

1 JAMES A. DiBOISE, State Bar No. 83296
 Email: jdiboise@wsgr.com
 2 LEO CUNNINGHAM, State Bar No. 121605
 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
 15 corporation; and REALNETWORKS HOME
 ENTERTAINMENT, INC., a Delaware
 16 corporation,

17 Plaintiffs,

18 v.

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

25 Defendants.

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**REALNETWORKS' OPPOSITION TO
 STUDIO DEFENDANTS'
 ADMINISTRATIVE MOTION FOR
 JUDICIAL NOTICE OF
 REALNETWORKS' PATENT
 APPLICATIONS**

26
 27 AND RELATED CASES
 28

REAL'S OPP. TO STUDIO DEFS.' ADMIN. MOT.
 FOR JUD. NOTICE OF REAL'S PAT. APPS.
 CASE NOS. 08-cv-04548 MHP
 08-cv-04179 MHP

1 The Studio Defendants' so-called Administrative Motion for Judicial Notice of
2 RealNetworks' Patent Applications ("Motion") should be denied. It is a ham-handed attempt to
3 reargue issues that are under submission to this Court by mischaracterizing three patent
4 applications and the arguments RealNetworks made in opposition to the Defendants' Motion for
5 Preliminary Injunction. There is no justification for re-opening the record to allow consideration
6 of either the three patent applications or the Studio Defendants' further arguments purportedly
7 based on them.

8 The Studio Defendants' Motion is based on certain formerly confidential Real patent
9 applications of which the Studio Defendants have been long aware but which they nevertheless
10 now claim were improperly withheld in discovery. They were not. Read carefully, the Studio
11 Defendants' Motion admits that the patent applications were not responsive to the discovery
12 requests to which the parties eventually agreed, only that they could have been responsive to an
13 initial set of requests – requests that the Studio Defendants agreed to abandon during the parties'
14 negotiations to limit the scope of discovery for purposes of the preliminary injunction
15 proceeding. In April 2009, six months after the parties agreed to discovery limitations and well
16 after the Studios prevailed upon this Court to declare that the limited period for document
17 discovery had concluded, the Studios requested that Real supplement its document production
18 with copies of the patent applications. Given the Studios own refusals to produce supplemental
19 documents to Real, it is no surprise that Real did not accept the Studios Defendants' invitation to
20 submit to supplemental one-sided discovery at that late date. The Studio Defendants' carefully
21 worded innuendo that the patent applications were improperly withheld from discovery therefore
22 has no merit.

23 Nor is there any merit in the Studio Defendants' mischaracterization of either the
24 preliminary injunction record or the select snippets from the patent applications to reargue
25 preliminary injunction issues. As discussed below, the patent applications are consistent with
26 Real's arguments as to why the ARccOS and RipGuard products are not "effective technological
27 measures" under the DMCA and the Studios attempt to selectively reargue the preliminary
28 injunction proceedings should be rejected.

1 **I. The Patent Applications Were Not Called For In The Limited, Agreed-Upon**
2 **Preliminary Injunction Discovery**

3 The Studios’ assertion that the patent applications in issue “were undeniably called for in
4 discovery” is false. Real has abided by all of its discovery obligations and no discovery requests
5 agreed to by the parties encompass the patent applications in issue. While the Studios claim that
6 their “first set” of discovery requests dated October 28, 2008, were comprised of keywords
7 searches which may have implicated the patent applications (*see* Exhibit D to Motion), what the
8 Studios fail to acknowledge is that during the parties’ discovery meet and confer, Real explicitly
9 rejected the very keyword searches upon which the Studios now seek to rely. Indeed, while the
10 Studios attach as exhibits two emails comprising various discovery requests by the Studios, they
11 omit the specific email rejecting the keyword searches in issue. *See* Ex. A to Decl. of Jason
12 Putnam Gordon filed concurrently herewith at 2 (email from Mr. Berta stating that the keyword
13 searches proposed were “not feasible in time allotted for the parties to meet the mutual
14 production deadline of November 17” and specifically identifying the keyword searches which
15 would be performed by Real). The Studios own Exhibit E to this Motion which identifies the
16 Studios’ document requests as of November 6, 2008 (more than a week after and superseding the
17 Studios’ initial requests identified in Exhibit D to Motion) confirms that the keyword searches in
18 issue were dropped by the Studios, just as Real agreed to drop numerous requests for documents
19 during the preliminary injunction phase.¹ Similarly baseless is the assertion that Real’s patent
20 applications constitute technical or design specifications for RealDVD which should have been
21 produced is similarly misplaced – patent applications describe *inventions* and are not particular

22
23 ¹ It is worth noting that discovery in this case was highly expedited and that the Studios
24 refused to produce relevant information that they believed could not be collected and reviewed in
25 the limited time allotted and also refused to produce information outside of “what you [Real]
26 absolutely need[s].” *See* Ex. B. to Gordon Decl. Indeed the Studios explicitly stated that in
27 discovery both sides would “need to forego some things we obviously would like . . . [t]hat’s
28 why we’re both doing this without prejudice to positions we may take down the road if we get
into full-blown discovery.” *Id.* The Studios suggestion now that Real’s failure to broadly
construe discovery requests and overturn every stone for potentially responsive information
constitutes some sort of discovery abuse is without basis and ignores the parties’ agreements to
the contrary.

