           180.    The balance of hardships tips strongly against a preliminary injunction.

5  
6 Dated: May 15, 2009

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

7

8

By: /s/ Leo P. Cunningham  
Leo. P. Cunningham

9

10

Attorneys for Plaintiffs  
REALNETWORKS, INC. and  
REALNETWORKS HOME ENTERTAINMENT

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28