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United States District Court

Northern District of California

Before The Honorable Marilyn Hall Patel

Real Networks,)
Incorporated,)

Plaintiff,)

vs.)

No. C08-4548 MHP

DVD Copy Control)
Associates, et al.,)Defendant.)
_____)

San Francisco, California

Tuesday, October 7, 2008

Reporter's Transcript Of Proceedings**Appearances:**For Plaintiff
RealNetworks, Inc.
and RealNetworks
Home Entertainment,
Inc.,:Wilson, Sonsini, Goodrich & Rosati
One Market Street
Spear Tower, Suite 3300
San Francisco, California 94105**By: James A. DiBoise, Esquire**
Colleen Bal, Esquire
Michael A. Berta, Esquire
Tracy Tosh Lane, Esquire
Bryan Ketroser, Esquire**Reported By: Sahar McVickar, RPR, CSR No. 12963**
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

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1 Appearances, continued:

2 For Defendant
3 DVD Copy Control
4 Association and
5 Disney Enterprises,
6 Inc.,:

Munger, Tolles & Olson
355 South Grand Avenue, 35th Floor,
Los Angeles, California 90071

7 **By: Bart Harper Williams, Esquire**
8 **Kelly Max Klaus, Esquire**

9 Motion Picture Association of America
10 15301 Ventura Boulevard, Bldg. E
11 Sherman Oaks, California 91403

12 **By: Dan Robbins, Esquire**
13 **Gregory Goeckner, Esquire**

14 Mitchell Silberberg & Knupp, LLP
15 11377 West Olympic Boulevard
16 Los Angeles, California 90064

17 **By: Robert H. Rotstein, Esquire**

18 Also Present:

19 Robert Kimball, Esquire
20 Senior Vice President/General Counsel
21 RealNetworks, Inc.

22 Bill Way, Esquire
23 Vice President/Deputy General Counsel
24 RealNetworks, Inc.

25 ---o0o---

1 Tuesday, October 7, 2008

2:00 p.m.

2 P R O C E E D I N G S

3 **THE CLERK:** Calling civil 08-4548, RealNetworks,
4 Inc., versus DVD Copy Control Associates, et al.

5 **THE COURT:** May I have your appearances, please.

6 **MR. DIBOISE:** Good afternoon, Your Honor.

7 My name is James DiBoise. I'm with Wilson, Sonsini
8 Goodrich & Rosati.

9 With me are my colleagues, Michael Berta, Colleen
10 Bal and Bryan Ketroser.

11 Also with me are the general counsel of
12 RealNetworks, Bob Kimbell and the deputy general counsel,
13 Bill Way.

14 **THE COURT:** Good afternoon.

15 **MR. WILLIAMS:** Bart Williams from Munger Tolles &
16 Olson, along with Kelly Klaus and Rohit Singla and Mr. Bob
17 Rotstein.

18 We are also joined at counsel table by Mr. Greg
19 Goeckner and Mr. Dan Robbins.

20 **THE COURT:** Who are?

21 **MR. WILLIAMS:** They are lawyers for the MPAA
22 representing, in this capacity, the individual defendants and
23 counter-complainant studios.

24 **THE COURT:** Okay, thank you.

25 Now, I've received a fair amount of paper, not a lot

1 of time to read it. It seems as though there is some
2 difference of opinion as to how this real DVD operates.

3 Am I correct in that, Mr. DiBoise?

4 **MR. DIBOISE:** Your Honor --

5 **THE COURT:** In other words, as -- if I listen to
6 each side, I would think that these were two different pieces
7 of software or instrumentalities, or whatever.

8 **MR. DIBOISE:** The -- the actual implementation of
9 real DVD is characterized correctly by Mr. Buzzard's
10 declaration. I do not know that there is any technical
11 complaint by the studios as to what Mr. Buzzard says; however,
12 they do characterize and mischaracterize certain aspects of how
13 the Real DVD player works.

14 Having said that, I can understand Your Honor's
15 confusion, because it does appear from the studio's papers that
16 they mischaracterized certain steps that the Real DVD takes.

17 **THE COURT:** I didn't say that; I said there is a
18 difference of opinion.

19 **MR. DIBOISE:** Difference of opinion, Your Honor.

20 **THE COURT:** As to how it operates.

21 Is that correct?

22 **MR. WILLIAMS:** That is correct, Your Honor. I think
23 there is a fundamental difference of opinion, at least as
24 stated in the briefs, as to how the process works, although our
25 position is that there are a number of concessions in

1 Mr. Buzzard's declaration. When it really gets down to the
2 weeds, as to how the authentication and encryption works, we
3 actually believe that there is some agreement by their expert
4 on some critical issues. But, I think it's fair to say that
5 the plaintiffs and counter-defendants believe, as stated in
6 their papers, that we have mischaracterized the workings of
7 this product, and we don't believe we have.

8 **THE COURT:** Now, there also seems to be some
9 difference of opinion as to what is allowable under the
10 agreement.

11 For want of a better term, I can call it the CSS
12 agreement; would that be appropriate?

13 **MR. DIBOISE:** That is absolutely correct, Your
14 Honor.

15 **THE COURT:** And that is what it's called.

16 I was looking at whether it was DVDC -- what is it,
17 DCCA, or whatever it is?

18 **MR. DIBOISE:** DVD CCA --

19 **THE COURT:** Yes.

20 **MR. DIBOISE:** -- is a defendant, but that is the
21 entity that licenses the CSS encryption.

22 **THE COURT:** Is there, in fact, a difference in what
23 this allows --

24 **MR. DIBOISE:** Yes.

25 **THE COURT:** -- with respect to copying, et cetera?

1 **MR. DIBOISE:** Yes. That's the core issue, Your
2 Honor.

3 **THE COURT:** Get to the core of it, then, right?
4 Is that correct, there is a disagreement?

5 **MR. WILLIAMS:** Yes, there is a disagreement, Your
6 Honor.

7 **THE COURT:** Okay. Wherein does it say either that
8 it does allow for copying or does not allow for copying?

9 **MR. DIBOISE:** Your Honor, nowhere in the agreement
10 does it say thou shalt not copy.

11 **THE COURT:** It doesn't say thou shalt anywhere in
12 the agreement, as I recall, so --

13 **MR. DIBOISE:** What it does --

14 **THE COURT:** Does it say anything about copying?

15 **MR. DIBOISE:** Not in any of the specific provisions
16 of the CSS license does it say you shall not use this
17 technology to make copies.

18 **THE COURT:** What does it say in that respect?

19 **MR. WILLIAMS:** Sure, Your Honor.

20 If I may, is there any way I could use the overhead
21 to point the Court to specific provisions?

22 **THE COURT:** I've got it in front of me; I can read
23 sections, numbers, and things like that.

24 **MR. WILLIAMS:** Very well, Your Honor.

25 **THE COURT:** Okay.

1 **MR. WILLIAMS:** The first thing we point the Court to
2 is the name of the entity, that is, the licensor in this case,
3 that is the DVD CCA, the CCA --

4 **THE COURT:** Yes.

5 **MR. WILLIAMS:** Right? The idea behind the whole
6 organization is to protect copies. That's the Copy Control
7 Association is the name of the organization. And, it is an
8 organization, association, that we say exists for the purpose
9 of controlling copies, so I would start there.

10 The next specific provisions I would point the Court
11 to is the very first recital, and this is Exhibit F to
12 Mr. Pomerantz's declaration. The recital A, on the very first
13 page, says that, "CSS was developed to provide reasonable
14 security for content on DVD discs and thereby, together with
15 the terms and conditions of this agreement, to provide
16 protection for such copyrighted content against unauthorized
17 consumer copying." The entire fabric of this agreement is to
18 prevent unauthorized consumer copying.

19 The next provision that I would refer the Court to
20 is paragraph 9.2 of that same document. It appears on page 22
21 of 33 of the document. And, it's under the heading, "Equitable
22 Relief." This is a provision that refers to, specifically, the
23 category of people that are -- consist of my clients, that is,
24 people who are eligible licensees under the agreement, that is,
25 the studios.

1 What it notes here in paragraph 9.2 is the lasting
2 effect and harm of widespread unauthorized copying of
3 copyrighted content. And indeed, it goes on to say, in that
4 section, that to the extent there are any violations of any of
5 the provisions of this agreement, that the harm would be
6 irreparable.

7 And it specifically states that the licensor and the
8 licensee recognize that; thus, we would argue that irreparable
9 harm is assumed if the licensee, in this case, Real, violates
10 the license.

11 **THE COURT:** Well, is there -- is there any place in
12 the agreement where it defines unauthorized copying or copying?

13 **MR. WILLIAMS:** Not -- not as terms, no, Your Honor.
14 There is no callout, there is no separate definition section
15 that deals with those specific terms.

16 **THE COURT:** And, is there anything in the agreement
17 that incorporates by reference the DMCA or references the DMCA?

18 **MR. WILLIAMS:** Umm, there is nothing in the
19 agreement that specifically refers to the DMCA with respect to
20 the notion of copying, no, there is not, but the DMCA is a
21 statute that has specifically been described in various cases
22 as a statute that is meant to prohibit trafficking in a device
23 that circumvents technical measures, such as the CSS controls,
24 that is, the Content Scramble System controls that are dealt
25 with under this license.

1 So, in cases like Judge Illston's opinion in 321
2 studios, which was a couple of years ago from this district,
3 that case specifically held that the CSS controls are
4 specifically meant to be technical measures. And so, if you
5 violate those technical measures by trafficking in a device
6 that contravenes the DMCA, that is a violation of that statute.

7 If I may, Your Honor, there is one more provision
8 that I wanted to refer to that is probably the strongest
9 provision. It's not in the publicly-filed papers, but it's in
10 the confidential papers the are filed because it includes a
11 technical specification under the CSS.

12 **THE COURT:** Is this in the agreement itself between
13 RealNetworks and --

14 **MR. WILLIAMS:** It is referenced --

15 **THE COURT:** DCAA --

16 **MR. WILLIAMS:** I'm sorry, Your Honor.

17 **THE COURT:** -- whatever?

18 **MR. WILLIAMS:** It is referenced in the agreement.

19 If you'll note, Your Honor, paragraph 1.13 of that
20 agreement --

21 **THE COURT:** Um-hmm.

22 **MR. WILLIAMS:** -- specifically incorporates by
23 reference various procedural specifications and technical
24 specifications. It specifically incorporates those by
25 reference.

1 One of the technical specifications --

2 **THE COURT:** Which section of the agreement are you
3 referring to?

4 **MR. WILLIAMS:** That is section 1.13 of that same
5 Exhibit N.

6 **THE COURT:** Okay, I see what you are talking about.

7 **MR. WILLIAMS:** Okay?

8 **MR. DIBOISE:** Exhibit N?

9 **MR. WILLIAMS:** Yes.

10 **MR. DIBOISE:** I think you mean Exhibit F.

11 **MR. WILLIAMS:** Oh, pardon me. Exhibit F, the CSS
12 license agreement that you have in front of you.

13 **MR. DIBOISE:** Your Honor, if I might respond?

14 **THE COURT:** Well, I don't think -- are you finished?

15 **MR. DIBOISE:** Sorry.

16 **MR. WILLIAMS:** No, I wasn't.

17 **THE COURT:** Sort of sounded like he finished in
18 mid-sentence, there.

19 **MR. WILLIAMS:** One of the technical specifications
20 that we refer to and that we filed under seal, and this is
21 Exhibit G to Mr. Pomerantz's declaration --

22 **THE COURT:** Um-hmm.

23 **MR. WILLIAMS:** -- specifically talks about this
24 particular environment and making digital-to-digital copying of
25 protected content in the environment of a personal computer.

1 And, it indicates that the whole idea of the authentication and
2 encryption, that is part of the CSS protections, is to prevent
3 that type of digital-to-digital copying. And we would refer
4 Your Honor to that --

5 **THE COURT:** Do you have a copy there?

6 **MR. WILLIAMS:** Yes, I do.

7 May I hand it to your clerk, Your Honor?

8 **THE COURT:** Yes.

9 **MR. WILLIAMS:** Counsel?

10 **MR. DIBOISE:** I have one.

11 **MR. WILLIAMS:** Okay.

12 And, it's under section 1.1 there, Your Honor.

13 **THE COURT:** And, you're referring me to what
14 portion?

15 **MR. WILLIAMS:** Under section 1.1, there is a
16 paragraph the begins "the objectives" --

17 **THE COURT:** Yes?

18 **MR. WILLIAMS:** And it goes on. I would refer the
19 Court to the four lines that are indented there, where there is
20 a reference to a particular type of authentication and
21 encryption. It defines the purpose of this technical
22 specification that is part of the CSS and we feel makes clear
23 that the purpose of the CSS protections is to prevent copying
24 of -- digital-to-digital copying -- of DVDs onto personal
25 computers.

1 **THE COURT:** And, how do we know that this is, in
2 fact, what is referred to in 1.13 when it uses the terms
3 "procedural specifications" or "technical specifications" or,
4 quote "CSS specifications"?

5 **MR. WILLIAMS:** Your Honor, let me -- let me tell you
6 what I know about it, and perhaps one of my colleagues can give
7 more information, but here's what I know: We had to
8 specifically make a request to get this technical specification
9 going through the DVD CCA, signing agreements that we would not
10 disclose the technical specifications. We asked for all the
11 technical specifications and then reviewed them when they were
12 sent to us just in the past week or so, and this is one of the
13 technical specifications.