1 product specifications. 35 U.S.C. § 112. Real produced product specifications for the RealDVD
2 products long ago along with the source code that specifically sets forth the products' operations.
3 The Studios' suggestion that Real wrongly withheld documents it agreed to produce is untrue.

4 What is true is that the Studios have been aware of the patent applications in issue since
5 February 13, 2008, when Ms. Hamilton discussed them during her deposition, and that they
6 specifically requested such patent applications in April 2008. Exhibit F to Motion. It is also true
7 that the Studios never followed up nor moved the Court when Real did not agree to produce such
8 patent applications, as by that time discovery for the PI proceeding was long closed. These
9 applications are by no means "new" evidence concealed by Real as the Studios would have the
10 Court believe – and such false assertions in no way justify additional briefing on a preliminary
11 injunction proceeding which has been closed for over a month. The Studios' request to
12 supplement the record to include the patent applications should be denied and their attempt to
13 submit additional briefing on issues already pending before the Court should be rejected.

14 **II. The Real Patent Applications Are Consistent With Real's Evidence And Arguments** 15 **At The Preliminary Injunction Proceeding**

16 The Studio Defendants also seek to rely on the patent applications to advance new
17 arguments with respect to the closed preliminary injunction proceeding. In order to do so, the
18 Studio Defendants have mischaracterized both Real's arguments in the preliminary injunction
19 proceeding and the contents of the patent applications themselves.

20 **A. Whether ARccOS Or RipGuard Are Intended As "Copy Protection"** 21 **Mechanisms Is Irrelevant**

22 First, the Studio Defendants falsely claim that Real argued that ARccOS and RipGuard
23 are not labeled or marketed as "copy protection" measures. The Studio Defendants then cite to
24 portions of the patent applications recognizing that ARccOS and RipGuard are intended to
25 provide some sort of "copy protection" to argue that the patent applications contain an admission
26 of something. There is no such admission – the labeling and intent behind ARccOS or RipGuard
27 products is irrelevant to the Studio Defendants' claims under the DMCA. As Real argued at the
28 preliminary injunction proceeding, regardless of the intent behind ARccOS and RipGuard or
whether they are marketed as or labeled as *intending* to provide some sort of "copy protection,"

1 they are not eligible as “effective technological measures” under the DMCA. This is so because
2 (1) ARccOS and RipGuard comprise intentional errors that mimic errors that can appear
3 unintentionally on DVDs and (2) the ARccOS and RipGuard techniques freely allow access and
4 copying of DVDs if a software program accesses the DVD in a DVD Video Specification
5 compliant manner. These arguments have nothing to do with what ARccOS or RipGuard are
6 called. Instead, they have to do with fundamental facts that Real provided at the preliminary
7 injunction proceeding about the nature and limitations of the ARccOS or RipGuard error
8 techniques that have been grafted onto accepted DVD Video standards.

9 Indeed, while the Studio Defendants argue on Page 2 of their Motion that the term “copy
10 protection” should have some meaning, they then acknowledge (as they must) the irrelevance of
11 their entire argument by expressly conceding on Page 3 of their Motion that “the issue for
12 DMCA purposes, of course, is not whether ARccOS/RipGuard are ‘copy protection’ but whether
13 they are effective technological measures under 17 U.S.C. § 1201(b).” The label “copy
14 protection” is entirely irrelevant to the issues before this Court under the DMCA and thus the
15 Studios’ first attempt to identify relevant evidence by the patent applications’ use of this term
16 fails.

17 **B. ARccOS and RipGuard Cannot Prevent Linear Copying of DVDs**

18 Next, the Studio Defendants attempt to manufacture an inconsistency between Real’s
19 patent applications and the evidence adduced at the preliminary injunction proceeding regarding
20 the ability to make a linear copy of DVDs infected with ARccOS or RipGuard errors. That
21 argument also fails. What Real established at the preliminary injunction proceeding through,
22 among other evidence, the *admissions* of the Macrovision engineer who created RipGuard, was
23 that computer software would *always* be able to make a copy of a DVD with sector errors on it *if*
24 *the computer software were configured to ignore and proceed through those sector errors.*
25 *See, e.g.,* Hollar Tr. at 46:18-47:2 (lodged with Studios’ Notice of Lodging of Designated
26 Deposition Testimony of Mark Hollar and Video (docket entry 321), filed May 12, 2009);
27 Hearing Tr. (Dixon) at 899:20-901:3; *see also* Motion at 3:2-4.