14 And, I'm looking at my colleagues. Mr. Singla may
15 have a more specific description of how it is we got this copy.

16 **MR. SINGLA:** Well, Your Honor --

17 **THE COURT:** I'm not so concerned right now, unless
18 somebody calls to my attention some reason why I should be.

19 What I want to know is, then, how do we know that
20 that is a part of this contract? For example, there are some
21 membership categories that are appended to the contract. And
22 then -- and I assume these are -- in connection with
23 RealNetworks that certain of these are checked off and a number
24 of others are not; is that correct?

25 **MR. WILLIAMS:** That's correct.

1 **MR. DIBOISE:** Yes, Your Honor.

2 Let me back --

3 **THE COURT:** Those particular designations as to, I
4 gather, what it is that RealNetworks said it was going to be
5 doing, that resulted in these particular membership categories
6 being checked off; is that correct?

7 **MR. DIBOISE:** They are checked off, but you need to
8 understand the mechanism by which this license is created.

9 **THE COURT:** Um-hmm.

10 **MR. DIBOISE:** The only thing that Real DVD -- I'm
11 sorry, that RealNetworks saw at the time that it signed the
12 license with the DVD CCA is the material that is attached to
13 Exhibit F. None of the technical specifications or procedural
14 specifications were part of the agreement that they saw at the
15 time they saw it.

16 The technical specifications, as Mr. Williams
17 indicated, are tightly controlled by the DVD CCA and weren't
18 sent to anyone at RealNetworks until after the agreement had
19 been signed by RealNetworks.

20 **THE COURT:** But, at some point, then, after you
21 signed that agreement you came in possession of --

22 **MR. DIBOISE:** Mr. --

23 **THE COURT:** Of what is contained in this Exhibit G.

24 **MR. DIBOISE:** I saw Exhibit G when Mr. Pomerantz
25 filed his declaration in the Central District of California on

1 September 30th, 2008. That is the first time that anyone --

2 **THE COURT:** Well --

3 **MR. DIBOISE:** I'm --

4 **THE COURT:** Did someone from RealNetworks come into
5 possession of this, not you personally?

6 **MR. DIBOISE:** Mr. Buzzard saw them.

7 **THE COURT:** Um-hmm.

8 **MR. DIBOISE:** And was part of the team that devised
9 and designed and created Real DVD. He was in possession of
10 that specification.

11 **THE COURT:** I see. That's what I want to know,
12 okay.

13 So, at time after having become a party to this
14 license agreement and received this -- these specifications; is
15 that correct?

16 **MR. DIBOISE:** Yes.

17 **THE COURT:** Okay.

18 **MR. DIBOISE:** And --

19 **THE COURT:** And they are deemed incorporated by
20 reference to paragraph 1.13?

21 **MR. DIBOISE:** That's the position of the studios and
22 the DVD CCA.

23 **THE COURT:** Is that incorrect?

24 **MR. DIBOISE:** We would dispute some aspects of that.

25 **THE COURT:** Well, what purpose do they serve if they

1 are not the specifications referenced in 1.13? What are they?

2 **MR. DIBOISE:** They -- I may have misspoken a bit.

3 We don't dispute that the technical specifications
4 say what they say. They are designed to teach the technical
5 people how to build a product in compliance with the license.

6 We do disagree with the studio's characterization of
7 the content of those specifications, so that when Mr. Buzzard
8 at RealNetworks and the team of engineers who were authorized
9 to have access to that -- to the technical specifications,
10 that's the document that they used in order to blueprint what
11 it was that we should do in Real DVD.

12 That aspirational, in a sense, nature of the
13 document that is before you I am sure, and I know from
14 Mr. Buzzard's declaration, that as far as bus authentication
15 goes and the bus decryption, both of those procedures are
16 followed within Real DVD. And that's the only evidence before
17 the Court today, is that Mr. Buzzard's declaration says we
18 followed faithfully these specifications to make the product.

19 What the studios are trying to do is to take this
20 technical specification and somehow or other bootstrap it into
21 the entire purpose of the agreement, which is where Your Honor
22 started out this question, which is, where in this agreement
23 does it say that the purpose of the agreement, or that the
24 purpose -- the agreement itself prohibits copying?

25 This doesn't prohibit copying, it just says if

1 you're going to read data from your DVD drive to the personal
2 computer, you must make certain that that bus, the connector,
3 the road that takes that data from the DVD to the computer
4 itself, must be encrypted. And, in fact, the Real DVD does
5 that.

6 **MR. WILLIAMS:** Your Honor, if I may respond?

7 **THE COURT:** Yes.

8 **MR. WILLIAMS:** The response to that is this is one
9 of the specific places where the parties are in disagreement as
10 to how the Real DVD product works. In the declarations that we
11 have provided from Dr. Bell and Dr. Kelly, they take great
12 pains, and they go very, very -- step by step in describing
13 exactly how it is that this technology does not use, in fact,
14 bus authentication or bus encryption from the point in time
15 that a copy has been made of a DVD.

16 Mr. Singla is the technical lawyer here who can go
17 into the real details of it, but I can tell you this, that the
18 way that this product works is they have a license that allows
19 them to access some of the encryption codes and the keys, the
20 CSS keys -- by "they," I mean RealNetworks. RealNetworks uses
21 those keys, accesses those keys in a manner that was not
22 contemplated by their license, because, after all, their
23 license was for the purpose of allowing RealNetworks to make a
24 DVD player.

25 So, what they do is, they designed a technology that

1 allows one to make a copy onto a hard drive of a computer of a
2 DVD. And, after that copy is made, and we can go step by step
3 with an overhead that I think really would illustrate it, after
4 that copy is made, Your Honor, neither bus encryption nor bus
5 authentication, none of those things take place, because once
6 it goes onto the hard drive of a computer, there is not even a
7 DVD disc drive the one typically uses when you insert it into
8 the tray of a DVD.

9 There is normally a communication, an
10 authentication, if you will, between the player, on the one
11 hand, and the disc drive on the other. What Real does is, they
12 say, well, once we have made the copy, we don't need to use the
13 player -- or, excuse me, the disc drive, and therefore, all the
14 technical specifications that require that a disc drive be used
15 and that authentication occur no longer have to be used.

16 And so, by that sleight of hand, they say, look, we
17 are compliant. We used all those authentication measures at
18 the beginning, before the copy was made. But, Your Honor, once
19 that copy is made, and there is nothing in Mr. Buzzard's
20 declaration that contradicts this, once that copy is made, none
21 of those protections except for the encryption of the content
22 of the movie, that is the only protection that remains, once
23 the copy is made onto a hard drive of the computer.

24 There are about you three or four others that
25 Mr. Singla can describe whenever Your Honor would like, if

1 you'd like, that are not used once the copy is made, and that
2 is the manner in which there is a bypassing or an avoidance of
3 the CSS protective measures.

4 **THE COURT:** Well, is -- is there anything in the
5 agreement that, as far as you read it, your interpretation of
6 it, proscribes their making a copy, or copying, I should say,
7 to the hard drive?

8 **MR. WILLIAMS:** No. In fact, there is not --

9 **THE COURT:** Does the agreement prevent that, prevent
10 copying, as you interpret it? Does it prevent or bar copying
11 to the hard drive?

12 **MR. WILLIAMS:** Yes, it does. It prevents copying of
13 any type in a playable form. So, if a copy is made of a DVD
14 that can be played, that is prohibited because of the passages
15 that I already described to you, the recital at the beginning,
16 I believe it was section 9.2, and other sections, the technical
17 specifications that specifically say that the purpose of this
18 whole framework of protections is to prevent unauthorized
19 copying of the DVDs. That's the whole purpose of it.

20 **THE COURT:** Well, what is meant by -- it says
21 "unauthorized consumer copying"; what is meant by that?

22 **MR. WILLIAMS:** Very simple: Unauthorized consumer
23 copying is exactly what Real DVD does.

24 **THE COURT:** No, no, that's not what I asked you.
25 What does it mean? Does it mean any copying of any copyrighted

1 work that is on -- that is on DVD and that can, you know, be
2 played?

3 **MR. WILLIAMS:** That's correct, Your Honor. It's the
4 first thing that shows up on a DVD when you play it on a
5 computer. It says that this is copyrighted material. The
6 copyright owner is whatever studio or whomever owns that movie.
7 That may be played only on a player that is a licensed player
8 that has worked with DVD CCA in order to have the codes that
9 allow the DVD to be played.

10 If you take a DVD that you purchase at a store and
11 you put it on your computer and you put it in the disc drive
12 and play it, there is nothing that allows you to make a copy of
13 that DVD, and, indeed, all of these protections prevent one
14 from making a copy of that DVD that can be played.

15 The way that RealNetworks tries to finesse that is
16 by saying that, well, any computer can make a copy of the data
17 that constitutes the content of a movie. And that's true, but
18 they can make a copy by using the Microsoft Windows, for
19 example. They can make a copy, but it is not a copy that can
20 be played, it's a copy that is jumbled and that needs these
21 access codes in order to be played.

22 **THE COURT:** And then, that's how the decryption that
23 they are doing essentially unscrambles it for the purpose of
24 allowing it to be played; is that it?

25 **MR. WILLIAMS:** That's correct, that's exactly right.

1 And that decryption, that you just mentioned, is the final step
2 before it's actually played onto the screen.

3 There are two or that other steps that have to take
4 place as different layers of protection before it can be
5 played; what Real DVD does is it eliminates those first three
6 or four protections, maintains the encryption protection to
7 which they have the access codes, and then it is employed by
8 the consumer, bypassing those first three. Because the whole
9 idea, as you can see from the technical specification, is that
10 the protections are meant to prevent digital-to-digital copying
11 in the personal computer environment. That's the whole idea of
12 these protections, and they have been bypassed in that way.

13 **MR. DIBOISE:** Your Honor, if I might?

14 **THE COURT:** Hold on.

15 I gather that there are any number of different
16 types of parties, and then they would become types of members,
17 I guess, that can sign onto or enter into this license
18 agreement. And, for example, some of the lists, those included
19 on the list are DVD player manufacturer, DVD driver
20 manufacturer, et cetera, right?

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

22 **THE COURT:** Now, and you referred -- I thought you
23 referred to RealNetworks as having signed this agreement and
24 being a DVD manufacturer, or DVD -- but they are not
25 manufacturing DVDs or players or drivers, or anything like

1 that, right?

2 **MR. WILLIAMS:** Well, actually --

3 **THE COURT:** What they've signed up for and what I
4 would like to know is the significance of this is a descrambler
5 manufacturer, and what are you descrambling, in this context,
6 that is legitimate for the purposes of what you say the
7 agreement is supposed to achieve? What is a descrambler
8 manufacturer do? And, I have no clue either as to what an
9 authenticator module for CSS decryption module, what it does.

10 **MR. DIBOISE:** Your Honor --

11 **THE COURT:** I think Mr. Singla is jumping up behind
12 you.

13 (Laughter.)

14 **MR. WILLIAMS:** Sure, Your Honor.

15 **THE COURT:** I want to get this straightened out and
16 then I'll talk to you.

17 **MR. DIBOISE:** The reason I'm sitting down is I just
18 have a hip problem, and it occasionally relieves --

19 **THE COURT:** No, that's fine, you may sit down. If
20 you want to stay seated and use the mic, you can do that as
21 well.

22 **MR. DIBOISE:** It's just my --

23 **THE COURT:** Okay sure, have a seat.

24 **MR. SINGLA:** As Mr. Williams mentioned, my purpose
25 here is just to try to help explain some of this technology and

1 what all these terms mean.

2 So, the Court, having very correctly referenced the
3 fact that the categories include DVD player and DVD drive, so
4 the CSS's license envisions that the term "DVD Player," with a
5 capital "P" is someone who -- may I put up a slide just to
6 illustrate?

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

8 What are you using here?

9 **MR. SINGLA:** We're going to use the TV screen here.

10 **THE COURT:** You're going to use this one here?

11 **MR. SINGLA:** Yes, I think that should work.

12 If we get Slide 15 up?

13 **THE COURT:** Can you turn that so that -- well, isn't
14 it playing on your -- should be playing on your screens there.
15 No?

16 **MR. DIBOISE:** I can see it now, Your Honor.

17 **THE COURT:** Okay. Okay.

18 **MR. SINGLA:** So, on the left you'll see what is
19 called a DVD player.

20 **THE COURT:** Right.

21 **MR. SINGLA:** In the context of the CSS license, the
22 capital P, player. Those are like the Sony box you have
23 underneath your computer, okay? That is not what this case is
24 about. Those machines have a relative low risk of copying
25 because it's a closed box system, there is no computer

1 programs, you can't attach a hard drive.

2 What this case is about is the right category, which
3 is when you have a computer system with a DVD drive attached to
4 it. We call that DVD Player, they call that DVD player, with a
5 small "P." It's not a DVD player, as that term is defined in
6 the CSS license, unfortunately, the way that both parties have
7 been talking about this.

8 **THE COURT:** Okay.

9 **MR. SINGLA:** Under the CSS license, a software
10 player, not a Sony box, but a software player like Real DVD, is
11 known as a descrambler and an authenticator of module for a
12 de-encryption module.

13 **THE COURT:** Who knew.

14 (Laughter.)

15 **THE COURT:** Certainly not I.

16 **MR. SINGLA:** And, this is explained in Dr. Bell's
17 declaration, which was submitted on Friday. But the idea is
18 that the authenticator module is the part of their program that
19 talks to the DVD drive and authenticates. And, the descrambler
20 module is the part of their program that knows how to take the
21 movie and decrypt it, undo the encryption and reveal what it
22 shows, and play it up on a screen.

23 If we could get Slide 17?

24 So, this is a DVD. And what Real has been talking
25 about is, you see it says "encrypted movie data"?

1 **THE COURT:** Um-hmm.

2 **MR. SINGLA:** The data that constitutes the movie is
3 encrypted. And that is one form of protection provided by the
4 CSS technology. And that is what Real focuses on because they
5 maintain that. In the copy they make -- we don't deny they
6 keep on their copy. The copy that they make is still
7 encrypted.

8 And so, they say, their declarant said, in their
9 papers they say we don't circumvent anything, we maintain the
10 CSS protections, but there are many, as Mr. William mentioned,
11 there are many other layers to CSS protections that are
12 completely circumvented.

13 And, I don't think there is a factual dispute, when
14 you dig down and see what they are saying. For purposes -- I
15 think we are accepting, really, their own characterization and
16 the way their witness described it.

17 If we could get the next slide?

18 There is also on the disk, and this is not in
19 dispute, what is called a "secure lead-in area." These are all
20 protections that were designed as part of CSS to protect movies
21 from copying. And, the secure lead-in area are the keys, the
22 codes that allow the decryption module, that part of the
23 program, to unlock the movie, decrypt the movie, okay?

24 We have a next set?

25 That is half the equation under the CSS

1 technological system. The second half of the protections are
2 contained in the DVD drive. And this is all, again, in
3 Dr. Bell's declaration. He is one of the people, and he is
4 here today, he is one of the people who led the committee in
5 the mid '90s to develop this entire system. He worked at IBM
6 at the time, and to give the studios comfort that they could
7 release movies on DVD. And his declaration explains all of
8 this.

9 So, there is a series of protection layers that
10 are -- this is the physical drives that come in your computer.
11 And our laptops have a DVD drive in them, or an external one.
12 One is a drive with that locking mechanism. The second is
13 authentication protocols; that is what talks to the
14 authentication module in the program. And, the third is the
15 bus encryption, and I'll talk about that a bit more. That's a
16 way in which the communication between the drive and the
17 computer are themselves rescrambled to make additionally sure
18 that nobody can tap into that line and get access to the movie.

19 If we can go to the next slide?

20 I think it's worthwhile, in listening to the Court's
21 questions, to kind of go through just a high level how CSS
22 works. I don't really think this is in dispute. I think it's
23 in Dr. Felten's declaration also. I don't think he really
24 disputes this.

25 **THE COURT:** I think in reality it probably helps to

1 see it as opposed to having a jumble of words, some of which
2 makes sense and some of which doesn't.

3 **MR. SINGLA:** It took us a while as the lawyers tried
4 to understand this from Dr. Bell.

5 The first thing is when you put a DVD in the drive
6 the drive locks; the drive will physically lock. It will
7 refuse to let you look at any part of the DVD. That is the
8 first layer of protection that is provided.

9 The next step?

10 The drive goes in and it locks. Cute little
11 animation.

12 The next step?

13 Now, once the drive locks, it will not unlock until
14 there is authentication. Authentication is a computer science
15 term that is used in computer science to mean having two
16 entities talk to each other, have a dialogue and make sure that
17 they can verify the other entity that they are dealing with is
18 legitimate, trustworthy. So there is a conversation. And
19 again, I don't think this is in dispute.

20 The DVD drive asks the player, this is the Real DVD
21 player they would ask, for example, their software, for some
22 security codes. And the Real DVD player sends them security
23 codes. And then, the player does another thing where it takes
24 those security codes and encrypts them, sends it back and says
25 encrypt this for me, and it does that. And it's doing this to

1 make sure that the player knows CSS, is CSS compliant,
2 understands the algorithms, and is a legitimate entity for it
3 to deal with and to send the movie to.

4 The next slide.

5 At that point, the drive will unlock. And at that
6 point, the computer can read what is on the DVD. And when
7 Dr. Felten and Real says the movie can be copied at this stage,
8 that's what they are saying; at this stage, once there is an
9 authentication protocol that takes place, the movie file can be
10 literally copied.

11 But what can't be copied is the lead-in area. If
12 you recall the last slide, there was a part of the disc that
13 has secret keys, those are physically blocked from being read
14 at this stage. You, as a consumer, when you open up a DVD on
15 your computer, even if it's been authenticated and unlocked,
16 you still can't get to those keys, so you still can't watch the
17 movie. That is, again, another security feature in CSS. The
18 idea here is that just encryption alone was not considered
19 enough. People wanted layers of protection, locks upon locks.

20 If you go to the next slide?

21 What happens is --

22 I'm sorry, go back one, if possible. There we go.

23 -- is that the player and the drive negotiate a,
24 agree on bus encryption, which is a way to further protect
25 those keys, you know, sort of the jewels, the keys. And they

1 are transmitted over the wire between the drive and the
2 computer, right?

3 This is another layer of protection on top of all
4 the other encryption. They make sure that -- and the reason
5 is, literally, and it says this in the specification, if
6 someone were to tap into that line, you know, insert themselves
7 in between the drive and the computer, the CSS specifications
8 and technology wants to make sure that that person can't make
9 any use of this, so they have a further layer of encryption
10 there.

11 Next slide.

12 It's only after all of that is done that the keys,
13 and you can see a little animation -- our IT people love this
14 kind of thing -- is finally sent to the player. And it's only
15 at this stage the movie can be played. What happens after that
16 is then the DVD will actually encrypt the movie. So as the
17 Court can see, there are layers of encryption here protection
18 here beyond just the encryption.

19 Next step, here.

20 Now, what -- one form of circumvention that is going
21 on, and this is what Mr. Williams and Mr. DiBoise we're arguing
22 about, is whether -- and we don't dispute this, when Real does
23 all this, they do all this, they do all this just as it's
24 specified in the specifications, but they do it to make a copy.
25 And so, our contention is that that's not authorized, to use it

1 this to make a copy. That is one form of circumvention that
2 relies upon the license, the language of the license, how you
3 interpret it our view of federal law that says that when you
4 have a copyright or patent license, anything that is not given
5 expressly is retained by the copyright holder. But, there are
6 other forms of circumvention that don't rely upon that license.
7 I think if that's the concern, that don't rely upon the
8 license -- and again, I don't think this is really in dispute.

9 **MR. DIBOISE:** It is, Your Honor.

10 **MR. SINGLA:** We can talk about it, you can respond.
11 Why don't we talk about the next -- get the next
12 slide.

13 **THE COURT:** Well, so far, in terms of how the Real
14 DVD operates, is this a correct?

15 **MR. DIBOISE:** At 30,000 feet, yes.

16 **THE COURT:** Um-hmm.

17 **MR. DIBOISE:** So Your Honor's question was where in
18 this license does it say thou shalt not --

19 **THE COURT:** I know. That was back sometime ago.

20 **MR. DIBOISE:** Well, that's the point, Your Honor,
21 because they can't point to anything in this agreement that
22 says you shall not make a copy. What they want to do is go
23 through the secret handshake and these other points.

24 The only point I want to make is --

25 **THE COURT:** I didn't cut them off from that. You

1 know that I can perfectly well cut them off if I want to.

2 **MR. SINGLA:** I'm sorry, Your Honor.

3 **THE COURT:** Yes?

4 **MR. SINGLA:** There are ways in which they
5 circumvent. This is the one form of circumvention, we contend,
6 at least, and they dispute, is that there is -- this is done to
7 make a copy instead of playing the movie.

8 If we get to the next slide, this is another form of
9 circumvention. I don't really think there is a dispute, and
10 this is very little to do with the license, and that is when
11 they play back the copy, now they have made a copy onto the
12 hard disc using all of these protocols, all the information
13 they learned from the license, they go through all that.
14 Instead of playing the movie, they copy it onto their hard
15 drive.

16 When they do that, and play the movie back from the
17 hard drive, none of those layers of protection are maintained.
18 They don't exist anymore on the drive, they've been removed.
19 Circumvention under the DMCA is not just unencrypted; the DMCA
20 defines circumvention to mean removing a protection,
21 deactivating a protection, impairing a protection. So the
22 movie on a hard drive -- the hard drive doesn't lock. They
23 don't say it does. There is no declaration or contention by
24 the other side saying that the hard drive copy, the hard drive
25 will physically lock the way the DVD drive did. The hard drive

1 doesn't authenticate with the player the way the DVD drive did.
2 Again, this is a protection in the CSS technology that is no
3 longer there in the copy. It has nothing to do with the
4 license.

5 **THE COURT:** Well, is there any kind of encryption or
6 any kind of locks that are left?

7 **MR. SINGLA:** Yes, there is.

8 **THE COURT:** Once it is, in fact, on the hard drive?

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

10 So, the -- the bottom-most layer of protection
11 provided by the CSS system is the encryption of movie itself.
12 And that is maintained. They maintain that. They maintain the
13 CSS encryption; they made a decision to keep that. But, all of
14 the other protections are removed.

15 And, you know, the Court has asked for language from
16 the contract. Now, again, it's our position that if the
17 contract doesn't give them explicit license to do this, to make
18 these copies and deactivate these protections, then they don't
19 have, you know, they are not authorized. They are not,
20 literally, authorized.

21 But, there is language in the specification that are
22 clearly violated by what they do. So one example --

23 If we can get Slide 26?

24 This is an excerpt from the procedural
25 specification. It was submitted this morning attached to

1 Mr. Pomerantz's supplemental declaration. I can give the Court
2 a copy, if it needs.

3 Does the Court need a copy?

4 **THE COURT:** Well, I will tell you in a minute.

5 Is that Exhibit A?

6 **MR. SINGLA:** I believe it is Exhibit A.

7 **THE COURT:** Yes?

8 **MR. SINGLA:** What that is, Your Honor, that is one
9 page of those procedural specifications. I have the entire
10 document, if the Court likes. I think it was an error on our
11 part to just give the Court one page.

12 **THE COURT:** Yes. It always makes me a little
13 nervous to see one extracted page without reference to
14 anything.

15 **MR. SINGLA:** This is a copy for the Court, and I
16 have a copy for Counsel, obviously.

17 If the Court turns to section 6.2.3, which I believe
18 is on Slide 26 up here, the Court will see the language there
19 that says, and I want to -- and I kind of went through some of
20 that, frankly, to help the Court -- help me explain to the
21 Court this language because it is a little technical. So I'm
22 going to translate this into English.

23 It says, "the authenticator in a CSS description
24 module shall correctly engage in and complete the
25 authentication process with the DVD drive and ensure that the

1 CSS keys are received by the descrambler only if the
2 authentication process is successful."

3 So, what this is saying, Your Honor, is that the
4 part of their program called the authentication module that
5 they've licensed from the DVD CCA, it should only be handing
6 over those CSS keys, the secret keys, to the descrambler
7 module, the other part of their program they licensed from DVD
8 CCA, if the authorization of the drive took place. That is the
9 requirement. It says that right there, uses the word "shall,"
10 "shall correctly engage and shall hand them over only if the
11 authentication process is successful."

12 Now, when they play back a movie that they have
13 copied from the hard disc, this doesn't happen, because the
14 consumer -- this isn't in dispute, either, in fact, they
15 advertise this as a feature of their product. If the consumer
16 copies the movie with their program onto the hard disc, they
17 can unplug that drive, turn the computer off, turn it on and
18 play it, but there is no DVD drive there for the authenticator
19 module to authenticate anything. But, they still hand over
20 these keys to the descrambler module.

21 Similarly, they say they can take a movie, their
22 program allows them to take a movie, and copy it onto a thumb
23 drive, one of those little USB drives, and take that into
24 another computer that the consumer owns and plug it in. Now
25 that computer maybe has never even had a DVD drive attached to

1 it, and yet the copy of Real DVD on that computer, the
2 authenticator hands over those keys to the descrambler module
3 without any authentication, without any drive because there is
4 no drive there.

5 And this is -- again, we certainly don't hang our
6 hat on the idea there has to be expressed prohibitions in the
7 license, but, to the extent the Court is asking, are for the,
8 you know, specific examples, or they are suggesting there is
9 nothing, I mean, these are -- this is just a flat-out place in
10 which they violate the terms of the contract. Section 4.2 of
11 the license says they have to comply with every part of the
12 specifications, including this, and they don't do that.

13 I could also, if the Court wants, walk the Court
14 through the specification, and there is section after section
15 after section designed to prevent copying. I mean, the
16 specifications, this document right here, has things about how,
17 when you play a DVD, the computer, if it outputs something to
18 the television has to make sure that it's -- it can't be
19 copied, that when you copy -- when you read a DVD disc and
20 you -- it looks like someone has made a copy of a movie onto
21 that disc, you can't read it. I mean, there is section after
22 section that would be rendered pointless if they were right,
23 and they were permitted to just freely make copies of movies.

24 There is a third circumvention that takes place
25 that, again, is independent of this license.

1 Can I get Slide 27?

2 Every DVD has on it as part of the DVD format what
3 are called "CGMS signals." This is in Dr. Fenten's
4 declaration, their expert's, and it's in Dr. Bell's
5 declaration, our expert, one of the people who helped develop
6 the entire DVD and CSS formats. He was the co-chair of a
7 120-person committee who designed that.