1 Contrary to the Studio's claim, there is no inconsistency between Real's arguments in the
2 preliminary injunction proceeding and the statements in the patent applications. Real has
3 consistently acknowledged that if a computer program is designed such that it does *not* ignore
4 sector errors, then such sector errors could cause a copying process to fail for that program. This
5 is no more and no less than what is stated in Real's patent applications, which acknowledge that
6 a set of DVD errors "*may* cause an archiving process to fail" (*see* Motion at 3:7-8). This is not
7 the issue. Rather, the issue before the Court is the following: where a trivial computer program
8 ability – *i.e.*, the ability to ignore sector errors – enables a complete useable copy of a DVD,
9 should the intentional use of sector errors be elevated to an "effective technological measure"
10 under the DMCA? Real has argued that it should not – the intentional use of such errors cannot
11 be protected by the DMCA when they are so easily ignored in the case of a simple linear copy of
12 a DVD. This is especially true where the Studio Defendants themselves have conceded that
13 "subjective intent" – *e.g.*, the Studios' asserted intent to prevent copying by using such errors – is
14 "irrelevant" under the DMCA (*see* Studio P.I. Motion at 18) and where the Studios have
15 admitted that ARccOS and RipGuard are, indeed, ineffective. Hearing Exhibit E (MPAA-WAR-
16 0010954-5).

17 **C. DVD Walk Is Designed To Traverse A DVD In A DVD Video Specification**
18 **Compliant Manner**

19 The final argument of the Studios is the exact same rhetorical argument that the Studios
20 advanced at the hearing: if DVD software is designed to follow the DVD Video Specifications,
21 and thus would never see ARccOS or RipGuard errors (which the Studios' experts have admitted
22 are designed to be invisible to software following the DVD Video Specifications), does that
23 software "avoid" ARccOS or RipGuard errors under the DMCA? It does not. As Mr. Bielman
24 candidly explained at the preliminary injunction proceeding, he was aware that the ARccOS and
25 RipGuard product used some indeterminate grab-bag of errors. Hearing Tr. at 1017:3-18. But,
26 he was also aware that interacting with a DVD in a DVD Video Specification compliant manner,
27 under Real's license through the FLLC would ensure that Real's software should not see such
28 errors. *See, e.g., id.* This awareness is no more and no less than what the various quoted

1 snippets of the patent specifications state. The awareness that ARccOS and RipGuard errors
 2 exist cannot be equated to “circumvention” of an “effective technological measure” under the
 3 DMCA, because, as Real’s evidence at the preliminary injunction proceeding showed, ARccOS
 4 and RipGuard do not contain any “effective technological measure” against access and copying
 5 in a DVD Video Specification compliant manner. *See also* Hearing Tr. (Dixon) at 865:14-
 6 866:11. Whether accessing and copying a DVD in a licensed and compliant manner “avoids”
 7 errors that are never intended to be seen by compliant software is an interesting linguistic
 8 question, but does not amount to circumvention under the DMCA. *See Lexmark Int’l, Inc. v.*
 9 *Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004) (the DMCA does not “extend
 10 to a technological measure that restricts one form of access but leaves another route wide
 11 open.”); *see also I.M.S. Inquiry Mgmt. Sys. Ltd. v. Berkshire Info. Sys., Inc.*, 307 F. Supp. 2d 521,
 12 530-3 (S.D. N.Y. 2004) (an entity does not violate the DMCA by utilizing an authorized access
 13 mechanism regardless of whether copies are made or whether the entity has permission to use
 14 that access mechanism for copying); *Egilman v. Keller & Heckman, LLP*, 401 F. Supp. 2d 105,
 15 113-14 (D.D.C. 2005) (same). The patent applications do not contain any statements that
 16 conflict with this conclusion.

17 CONCLUSION

18 For the foregoing reasons, the Studio Defendants’ claims that the patent applications
 19 should be made part of the record for the Studio Defendants’ Motion for Preliminary Injunction
 20 should be denied.

21
 22 Date: June 29, 2009

WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation

24 By: /s/
 Michael A. Berta

25
 26 Attorneys for Plaintiffs and Counterclaim
 Defendants REAL NETWORKS, INC. and
 27 REALNETWORKS HOME
 ENTERTAINMENT, INC.