8 And the CGMS signals are all over this. There is,
9 like, literally, more than a million of them. And every place
10 in the disc it says, on a DVD disc it says, don't copy this.
11 You can set to 0-0, do make copies, or 1-1, don't make a copy.
12 And it's all over the disc, these markings. And the Real
13 program circumvents that. It still makes a copy, even though
14 the DVDs are marked all over the place, "don't copy," they have
15 signals, do not copy.

16 The irony here, Your Honor --

17 If I could get --

18 Well, the Court may have seen in our papers
19 something that the other side didn't even respond to, which is
20 they brought a lawsuit under the DMCA against a company called
21 StreamBox, this was back 7 or 8 years ago. And I believe
22 attached as Exhibit N to Mr. Pomerantz's declaration is the one
23 public document we have been able to get from the lawsuit just
24 from PACER or maybe West Law, which is the -- which is the
25 reply brief that they submitted in support of a preliminary

1 injunction. They got a preliminary injunction against this
2 company, StreamBox, for violating the DMCA. And the basis for
3 that, Your Honor, was, at that time, when the shoe was on the
4 other foot, when someone is trying to circumvent their copy
5 protection technologies, their video streams that they would
6 allow users to view, consumers on view on the computer, were
7 marked with something they called a "copy switch," exactly the
8 same thing as the CGMS signals on DVDs. It was a little
9 switch -- I have a copy I can just hand up to the Court, since
10 we can't seem to get the -- may I hand this up?

11 **THE COURT:** Yes.

12 **MR. SINGLA:** This is Exhibit N to Mr. Pomerantz's
13 declaration. And I apologize, it has two little marks from me
14 for the passage I'd like to point the Court to.

15 Now, the Court sees, I believe on page 2 there.

16 **THE COURT:** Yes?

17 **MR. SINGLA:** Forget this technology, we'll just look
18 at it.

19 They say there in the second paragraph that this VCR
20 program that they sued on, they got an injunction against this
21 company, that it circumvents their security system, and the
22 secret handshake, that is an authentication protocol. That is
23 what I was just saying that they don't respect in the CSS
24 system.

25 And then it says, "It is precisely because a Real

1 player is not on the receiving end that the user is able to
2 copy the streaming content, even though the content owner has
3 left the copy switch off."

4 This copy switch is the exact same thing as the CGMS
5 signals. They had a little place in their video stream where
6 the content provider of Real or a movie or television station
7 on the Internet could put a little signal saying don't copy
8 this. And just like we have on DVDs a little signal, in fact,
9 millions of them, that say don't copy this.

10 And this program, this VCR program that they
11 enjoined, didn't respect that circumvented that, made a copy
12 anyways. And Real said to the Court, "The VCR thus circumvents
13 both the access and copy protection."

14 And -- I'm sorry, can we switch back to the slides?

15 And then they won on that argument, Your Honor.

16 That very argument they won --

17 Slide 29.

18 They got a decision in the StreamBox case in the
19 year 2000, enjoining this company, StreamBox, and they
20 persuaded the Court successfully that the copy switch in the
21 ordinary course of its operation, when it is on, restricts and
22 limits the ability of people to make perfect digital copies of
23 copyrighted material. The copy switch therefore constitutes a
24 technological measure that effectively protects a copyright
25 owner's rights."

1 And the Court held that circumventing this was a
2 violation of the DMCA that required an injunction, a permanent
3 injunction -- sorry, TRO. And that was exactly what is going
4 on here, we have these CGMS signals all over our DVDs saying
5 don't copy, and they bypass and circumvent that and makes
6 copies anyways.

7 So --

8 **THE COURT:** Now, I'm giving a little time to be
9 heard from Mr. DiBoise also.

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

11 **THE COURT:** But, in talking about these
12 specifications and these additional documents that are not a
13 part of the actual licensing agreement, would I be correct in
14 assuming that what really incorporates these by reference, if
15 you will, is what is contained in paragraph 4?

16 **MR. SINGLA:** 4.2, yes, Your Honor.

17 **THE COURT:** Of the CSS specification -- where the
18 heading is CSS specification?

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

20 **THE COURT:** And refers to delivery and compliance;
21 is that --

22 **MR. SINGLA:** Let me pull my copy here.

23 Yes, so 4.2 -- and the Court is ahead of me here on
24 getting the page number.

25 **MR. WILLIAMS:** 4.2.

1 **MR. SINGLA:** 4.2 says, "license see shall comply
2 with the CSS specifications." 4.21, under "General."

3 **THE COURT:** Yes.

4 **MR. SINGLA:** "As may be amended from time to time."
5 And then 1. -- Mr. Williams will help me out here.

6 **MR. WILLIAMS:** 13.

7 **MR. SINGLA:** 1.13.

8 **THE COURT:** That one we have had reference before.

9 **MR. SINGLA:** So that is the provision --

10 **THE COURT:** That one is a little less specific
11 than --

12 **MR. SINGLA:** Right. That just defines the term.

13 **THE COURT:** Um-hmm.

14 **MR. SINGLA:** The Court is correct. This is here,
15 the Court is absolutely correct, in 4.1 and 4.2, which says
16 they shall comply.

17 **THE COURT:** Hold just one moment, both of you,
18 please.

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

20 **(Court and clerk confer.)**

21 **THE COURT:** In addition to copying to the hard
22 drive, and you referred to copying, for example, to a thumb
23 drive or to an external hard drive, or whatever, you know, that
24 it is owned by the person who has purchased, I guess, the Real
25 DVD, is there any reason why copies cannot be made to other

1 thumb drives, I mean, that you can take a thumb -- you know,
2 you can have 90 friends and invite them over with their thumb
3 drives and wine.

4 **MR. SINGLA:** That is an excellent question.

5 **THE COURT:** And you got 90 copies floating around
6 out there.

7 **MR. SINGLA:** Right, now you can make 90 copies, but
8 you can only play them back on five computers. So they have
9 voluntarily --

10 **THE COURT:** Is that it? They can only play them
11 back on five computers?

12 **MR. SINGLA:** That is our understanding from what
13 they are saying. We accept that for purposes of this hearing.

14 **THE COURT:** I see.

15 **MR. SINGLA:** We haven't had discovery yet. They say
16 you can only play it back on five, so we accept that for now.

17 **THE COURT:** Why five?

18 **MR. SINGLA:** That's question that we had, Your
19 Honor.

20 **THE COURT:** Is that the \$19.99 piece that you have
21 to buy and put on each computer, then, or something?

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

23 And if you -- exactly. If you took their arguments
24 literally, that the license allows them to just use these
25 specifications and secret information and codes to make copies

1 at will, why not 100? Why not 1000? According to them, they
2 could remove even the CSS encryption and allow consumers to
3 make freely copyable, freely playable movies. And there's
4 nothing in the CSS license, according to them, that would
5 prevent that.

6 I mean, what they are saying, their argument is that
7 basically, the CSS license, by taking a license they have
8 gotten free, quote "authorization," end quote, to just ignore
9 the DMCA and ignore the entire copy protection scheme and do
10 whatever they want.

11 **THE COURT:** Well, do you understand the technology
12 to be such that, in fact, if someone else had paid the \$29.99
13 for their computer, what is that protecting? "X" number of
14 computers --

15 **MR. SINGLA:** My understanding from their web site is
16 today, the way they have implemented it for now, at least, is
17 that when you pay \$29.99, you can play movies back on one
18 computer, the same computer from which you made the copy.

19 **THE COURT:** Um-hmm.

20 **MR. SINGLA:** And if you want to pay \$19.99 more, you
21 can add up to five computers. It doesn't have to be your own;
22 could be your dormmates, your roommates, your friends down the
23 street, your sister, your cousin, up to five other computers
24 that you could play copies made --

25 **THE COURT:** Okay, my question is, okay, so then

1 you're willing to splurge and spend another \$29.99 --

2 **MR. SINGLA:** I believe it's just five.

3 **THE COURT:** No, but this is a whole new purchase
4 now, a new transaction, \$29.99 and another five.

5 **MR. DIBOISE:** It's \$100, if you want five.

6 **THE COURT:** Yeah. I mean, I can figure that out.
7 It's almost \$20, right, plus the \$29.99. And you buy that,
8 that you can copy to all of those what you had, in fact, copied
9 to the hard drive on number one, or does that only allow you to
10 access those, quote, "five"?

11 **MR. SINGLA:** No, I think you're right. What would
12 happen is, you could download one copy of Real DVD and four
13 connected ones, put those on four computers of your friends,
14 and you could download another \$29.99, exactly what the Court
15 is saying, version, put that on your computer, that would be
16 set B, and then you could have four more computers. And you
17 could do that ad infinitum, as we understand their technology.

18 The other thing is, the five, as the Court
19 indicated, what their position is is that they are just sort of
20 voluntarily, as a good Samaritan, limiting it to five, and
21 tomorrow they could change it to 20 or a hundred or a thousand.

22 **THE COURT:** Maybe that's how they determined how to
23 define -- and I'll let him tell me that, but define parameters
24 of fair use.

25 **MR. SINGLA:** Perhaps, Your Honor.

1 **THE COURT:** Is that what it is?

2 **MR. DIBOISE:** Certainly, in part, that is what it
3 is.

4 **THE COURT:** First of all, with respect to how all of
5 this operates as has been described, not with respect to these
6 last few questions I asked, but is there a dispute about what
7 Mr. Singla showed us on the, you know, on the videos here with
8 the animations, and so forth?

9 **MR. DIBOISE:** Yes.

10 **THE COURT:** Is that an accurate --

11 **MR. DIBOISE:** No, it's not.

12 **THE COURT:** -- in terms of how the encryption works
13 and opens up.

14 **MR. DIBOISE:** Oh --

15 **THE COURT:** The various levels of encryption or
16 layers of encryption?

17 **MR. DIBOISE:** With respect to the actual
18 specifications on how to implement this and the actual language
19 and the technical specifications, we don't dispute what they
20 say. We do dispute what they interpret that language to mean.
21 So, for example, I could just show you one example and perhaps
22 emphasize this.

23 Could I have your slide back up that shows 6.2.3.

24 **MR. SINGLA:** It's Slide, Shannon -- just one second.

25 **MR. WILLIAMS:** Twenty-nine?

1 **MR. SINGLA:** Twenty-nine -- no, that's not it.

2 **MR. DIBOISE:** Your Honor, it is the part of --

3 **MR. WILLIAMS:** Twenty-six.

4 **MR. DIBOISE:** Twenty-six?

5 **MR. SINGLA:** It's got my notes.

6 **THE COURT:** There it is.

7 **MR. SINGLA:** That's right, 26.

8 **MR. DIBOISE:** So where it says -- sorry, this is
9 difficult, "The authenticator in a CSS decryption module shall
10 correctly engage in the" -- "in and complete the authentication
11 process with the DVD drive and ensure that the CSS keys are
12 received by the descrambler only if the authentication process
13 is successful."

14 We are in absolute -- Real DVD does every word of
15 that specification. They interpret that specification to mean
16 that you have to do, have to have the physical DVD in a
17 physical DVD drive each time there is a play back. That is not
18 in that specification.

19 At the time Real DVD gets the key for the
20 authentication, it goes through all the authentication steps
21 that are required by the technical specification. And there is
22 nothing in that specification that -- or elsewhere in the
23 agreement that says physical disc, the DVD, has to be in a
24 drive when you access those keys.

25 **MR. SINGLA:** I think --

1 **MR. DIBOISE:** It just means that --

2 **THE COURT:** Hold on.

3 **MR. SINGLA:** Okay.

4 **MR. DIBOISE:** -- that you have to make certain, when
5 you access that lead-in area where these keys are hidden, that
6 you go through the authentication process. And, in fact, Real
7 DVD does that.

8 **MR. SINGLA:** If I could --

9 **THE COURT:** But then you can essentially copy, not
10 with impunity, but copy 1 plus 4; is that -- is that correct?

11 **MR. DIBOISE:** You mean make five copies?

12 **THE COURT:** Yeah.

13 **MR. DIBOISE:** This doesn't have anything to do with
14 making copies.

15 **THE COURT:** I know it doesn't have anything to do
16 with making copies, but, once you get past all the scrambling,
17 and so forth, or descramble, decrypt, then, do you have to --
18 what happens to all of that encryption, then?

19 **MR. DIBOISE:** It's right on the copy on the hard
20 drive.

21 **THE COURT:** All of it?

22 **MR. DIBOISE:** All of it.

23 **THE COURT:** And everything that enables you to
24 essentially unlock and open up and go in, and the various
25 layers that he was talking about?

1 You don't dispute that there are all those various
2 layers, right?

3 **MR. DIBOISE:** No, we don't. And, when we play it
4 back, we go through each --

5 **THE COURT:** You are saying that all of those layers
6 remain there?

7 **MR. DIBOISE:** On the copy on the hard drive. And
8 they have to be there -- sorry, Your Honor, I apologize.

9 They have to be there in order to play back, whether
10 it's on computer one or computer five that you are authorized
11 to use.

12 That is why we are in compliance with the license
13 agreement; if there were a specific requirement that said there
14 must be a physical DVD in the DVD drive at the time that you do
15 this, they would point it out to you. It isn't there.

16 And another reason we know it's not there is because
17 every DVD player, now I'm talking about the stand-alone
18 machines that you can buy and come with your computer, makes a
19 copy, at a minimum, into the RAM of the computer or into
20 whatever buffer area exists in a stand-alone DVD player so that
21 it doesn't prohibit the making of a copy because there is a
22 copy being made in the normal legitimate way of the playback of
23 a DVD.

24 What they are concerned about is the fact that the
25 copy on the hard drive created by Real DVD is persistent, is a

1 permanent copy on that user's hard drive.

2 **THE COURT:** Which is not the case when you play a
3 DVD in a regular DVD player. Once you take it out, it's gone,
4 right?

5 **MR. DIBOISE:** Right, but you have the DVD.

6 **THE COURT:** Well --

7 **MR. DIBOISE:** There is no difference, Your Honor.

8 **THE COURT:** You have the DVD, yes.

9 **MR. DIBOISE:** Yes. And all those protections that
10 were on the --

11 **THE COURT:** Or I suppose if you rent it, you don't
12 have the DVD, right?

13 **MR. DIBOISE:** You had it at the time you watched
14 it --

15 **THE COURT:** Yeah.

16 **MR. DIBOISE:** And, at the time you made the copy.

17 **THE COURT:** And now that it resides on your hard
18 drive, you can give back the DVD, but you will have it forever,
19 right?

20 **MR. DIBOISE:** To -- yes, to watch, not to do
21 anything else with.

22 **THE COURT:** Except that, except that you can use, by
23 way of your external hard drive or thumb drive, or whatever,
24 what, for an additional \$19.99 you can copy it, correct?

25 **MR. DIBOISE:** To an account that is authorized to

1 you.

2 **THE COURT:** Well, that's --

3 **MR. DIBOISE:** So for \$19.99.

4 **THE COURT:** That's what I want to know, number one.
5 Is -- and is that, you know, I guess what you are saying is
6 that that's fair use?

7 **MR. DIBOISE:** The ultimate copy is fair use. The
8 end user's copy is fair use.

9 **THE COURT:** How about all the rest of these copies
10 for \$19.99?

11 **MR. DIBOISE:** There aren't additional -- there is
12 only, at most, five copies.

13 **THE COURT:** Okay, that the's what I mean.

14 **MR. DIBOISE:** Those five copies we submit --

15 **THE COURT:** Are all fair use.

16 **MR. DIBOISE:** In the consumer's hands are fair use.

17 **MR. WILLIAMS:** Your Honor, if I may --

18 **THE COURT:** Yes.

19 **MR. WILLIAMS:** May I be heard on the issue of fair
20 use?

21 **THE COURT:** Yes.

22 **MR. WILLIAMS:** There is no question in the papers
23 that have been provided by RealNetworks that they try to go
24 into the realm of fair use and whether or not their intention,
25 or purported intention, that the ultimate user of this

1 technology be someone who is just making copies of DVDs that
2 they own --

3 **THE COURT:** Um-hmm.

4 **MR. WILLIAMS:** But the case law is pretty clear.
5 And there is case after case that says in the DMCA context
6 there is no defense of fair use. And, we cite in our papers
7 case after case after case that suggests that. And the reason
8 for that is that the device under the DMCA is trafficking in a
9 technology --

10 **THE COURT:** Um-hmm.

11 **MR. WILLIAMS:** -- that circumvents.

12 So as long as we establish, and we think that it's
13 manifest that we do, and I wanted to get back to one point that
14 Counsel made, as long as we establish, and I would say the
15 burden is not on us, but to the extent that the Court believes
16 that we have established that there are any of these
17 authentication or encryption procedures that are bypassed after
18 the copy is made, the fact that Real intends, or purports to
19 intend, that the use will be made is for folks who own the DVD
20 is of no moment one way or the other. The violation of Section
21 1201(a)(2) and 1201(b)(1) occurs at the time that you enter
22 into the marketplace a device that circumvents.

23 If I may --

24 **THE COURT:** I understand what --

25 **MR. WILLIAMS:** Okay.

1 **THE COURT:** -- you're saying, but somehow I got a
2 feeling that they were working fair use into this somehow.

3 **MR. WILLIAMS:** That's right.

4 **MR. DIBOISE:** Fair use drives the product, not
5 whether or not Real DVD complies with the CSS license to do
6 what we do. Remember, Your Honor, this is an issue of whether
7 what Real DVD does, the device that is alleged to be sold to
8 circumvent certain access protections, does that illegally.
9 And, our submission is that, if you are authorized to do what
10 Real DVD does, we are not circumventing anything.

11 **THE COURT:** Well, this is an interesting question:
12 What are you authorized to do?

13 **MR. DIBOISE:** That's in the agreement. In the
14 agreement, it tells us what we need to do to be able to read a
15 DVD and be able to play it back. And the Real DVD player
16 follows faithfully the specifications in the agreement with
17 respect to what we must do to be able to read a DVD and be able
18 to play it back.

19 **THE COURT:** Doesn't say anything about copying.

20 **MR. DIBOISE:** Doesn't say anything about copying and
21 the copy -- which is what Real wants to do. I mean, after all,
22 Your Honor, Real is a half billion-dollar company whose entire
23 business is dependent on preserving the protection and security
24 of digital content. That's what it distributes.

25 Here we are taking every step to make certain that

1 what is on the DVD, whatever encryption scheme that is on the
2 DVD, remains on the copy that is made by Real DVD. There is no
3 circumvention. We have to come back --

4 To get on to the fair use issue, is because they
5 want to say because you make a copy, you therefore are
6 circumventing protection. And ipso facto, if there is a copy
7 made, it means you violate the DMCA. That's not the inquiry,
8 it's whether or not there is something in this agreement that,
9 since we are licensed to do what we do, we can make a copy as
10 long as we preserve all the restrictions on playback. That's
11 the issue that you have to decide, not whether or not fair use
12 copies, whether five is fair use, whether three is fair use,
13 whether one is fair use.

14 **THE COURT:** Well, I'm trying to get at what you
15 thought you were doing and whether or not that was something --

16 **MR. DIBOISE:** Right, obviously, Your Honor --

17 **THE COURT:** -- that was lurking there.

18 **MR. DIBOISE:** -- in the minds of the designers of
19 the product as well as the marketing folks, we wanted to make
20 certain that what we ultimately place in the hands of the
21 consumer would comply with the legitimate legal fair use. And,
22 that is why they are protections built into the entire product
23 as well as limiting the number of times computers you can have
24 to play it back on.

25 I submit, Your Honor, with respect to, I think a

1 question was in your mind, is that spending \$100 to be able to
2 view one copy on five different computers is a lot more
3 expensive than going to handbrake- or download.com and
4 downloading a program for free that would enable you to play a
5 DVD on a thousand computers.

6 **THE COURT:** Is that legitimate?

7 **MR. DIBOISE:** No, because those rippers don't
8 maintain --

9 **THE COURT:** Then why are you comparing yourself to
10 those that are, you know, whatever billion dollars or however
11 billion dollars you say your company is?

12 **MR. DIBOISE:** Because that's the harm --

13 **THE COURT:** Were why are you measuring yourself
14 against those who are not legitimate?

15 **MR. DIBOISE:** Because that's harm that they complain
16 of. They say if you allow Real DVD to be downloaded, look at
17 what's going on in this marketplace. What we are saying is we
18 maintain the protection; we are not part of that marketplace.

19 **THE COURT:** Well, the recitals in the license
20 agreement talk about providing protection for such copyrighted
21 content against unauthorized consumer copying. Can a consumer
22 who gets a DVD, whether they buy one or whether they rent it,
23 are they authorized to copy that?

24 **MR. DIBOISE:** Yes, under -- if they purchase it,
25 they are authorized to copy it. As far as I understand it,

1 once you have rented it, you can copy it as well. But I could
2 stand corrected on that one.

3 **MR. WILLIAMS:** No.

4 If I may, Your Honor, a consumer may not copy. That
5 is the first thing that comes up on a DVD. If you play it --
6 you are allowed to play it if you own it, you are not allowed
7 to copy it if you -- if that were true, then nobody --

8 **THE COURT:** You wouldn't need all this. You'd burn
9 a bunch of CDs and give them away, I suppose.

10 **MR. WILLIAMS:** Sorry, Your Honor.

11 **THE COURT:** You were wrong, right?

12 **MR. DIBOISE:** No.

13 **THE COURT:** No?

14 **MR. DIBOISE:** That's not what the product is
15 marketed for.

16 **THE COURT:** That's not the question. The question I
17 asked is what is unauthorized consumer copying? Because the
18 purpose of this section is to provide protection against that
19 unauthorized copying.

20 **MR. DIBOISE:** And, the only point that I'm corrected
21 on is that, as far as we know, there is no case that has
22 interpreted that in terms of fair use.

23 **MR. WILLIAMS:** Your Honor --

24 **THE COURT:** I'm not talking about fair use now.

25 **MR. DIBOISE:** That would be the protection.

1 **THE COURT:** I'm talking about what is unauthorized
2 consumer copying? It's copying of anything that is
3 copyrighted, right, without authorization, correct?

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

5 **MR. DIBOISE:** Correct, but we don't circumvent that
6 protection.

7 **MR. WILLIAMS:** Well --

8 **MR. DIBOISE:** I mean, that's the whole point of the
9 license, Your Honor. It says in order to do that, here are the
10 protections and the provisions you must comply with in order to
11 accomplish that goal. We accomplished that goal.

12 Now, I think what's bothering Your Honor is that
13 there may be some wiggle room here in the license agreement.
14 And, in fact, the studios knew that there was wiggle room in
15 the license agreement, and they tried twice in 2007 to amend
16 the DVD CCA license agreement to put in an explicit no copying
17 provision; both of those attempts failed.

18 The issue is -- I understand Your Honor's concern
19 with unauthorized copying, but what we do to prevent
20 unauthorized copying is follow faithfully every part of the CSS
21 encryption scheme in compliance with every technical
22 specification that they set out for us.

23 We have done what they asked us to do to prevent
24 unauthorized consumer copying. The fact that they didn't write
25 in big bold letters or include a clause that says you must have

1 a physical DVD in a DVD drive when you play this back is not
2 Real's fault. We faithfully follow the license terms.

3 **MR. WILLIAMS:** Your Honor, may I respond?

4 **THE COURT:** Yes.

5 **MR. WILLIAMS:** Here is the fundamental difference:
6 You just heard Mr. DiBoise say that we, the studios, needed to
7 put into the CSS license language in big bold letters that says
8 you may not copy, and that fundamentally reverses the way that
9 the law works when we are dealing with federal copyright law.
10 That is the whole reason we are here today.

11 We are here today because RealNetworks saw that
12 there was a State Court judge, Judge Nichols in Santa Clara,
13 who found that this CSS license, in his opinion, was not
14 violated by making of copies. He did that, and he got to that
15 conclusion in his own way.

16 But, the reason why this Court should not allow that
17 fact to get around the protections of the DMCA is the
18 following: Under federal copyright law, it is manifest under
19 **SOS versus Payday**, a Ninth Circuit case from 1989, that
20 copyright licenses are assumed to prohibit that which is not
21 authorized.

22 The issue is not prohibition, the issue is
23 authorization. And it is fair to say that over the last week
24 these parties have pointed to every provision in the CSS
25 license that bears on this question of copying. We have gone

1 to great lengths to give you recital No. 1, the technical
2 specification, section 93.2.

3 Juxtaposed against that, the best that RealNetworks
4 can do in responding appears on page 14 of their brief, where
5 they write as follows, and I quote, this is line 10 through 12
6 on page 14 of their brief:

7 "The CSS license agreement authorizes Real to,
8 quote, 'use and implement,' closed quote, "CSS technology. And
9 there is no limitation on these rights if Real complies with
10 the specifications as required."In other words, there is
11 nothing in the license that allows them to copy.

12 For purposes of federal law, Your Honor, the inquiry
13 is whether it is authorized, not whether it is prohibited; that
14 is to say, the burden is on them to establish that it is
15 authorized, and they cannot establish that.

16 **THE COURT:** What are they authorized to do under
17 this agreement?

18 **MR. WILLIAMS:** What they are authorized to do are
19 the things that are checked at the back of the CSS license;
20 that is, they are make a player, small "p," as Mr. Singla
21 described it, they are making a DVD player of that type. And
22 they are not authorized -- and they are allowed to show it --
23 they are not authorized to make a copy.

24 In direct response to the question that you posed to
25 Mr. DiBoise as to whether or not a consumer can copy

1 copyrighted material, the answer, of course, is, no, a consumer
2 may not copy a copyrighted material. What Real DVD does is it
3 allows a consumer to do just that; you take the DVD that you
4 have either purchased or rented or borrowed, you put it into
5 the machine, it says play or save and play, if you hit save,
6 that is a buzzword for copy. And every time there is a
7 advertisement for Real DVD that says you may save, that means
8 that you are making a copy. That is unauthorized.

9 The difference here, the question that's before the
10 Court is whether or not there are protections that are
11 violated, and there are once the copy is made. You heard
12 Mr. DiBoise say that there is nothing in this license that says
13 that you have to have a player -- excuse me, a disc drive that
14 is hooked up to the machine; well, actually, Mr. Singla showed
15 you some provisions of the license that talk about how you have
16 to go through the authentication process.

17 And even in the declarations from Mr. Buzzard that
18 they provided, and we ask the Court to look at paragraphs 8 and
19 9 of Mr. Buzzard's declaration, even his declarations do not
20 say that these authentications and bus encryption and bus
21 authentication measures are done after the copy is made. And
22 how could they be? Because if they were done after the copy of
23 the movie were made, the computer would lock. There would be
24 no ability for the player and the drive to communicate because
25 there is no drive, they have taken the drive out. They have

1 thus by-passed or avoided the protections.

2 What we would suggest, Your Honor, is that there are
3 already cases that have been decided that deal with this
4 question of whether or not you can make a copy versus whether
5 you can make a watchable copy. And, one of the cases we cited
6 is a Southern District of New York case, Macrovision versus
7 Sima Products Corporation from 2006. The issue in that case
8 was that Macrovision is a manufacturer of its own protection
9 scheme called ACP. And this ACP system prevents the making of
10 a watchable copy of a video over an analog system as opposed to
11 a digital system.

12 What the Court found -- that was Judge Owen in the
13 Southern District of New York, he found that Macrovision's ACP
14 system only prevented the making of watchable copies, it did
15 not prohibit copying, per se. But the court held that
16 Macrovision, quote, "has made a clear showing that Sima is in
17 violation of 1201(a)(2) of the DMCA and for making a
18 technology" -- excuse me, "for making a technology that
19 rendered those copies watchable." And it makes perfect sense,
20 that is exactly what is going on in this case.

21 What they are doing is making a copy, and their
22 response is theoretically, at least, a computer can always make
23 a copy, but it cannot make a watchable copy. And, that is what
24 they are doing, a watchable copy that one may watch without
25 even having a DVD introduced into the system.

1 So, if the Court applies the federal law as opposed
2 to the state law that was being applied in the Kaleidescape
3 case by Judge Nichols, who specifically said he was not -- he
4 used the phrase "tip-toeing into the area of federal copyright
5 law," he said he was applying California state law.

6 What Real did was they saw that decision, they
7 immediately then and only then went out and got a license from
8 DVD CCA. They put their technical people on it, and they
9 devised a system that instead of just being a player was a
10 copier. And then they are going to sell it to the public and
11 intervene on the profits of the companies that took all the
12 risk, that made the movies, most of which flopped, some of them
13 make it.

14 And, instead of the studio clients getting paid,
15 some portion of it the money goes to Real because all that
16 happens is that a person puts this on -- this equipment on
17 their machine. There are 3000 some-odd who already have it.
18 Each of them can put it on five computers, that is 15,000
19 copies. And then there is an unlimited number of movies that
20 can be done for each of those individuals making the copies.
21 And that is the vice of this system.

22 **THE COURT:** How does the technology here differ from
23 what was involved in Kaleidescope (sic) or Kaleidescape, I
24 guess it is.

25 **MR. SINGLA:** Your Honor, that is addressed in Mr. --

1 Dr. Bell's declaration.

2 **THE COURT:** I know, but that --

3 **MR. SINGLA:** I'll just explain at a high level,
4 sure.

5 In the Kaleidescape litigation, it was a very large
6 \$10,000 system. And it was a self-contained system. It's not
7 a computer, it's more like a DVD drive that you buy from Sony
8 to attach to your TV. So it's this huge box, and it has a slot
9 where you put in DVDs. And, it will copy them onto hard discs
10 maintained inside that box, and it will put them and play them
11 on your television.

12 So, it's not a system that is part of a computer
13 system, so it's covered by different provisions of the CSS
14 specifications. And the Court will recall, there a slide that
15 I put up with a stand-alone player versus the software player,
16 so there is different CSS provisions that applied to both.

17 So the Kaleidescape case didn't involve some of the
18 same provisions that we are talking about today that apply to
19 software players. It was not a descrambler module and
20 authenticator module for decryption module, because it was a
21 stand-alone player.

22 **MR. DIBOISE:** Your Honor, if I might?

23 **THE COURT:** Yes.

24 **MR. DIBOISE:** That's incorrect. The license that
25 Kaleidescape had checked the identical boxes that Real DVD

1 checked in order to get the specifications. And the
2 distinction about whether it's a PC or some other type of
3 operating system, I think, is a distinction without a
4 difference. It's a computer system, it just happens not to use
5 Windows --

6 **THE COURT:** It must have some computerized function
7 in order to be able to do what it did.

8 **MR. DIBOISE:** But before --

9 **THE COURT:** But it saves a copy to something
10 equivalent to a hard drive, right?

11 **MR. DIBOISE:** It saves it right to a hard drive,
12 many hard drives. It is a hard drive.

13 **THE COURT:** And that's it, it's not making any other
14 copies?

15 **MR. DIBOISE:** It goes right to that hard drive.

16 **THE COURT:** Um-hmm.

17 **MR. DIBOISE:** Now, that hard drive in a Kaleidescape
18 home can be networked, and the signal sent to as many players
19 or outlets as one wants to build into your home or your boat or
20 any other system that you have.

21 I do want to return to one question, Your Honor, if
22 I might. You asked me, what is unauthorized copying, and the
23 reason that is important and I want to come back to it is I
24 think you need to be in the proper framework. If this were
25 about unauthorized copying, which is copying thousands --

1 making thousands of copies and distributing them and making
2 money from those copies, you know, that would be a copyright
3 infringement or a contributory infringement case. This is a
4 DMCA alleged violation. This issue is whether we are
5 circumventing anything to be able to do what we do. And again,
6 that is why it's a license case, it's what we are authorized or
7 not authorized to do under the CSS license. To talk about the
8 copies only has relevance here to the extent that there is
9 something specifically in the agreement that says a copy is not
10 permitted.

11 **THE COURT:** Well, the DMCA was not adopted in a
12 vacuum.

13 **MR. DIBOISE:** Well, no, Your Honor, but it does say
14 unauthorized copies.

15 **THE COURT:** It is intended to protect copyrighted
16 works and to prevent use of various kinds of --

17 **MR. DIBOISE:** Correct.

18 **THE COURT:** -- devices, and so forth, to get around
19 that or to --

20 **MR. DIBOISE:** Correct.

21 **THE COURT:** -- avoid.

22 **MR. DIBOISE:** To avoid unauthorized --

23 **THE COURT:** Unauthorized copies.

24 **MR. DIBOISE:** -- copies. And the Real DVD makes
25 authorized copies from the DMCA perspective because we don't do

1 anything to violate the license we have.

2 The studios don't like that, but does it violate the
3 DMCA? The issue is whether we circumvent, not whether we make
4 copies or enable consumers to make copies.

5 And, Your Honor, if we are in compliance with the
6 agreement, then we are not circumventing their technology.
7 Even if it permits, for lack of a better word, an authorized
8 copy here, because remember, this is not a copy, this is
9 literally a bit-for-bit image of the DVD that has all of the
10 protections on it, you can't take that image that is created
11 and play it on anything other than the four other authorized
12 accounts.

13 **THE COURT:** Do we know that?

14 **MR. DIBOISE:** That's -- yes, that is in
15 Mr. Buzzard's declaration.

16 **THE COURT:** Do we know that?

17 **MR. SINGLA:** Your Honor, for current purposes, we
18 don't know that for sure. We haven't had discovery, but we
19 take them at their word, I think for current purposes, that is
20 the case.

21 Of course, as the Court indicated, you could buy
22 another five and put out five more computers. And the five, of
23 course, is a completely arbitrary limit that they have set
24 themselves.

25 **MR. DIBOISE:** You can't do that, Your Honor. You

1 can't take it and play it on five more if you authorize it.
2 It's tied to your personal computer and your personal account,
3 so it's not being multiplied. The maximum amount of any one
4 copy where it can be played is five.

5 **MR. SINGLA:** One thing I want to clear up that came
6 up a while ago, and then I'm going to turn it over to
7 Mr. Williams, because I'm just here to talk about the
8 technology, I want to make sure that there is not confusion
9 about the technology because I don't think there really is,
10 although I'm afraid the way it's being described might create
11 some confusion.

12 If you look at Mr. Buzzard's declaration --
13 Mr. Fenten's declaration -- Dr. Fenten's declaration, these are
14 their witnesses, their witnesses. Their witnesses do not
15 dispute that when there is a copy made by Real DVD and that
16 copy is played back, no authentication takes place, no bus
17 encryption takes place, the drive does not lock, the keys are
18 not held in a lead-in area. They don't say that; they don't
19 claim that. There is no such contention that those protections
20 are maintained on the copies. That is simply indisputably not
21 true. But --

22 **MR. DIBOISE:** Your Honor --

23 **THE COURT:** Hold on.

24 **MR. SINGLA:** What they say is -- Mr. Williams
25 referred to this earlier -- is, well, we don't need to maintain

1 those protections anymore because we don't have a DVD drive
2 involved. But that is our whole point; half of the CSS
3 protections are enforced and implemented by the DVD drive.
4 And, by bypassing the drive, removing the drive from the system
5 in the language of the DMCA, they have removed, bypassed
6 deactivated all of those protections.

7 This is not -- I mean, we would encourage the Court
8 to look at Mr. Buzzard and Dr. Fenten's declaration because
9 they never claim that they do these steps once a copy is made.
10 For example, you can take a thumb drive of a movie, you copy --
11 this computer, take it over to this computer over here that has
12 never ever had a DVD drive attached to it, ever, and maybe it
13 doesn't even have an outlet for a DVD drive, and you can still
14 watch that movie. So there is no way that the computer and the
15 version of the descrambler on that computer could have
16 authenticated with the drive, encrypted anything on a bus or
17 done any of those protections. That's the only point I wanted
18 to make.

19 **MR. DIBOISE:** Those protections aren't bypassed.
20 And I do disagree, RealNetworks disagrees with what most of
21 what Mr. Singla just said about the way our product operates.

22 **THE COURT:** Well, maybe that is really one of the
23 critical questions.

24 **MR. DIBOISE:** Your Honor --

25 **THE COURT:** And, maybe, there really is a dispute

1 among the experts. And, maybe, the Court should just
2 appointment its own expert and find out exactly how it does
3 operate.

4 **MR. DIBOISE:** It is Dr. Felten, and not Dr. Fenten.
5 And if I might, Your Honor --

6 **THE COURT:** Um-hmm.

7 **MR. DIBOISE:** The example that Mr. Singla just gave
8 about taking a thumb drive here and going over and putting it
9 in there, if this computer over here is playing Real DVD, the
10 authentication step has taken place. And it can't play back
11 without the authentication step having taken place.

12 **THE COURT:** What is the authentication? That
13 machine also plays Real DVD?

14 **MR. DIBOISE:** No, that the descrambler -- I'm sorry
15 -- yeah, the descrambler is receiving a signal that it is
16 authorized to receive. That's the authentication process. And
17 that step takes place when Real DVD pulls the bit-for-bit image
18 off of the DVD and places it, again, bit-for-bit encrypted into
19 the hard drive. Because what happens in the playback, as I
20 understand it, is that the lead-in keys, the lead-in area is
21 there as well so that the authentication step takes place. It
22 just doesn't take place with the DVD drive, but that
23 authentication step takes place.

24 **MR. SINGLA:** If you look at their --

25 **MR. DIBOISE:** And you can't play it there.

1 **MR. SINGLA:** If you look at their expert's
2 declaration --

3 **THE COURT:** And that's -- but what we are seeing as
4 a result of that is an authorized copy; is that your position?

5 **MR. DIBOISE:** If you want to adopt that language
6 from this license agreement, the answer to that is yes, because
7 it is authorized use and implementation of the CSS license
8 agreement.

9 **MR. SINGLA:** I --

10 **MR. DIBOISE:** From a copyright end user perspective,
11 and, if they were bringing a claim for copyright infringement
12 or inducing copyright infringement or contributory copyright
13 infringement, then we would be talking about more their use --
14 but that is not the issue, it's whether we're circumventing any
15 technological step -- tech -- sorry, can't get it out.

16 **THE COURT:** Technological, something like that?

17 **MR. DIBOISE:** Thank you.

18 Right. It's whether we faithfully put those steps
19 onto the copies that is on the hard drive.

20 So you have to be a licensed authenticator and a
21 licensed descrambler and a licensed descriptor to be able to
22 play it back with Real DVD. None of those things are necessary
23 if all you are doing is making copies.

24 **THE COURT:** Okay.

25 **MR. WILLIAMS:** Yes, Your Honor, I would like to put

1 this issue to bed because counsel has said, at least three
2 times, that they do not make any changes, that authentication
3 takes place with the use of the DVD player, and I just want to
4 refer the Court to paragraph 51 of Dr. Felten's declaration,
5 and I'll read it. Dr. Felten, their expert's declaration says.

6 "Real DVD does not need to authenticate to the drive
7 in these cases because it does not need to use the drive at
8 all. I understand that the DVD specifications only require
9 software players to authenticate themselves to the drive when
10 they are going to use the drive. This rule is consistent with
11 common sense.

12 He then goes on to use an analogy, and he says, "If
13 I stay at home from work today, this is not a circumvention of
14 the lock on my office door. To say otherwise defies logic,
15 especially in light of the fact that I have a lawfully acquired
16 key to the office and am authorized to use that key to enter
17 the office."

18 The point I am making, Your Honor, is that this is
19 their expert saying that Real DVD does not need to authenticate
20 to the drive. Now, that is a declarative sentence by their
21 expert conceding that they do not authenticate to the drive,
22 they do not authenticate to anything once the copy is made
23 because if they did, the program would seize up and stop.

24 As for the analogy that Dr. Felten uses, the facts
25 are inapposite. The question is not whether Dr. Felten decides

1 to go to work and thereby bypasses the lock on his door, this
2 is more akin, this situation is more akin to a custodian who
3 has a key to the door, who has a license to be inside of
4 Dr. Felten's office, but for a specific purpose, the purpose
5 being to clean it, the purpose being to dust it, perhaps, but
6 not to sit in Dr. Felten's chair and put his legs up and read
7 the materials there, and certainly not to steal any materials
8 inside Dr. Felten's office.

9 Yet that's exactly what they do in this case: they
10 use the authentication keys, it's given to the consumer, a copy
11 is made, and then the consumer goes inside that door by making
12 the copy up to five, could be 20, could be 100. That's just
13 out of the goodness of their hearts. It's not based on any
14 principled limitation on the law or the number of copies they
15 could make. So, we do dispute the issue that there is
16 authentication going on under the Real DVD system once the copy
17 is made.

18 **MR. SINGLA:** And, Your Honor --

19 **MR. DIBOISE:** So, if I might --

20 **MR. SINGLA:** Just one little point.

21 **THE COURT:** Hold on one moment.

22 What is it?

23 **MR. SINGLA:** The slide that is still up --

24 **THE COURT:** Um-hmm.

25 **MR. SINGLA:** And we keep coming back to this only

1 because Real's defense is that there is nothing that they are
2 doing that violates the CSS specification. And again, we
3 believe they haven't pointed to anything that says you can make
4 a copy that authorizes a copy. But, even under their reading
5 of the law, it says, "the authenticator in the CSS decryption
6 module shall correctly engage in and complete the
7 authentication process with the DVD drive before the keys are
8 given to the descrambler."

9 It doesn't say when you need to use the drive. It
10 says it would only hand over the keys if it authenticates. And
11 Dr. Felten, as Mr. Williams said, he indicates they don't
12 authenticate with the drive once they made a copy. You can
13 take the thumb drive -- I'm just making the same point because
14 I don't understand how they are testing this because their own
15 expert admits this: Once you take that thumb drive and you
16 move it to a second computer, there is no DVD drive there,
17 doesn't need to be. There is no way there could be any
18 authentication, and that is what he is saying here. And that
19 is completely inconsistent with 6.23. So, just from a
20 technical perspective, I want to make sure that's --

21 **THE COURT:** Okay we are here, essentially, on a TRO;
22 I don't know that, really, it's going to be possible to resolve
23 this in any authoritative way without having -- setting some
24 time for the testimony of the experts and taking their
25 testimony and/or my appointing my own expert to essentially

1 take a look at what the technology does. And, because, it
2 seems to me, that there really is a significant dispute about
3 what it does and what it's capable of doing, and I think that
4 is what is critical.

5 But, I have to say that I think this notion that you
6 can somehow look at what, you know, DMCA provides for with
7 respect to the technology involved cannot be looked at separate
8 and apart from the copyright laws and the fact that -- and the
9 question of whether or not there is authorized or unauthorized
10 copying.

11 I mean, the DMCA is not there in a vacuum; it was
12 put there for a purpose. And, it has to do to with the means
13 by which certain technologies were making it possible, in the
14 digital age, to gain access to materials that are copyrighted
15 in ways that have the potential to violate the, you know, the
16 copyright laws. So, I mean, it's not -- we can't just look at
17 it, as I said, in a vacuum. I don't know how it can really be
18 resolved without doing that. And I may want to just appoint my
19 own expert --

20 **MR. DIBOISE:** Your Honor, if I --

21 **THE COURT:** -- to take a look at all of this and see
22 what he or she has to say.

23 **MR. DIBOISE:** I just want to make is certain that
24 Your Honor is clear on the mechanism of these copies that
25 everyone keeps talking about.

1 When Real DVD --

2 **THE COURT:** I'm clear on what you are saying, and
3 I'm clear on what they are saying --

4 **MR. DIBOISE:** Well --

5 **THE COURT:** What I'm saying is everybody has an
6 expert and everybody's got their own idea about how to be
7 persuasive, but somewhere in between it all, the Court has to
8 filter out what is true and what isn't.

9 **MR. DIBOISE:** I just want to make certain Your Honor
10 understands that the copy that is made by Real DVD cannot be
11 copied by anybody, right? That copy, that -- so you copy it to
12 the thumb drive, you cannot copy from that thumb drive to
13 another hard drive, to another thumb drive. It can only be
14 copied to one thumb drive.

15 **THE COURT:** Or four.

16 **MR. DIBOISE:** No. You can play it back from that
17 one drive on the other four computers. So there are not five
18 copies being made, there is one copy being made that can be
19 viewed on up to five computers.

20 **THE COURT:** Well, you're downloading it onto a thumb
21 drive, right?

22 **MR. DIBOISE:** Yes.

23 **THE COURT:** Okay, what is downloading it?

24 **MR. DIBOISE:** It's copied.

25 **THE COURT:** Yes. Voila.

1 **MR. DIBOISE:** I'm saying one copy is made onto the
2 thumb drive, not five copies on five different thumb drives.

3 **THE COURT:** Well, but if you've got another thumb
4 drive or you have some other kind of external hard drive,
5 you're downloading it to that one. I mean --

6 **MR. DIBOISE:** You would have to go through the whole
7 process of taking it off the DVD itself again to make another
8 copy.

9 **THE COURT:** Well, you would have to -- all you have
10 to do is you got all those, you know, wonderful little plugs on
11 the side, whatever you want to call them --

12 **MR. WILLIAMS:** Ports.

13 **THE COURT:** Ports, right. Thank you -- putting in,
14 you know, and accessing -- putting your thumb drive in on one
15 side, your can put your external hard drive in over here, with
16 any luck, you probably got a couple more ports you can use, and
17 each one of those you are downloading separately.

18 **MR. DIBOISE:** Can't do that.

19 **THE COURT:** Oh, well --

20 **MR. DIBOISE:** You can copy it to one device.

21 **THE COURT:** Talk to your expert, then.

22 **MR. DIBOISE:** My experts and Mr. Buzzard says that
23 in their declarations.

24 **THE COURT:** Then I would like to have another expert
25 questioned -- or I would like to question them, because I think

1 that's a --

2 Do you agree, Mr. Singla, with what I just said?

3 **MR. SINGLA:** No, Your Honor, with that exact
4 statement I do not agree. In fact, there's a declaration --

5 **THE COURT:** Do you agree with him?

6 **MR. SINGLA:** I don't agree.

7 **THE COURT:** You agree with me?

8 **MR. SINGLA:** Yes, Your Honor, I agree with you.

9 **THE COURT:** That's what I wanted you to say.

10 (Laughter.)

11 **THE COURT:** You don't have to, you don't have to,
12 but tell me if --

13 **MR. SINGLA:** No, the Court's exactly right.

14 **THE COURT:** I mean, this is -- I can't believe what
15 I'm hearing.

16 **MR. SINGLA:** Yeah, the Court is exactly right. In
17 fact, our experts -- this is in their literature.

18 **THE COURT:** If I take out one thumb drive and put
19 another thumb drive in, I'm going to have to download it again.

20 **MR. DIBOISE:** Yes, you have to make another copy.

21 **THE COURT:** I make another copy.

22 **MR. SINGLA:** Exactly.

23 **THE COURT:** Yes.

24 **MR. DIBOISE:** Of --

25 **THE COURT:** Is that the magic there, another copy?

1 **MR. DIBOISE:** But, that copy still can only be
2 played -- it doesn't do you any good to have to have another
3 copy. It can only be played on the same five computers.

4 **THE COURT:** Well, that's what I would like to find
5 out.

6 **MR. DIBOISE:** Well -- I understand but, Your Honor,
7 that is what our declarants say. They don't dispute that they
8 say that.

9 **THE COURT:** Well, every expert says something that
10 satisfies their client. And I, you know, and the expert on the
11 other side will say something to satisfy their client. I would
12 like to be able to get to the truth.

13 **MR. DIBOISE:** I understand that, Your Honor, but --

14 **THE COURT:** To the extent that you are going to let
15 me --

16 **MR. DIBOISE:** I --

17 **THE COURT:** And believe me, you will let me.

18 **(Laughter.)**

19 **MR. DIBOISE:** I will, of course, Your Honor. I'm
20 just saying that Mr. Buzzard was the person who had the specs
21 in front of him, who designed and implemented the Real DVD, and
22 is the person who had in front of him the specifications.
23 Mr. Kelly did not have in front of him, I believe, the actual
24 technical specifications.

25 **THE COURT:** We'll get to the bottom of it, I'm sure.

1 Is there anything else that needs to be addressed
2 today?

3 **MR. DIBOISE:** Depends on who your thoughts are about
4 setting another hearing.

5 **THE COURT:** Well, why don't you talk among
6 yourselves. Let's take a short break and see if you can talk
7 among yourselves.

8 There is a period -- and you can talk to
9 Mr. Bowser -- there is a period of time coming up fairly soon
10 when I'm not going to be available for a short while, so I
11 think what we have to do is keep the TRO in place until we have
12 a hearing.

13 **MR. DIBOISE:** Your Honor, can we be heard on that
14 issue with respect to --

15 **THE COURT:** Not right now, we'll take a break.

16 **MR. DIBOISE:** That's fine.

17 **MR. SINGLA:** A procedural question.

18 **THE COURT:** Yes.

19 **MR. SINGLA:** What is the Court -- is the Court
20 envisioning a hearing with experts on both sides, and we are
21 trying to get timing for that?

22 **THE COURT:** Possibly.

23 **MR. SINGLA:** Okay.

24 **THE COURT:** If you have some other thoughts or -- as
25 I said, I will possibly appoint my own expert --

1 **MR. SINGLA:** Okay.

2 **THE COURT:** -- to essentially do what is necessary
3 and report to the Court.

4 And Mr. Klaus, you might even know who that expert
5 might be, since he served the Court very well and he is
6 available, I understand.

7 **MR. DIBOISE:** Might we know who that is, Your Honor?

8 **THE COURT:** Well, let me see what you have to say
9 when you come back after the break, about ten minutes.

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

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

12 **(Recess taken at 3:41 p.m.)**

13 **(Proceedings resumed at 4:00 p.m.)**

14 **THE COURT:** Just a couple of questions to see if I
15 can understand what you're saying.

16 First of all, is it unauthorized copying if, say,
17 you have the Real DVD player, and you -- I'm not talking now
18 about having bought a video or rented a video, or whatever, and
19 accessing in the fashion you have talked about, but you have a
20 friend who has several videos, and you want to -- you want to
21 save them and use your Real DVD player; can you do that?

22 **MR. DIBOISE:** Yes.

23 **THE COURT:** Okay. And then you can essentially also
24 access it in the same way with -- if you've got the four
25 external hard drives, whatever they may be. And I know you

1 don't want to say that is copying --

2 **MR. DIBOISE:** No, no, I'm just not certain --

3 **THE COURT:** -- downloading. And you could download
4 those friends' videos or movies, right?

5 **MR. DIBOISE:** I understand, Your Honor. I think you
6 don't grasp -- when you said "four hard drives" is where I
7 think that Your Honor has an incorrect exception.

8 **THE COURT:** I said external hard drives.

9 **MR. DIBOISE:** I understand.

10 **THE COURT:** You know, I mean, they are very small.

11 **MR. DIBOISE:** You could do that, Your Honor.

12 **THE COURT:** You could download things to those or
13 you could download them to flash drives, or thumb drives, or
14 whatever you want to call them, right?

15 **MR. DIBOISE:** You could.

16 If you owned a DVD --

17 **THE COURT:** Um-hmm.

18 **MR. DIBOISE:** -- just like you could give that DVD
19 to every friend that you had, 20, 100, a thousand, if you had
20 that many friends, you could give that DVD, and they could
21 share it, pass it along to everyone else, that's true. The
22 copy that can be made from that is really -- it's exactly what
23 was in front of the Court in Sony v. Betamax because you can't
24 make a copy of your copy to pass on to another thousand friends
25 to -- and have them make another copy of a copy of a copy. Our

1 system is locked to that first copy you make, or a second copy
2 you make, but the second copy you make can still only be played
3 on your five authorized machines.

4 And, I don't know whether this was in the minds of
5 the designers, or whatever, but it acts just like *iTunes* does
6 from Apple; you can authorize up to five of your computers to
7 play back digital content that you download in *iTunes*. And the
8 number 5 is probably not magic, it was determined from probably
9 a product perspective as well as mindful of the ultimate --

10 **THE COURT:** Somebody in marketing, probably.

11 **MR. DIBOISE:** Correct. So, but the copy you make is
12 locked in.

13 And Judge, this is not just sticking something in
14 the drive and, boom, it's copied. To download a movie of seven
15 gigabytes can take anywhere from, depending upon the speed of
16 your processor, four, six, seven hours, depending upon what
17 they have put on -- how much data is really in the disc. So
18 it's not a process that just gets multiplied and multiplied
19 where you go and have a thousand machines hooked up, and you
20 just put one disc in and it's copied to a thousand, you know,
21 or burned to a thousand DVDs at a time, or something. That's
22 not this product. It's really tied to you, the one user. You
23 could, if you wanted to, make another copy, but again, that
24 copy on that machine still tied to your five machines.

25 **MR. WILLIAMS:** Your Honor, our declarants --

1 **THE COURT:** Yes --

2 **MR. DIBOISE:** Now --

3 **THE COURT:** Yes, go ahead.

4 **MR. WILLIAMS:** I'm sorry.

5 Our declarants say that, as a matter of fact, it
6 only takes 20 to 40 minutes to download a movie. They did it
7 using the actual product on several movies. And I just wanted
8 to clear that up. It's not a matter of four to seven hours per
9 movie.

10 **THE COURT:** Well, some people have a lot of time on
11 their hands, and, unfortunately, it appears that there are more
12 and more people who have more time on their hands, regrettably.

13 And also, is it your contention that all of these
14 various accesses, if I may call them that, that are used, in
15 other words, all of these various encryptions that essentially
16 have to be bypassed -- not bypassed, but accessed, you know,
17 when you step through those various encryptions that are used,
18 all the protections that we saw, you know, for example, in the
19 animation, that all of those are maintained all the way
20 through, you know, whether you download this to another drive
21 or if you just maintain it on your computer, all of those
22 encryption and locks, so to speak, remain in place?

23 **MR. DIBOISE:** Yes, to the extent that the slides you
24 saw are faithful to what the CSS license actually says.

25 **THE COURT:** What does that mean?

1 **MR. DIBOISE:** It means --

2 **THE COURT:** I mean, there are various layers of
3 encryption, right?

4 **MR. DIBOISE:** So, let's take the one that everyone
5 was talking about that was up here: If you take the
6 authenticator having to access the DVD drive --

7 **THE COURT:** Um-hmm.

8 **MR. DIBOISE:** -- it doesn't say every time it has to
9 access the DVD drive at all, it just says when you do it, you
10 have to access and get the authenticator codes. Every time
11 Real DVD plays back, it has to access that specific code that
12 was on the DVD but now resides on the hard drive to be able to
13 get the secret handshake so you can decrypt.

14 **THE COURT:** How many of those so-called "codes" are
15 there, and are all of them retained?

16 **MR. SINGLA:** Your Honor, if I could just --

17 **MR. DIBOISE:** Yes.

18 **THE COURT:** Hold on.

19 **MR. DIBOISE:** I mean, I don't know the number of
20 them. If we think through the process, I'll try and do it out
21 loud with you.

22 **THE COURT:** Um-hmm.

23 **MR. DIBOISE:** At the time the drive is inserted, the
24 disc is inserted into a DVD drive, it is locked, it receives a
25 access code from the DVD player --

1 **THE COURT:** Um-hmm.

2 **MR. DIBOISE:** -- and that unlocks the disc so it
3 spins.

4 Then, when it asks to access the content on the DVD,
5 it asks for you to, one, authenticate again that you are a
6 authorized person to be able to access the content on the DVD.
7 Then, it lets you access the actual content that's encrypted,
8 and it gives you the key to be able to decrypt that content.

9 As this information is passing back and forth
10 between the DVD and the computer where the -- the computer, the
11 display mechanism in this case, there is a bus, a road, pathway
12 that has -- that is encrypted.

13 **THE COURT:** Um-hmm.

14 **MR. DIBOISE:** That step is complied with.

15 When it gets onto the hard drive, the encryption is
16 retained on the bus as well, but that encryption resides in the
17 microprocessor within your computer, there is no external drive
18 that you access.

19 So, while it did comply with the specification when
20 it came off the DVD drive, because there is no drive there we
21 don't go through that step again because it's just in the
22 driver. And when it plays back, it uses our authorized keys to
23 be able to decrypt the actual content on the DVD or on the hard
24 drive to be able to transform it into something that is
25 playable. So each step is complied with.

1 **MR. WILLIAMS:** Your Honor --

2 **MR. DIBOISE:** The only step that they contend isn't
3 complied with is going to a DVD drive when you play back from
4 the hard drive. And that's purpose of Mr. -- Dr. Felten's
5 declaration, is that you don't go to the DVD drive if you are
6 playing back from your copy that maintains all of these
7 protections, you just don't do it because you don't have to do
8 it. I mean, it's not circumventing anything; it's just there
9 isn't a DVD drive to handshake with.

10 **MR. WILLIAMS:** Your Honor --

11 **MR. DIBOISE:** And, there is nothing in that spec
12 that we kept looking at that says you have to go back there
13 every time you play back. It comes back to what the
14 permissible uses are within the license agreement.

15 **THE COURT:** Well, let me ask you this: Without a
16 license agreement, could you, without violating the copyright
17 laws, copy a movie to your computer's hard drive?

18 **MR. DIBOISE:** Who's the "you," Your Honor?

19 **THE COURT:** You, any of us.

20 **MR. DIBOISE:** Yes, I can do it.

21 **THE COURT:** You can do it, physically, without being
22 in violation?

23 **MR. DIBOISE:** I can make a fair use copy of a DVD
24 without using Real DVD.

25 **THE COURT:** Okay.

1 **MR. SINGLA:** There is, of course, the DMCA, that
2 would prevent a consumer, anybody, from making a copy of a DVD.

3 **THE COURT:** How many of those copies could you make?

4 **MR. DIBOISE:** If one -- Your Honor, if I might
5 change this into the speculative consumer? If one might, using
6 any of these other rippers, could make as many copies as they
7 had media to store them on --

8 **THE COURT:** I'm talking about and not violate the
9 copyright laws.

10 **MR. DIBOISE:** Oh, they could make one, maybe two,
11 maybe three. Depends on what the spectrum of fair use is in
12 that context.

13 **THE COURT:** Yes?

14 **MR. WILLIAMS:** Your Honor, the point I was going to
15 make is -- well, let me deal with this last issue first.

16 A person could not legally make a copy of their DVD
17 onto their hard drive. First, the copy that they would make
18 would not be a playable copy unless they used one of these
19 ripper-type softwares. The copy would not be playable. If
20 they were to make a copy for a so-called "fair use," the fact
21 that they are making a copy for a fair use using Real DVD
22 violates DMCA, that is our contention.

23 If you take the Real DVD out of the equation, my
24 understanding is that the copy that one could make onto their
25 hard drive from a DVD that they owned or rented, the copy that

1 they made would not be a playable copy.

2 **THE COURT:** Is that what you understand to be the
3 case?

4 **MR. DIBOISE:** You can make a copy without --

5 **THE COURT:** In other words, there would have to be
6 some device, and it may be some device the violates the DMCA,
7 right?

8 **MR. DIBOISE:** Right, you can make a copy without
9 violating the DMCA of the DVD; whether you can play it back and
10 see something that is useful to see might, and probably does,
11 violate the DMCA.

12 **MR. WILLIAMS:** And if I may --

13 **MR. DIBOISE:** Unless you were authorized --

14 **THE COURT:** Violation the copyright laws.

15 **MR. DIBOISE:** Well, no --

16 **THE COURT:** You are saying --

17 **MR. DIBOISE:** Violates the DMCA.

18 **THE COURT:** You would have to have a device that
19 allows you to do that and thereby violating the copyright laws.

20 **MR. DIBOISE:** No, violating the DMCA. The copyright
21 law is not violated; it's circumventing the encryption that is
22 against the law.

23 You could still make your --

24 **THE COURT:** Okay, I see --

25 **MR. DIBOISE:** -- fair use right --

1 **THE COURT:** I see what you are saying. Okay, I see
2 what you're saying.

3 **MR. DIBOISE:** -- of the copy. You have to come back
4 to the DMCA on that point.

5 Again, that point is crucial, because that is why
6 what Real DVD does is legal, because we are licensed to do that
7 decryption for playback.

8 **THE COURT:** Now, you did not seem to have any
9 difficulty, though, in discussing these CSS specifications
10 in -- pretty much you didn't come right out and say it, but I
11 got the sense you don't disagree, let's put it that way, with
12 the fact that these specifications --

13 *(Holding up document.)*

14 **THE COURT:** -- are referenced in and therefore a
15 part of the license agreement; is that correct?

16 **MR. DIBOISE:** Your Honor, you are asking an ultimate
17 legal question.

18 **THE COURT:** Um-hmm.

19 **MR. DIBOISE:** At this point in the case --

20 **THE COURT:** You are a lawyer.

21 *(Laughter.)*

22 **MR. DIBOISE:** I understand.

23 *(Laughter.)*

24 **MR. DIBOISE:** At this point in the case, we haven't
25 examined all the arguments we might have to contend that some

1 of the super secret, you know, technical specifications that we
2 didn't see until after we signed the license agreement don't
3 form a part of the contract.

4 **MR. SINGLA:** Your Honor, the document that the Court
5 held up is not super secret. It was not filed under seal.
6 That's not one of these documents.

7 If you are asking about that document --

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

9 **MR. SINGLA:** That is a public document.

10 **MR. DIBOISE:** That document we saw and signed it.

11 **THE COURT:** Yeah, okay, okay.

12 **MR. DIBOISE:** But there is nothing in that document
13 that prohibits what Real DVD does.

14 **THE COURT:** Okay.

15 Yes?

16 **MR. WILLIAMS:** Your Honor, may I just go back to
17 what Mr. DiBoise was saying when he recounted the different
18 protections just a couple of minutes ago and make just this
19 point: When I heard him describe it this last time after we
20 came back from the break, it's fairly clear to me, I think,
21 that we are in total agreement, actually, and that our experts
22 are in total agreement with what they said, which is to say
23 that when they first access the DVD, they use all of these
24 different encryption codes and protections. But, just as I
25 said before the break, once the copy is made, those

1 protections, authentication, bus encryption, et cetera, are not
2 done by Real DVD.

3 And I believe I heard Mr. DiBoise say, and the
4 record will --

5 **THE COURT:** And, by the copy that is then on the
6 hard drive.

7 **MR. WILLIAMS:** Correct. And, so once it's on the
8 hard drive, I believe I heard him to say that the only
9 authentication that takes place is a Real DVD authentication as
10 opposed to a CSS authentication. And, I believe I heard him
11 say that the justification for that is that, well, we aren't
12 using a hard drive anymore, just as in paragraph 52 of
13 Dr. Felten's declaration which I pointed the Court to, we don't
14 need to use those authentication measures because we aren't
15 using a hard drive --

16 **MR. SINGLA:** A disc drive.

17 **MR. WILLIAMS:** A disc drive. Pardon me.

18 So, I believe that the parties are in agreement on
19 that. And, I just wanted to let the Court know.

20 **MR. SINGLA:** Right. It's like they are saying they
21 don't need it: If you took the lock off the door, and now you
22 say I don't need to use the key, I don't need to do anything, I
23 haven't circumvented anything, they have -- in the copy they
24 made, I think Mr. Williams is exactly right, that Mr. DiBoise
25 now agrees that the copy that they made no longer has bus

1 encryption, the authentication protocols, the drive locking.

2 None of that is there anymore.

3 **THE COURT:** I understood that it had one layer of --

4 **MR. DIBOISE:** Your Honor --

5 **THE COURT:** Of encryption.

6 **MR. SINGLA:** Yes.

7 **MR. WILLIAMS:** That's true.

8 **THE COURT:** In other words --

9 **MR. DIBOISE:** I'm sorry, Your Honor, there are two
10 layers of encryption --

11 **THE COURT:** Two layers?

12 **MR. DIBOISE:** On the Real DVD.

13 Let's come back to this analogy.

14 **THE COURT:** Um-hmm.

15 **MR. DIBOISE:** It isn't that you take the lock off
16 the door. The answer to that analogy is there is no door,
17 because you don't have to go through it.

18 The actual bus authentication and the actual
19 authentication with the DVD itself is maintained by Real DVD
20 when it accesses the DVD in the DVD drive. When it goes to the
21 copy on the hard drive, there is no bus going to a DVD drive
22 and no DVD drive there for us to authenticate against.

23 **MR. SINGLA:** There is a bus, Your Honor --

24 **MR. DIBOISE:** Do you mind, sir?

25 **THE COURT:** Hold on, please.

1 **MR. DIBOISE:** There is no DVD drive bus for us to
2 authenticate against, that's the point. They are trying to
3 take that clause and say that that requires a DVD and a DVD
4 drive in order for you to comply with the specifications, but
5 that specification does not say that. It just says when you
6 access the DVD drive, you must perform these steps, and Real
7 DVD does that.

8 Now, when Real DVD accesses the copy on the hard
9 drive, we take their encryption and then re-encrypt it again,
10 using our own proprietary encryption process, which is a lot
11 harder -- well, frankly, Your Honor, it hadn't been cracked.
12 And that is in Dr. Felten's declaration, that the AES128
13 encryption scheme has never been cracked. And that is what we
14 put -- when it's stored on our drives, that encryption sits on
15 top of the CSS encryption. And, the only bus that exists is
16 between the hard drive on the system and the microprocessor.

17 And, over that bus, again, it's the AES128
18 encryption protects any transfer that is going on there from
19 Real DVD. There is no a way that somebody could circumvent our
20 system to be able to stream out --

21 **THE COURT:** When you say "AES," what do you mean by
22 AES?

23 **MR. DIBOISE:** That is a specific encryption program
24 that is utilized by Real DVD to protect the copy that is placed
25 onto a hard drive. Dr. Felten describes that in his

1 declaration, paragraph --

2 **THE COURT:** Is there any of the original encryption
3 that is left?

4 **MR. DIBOISE:** It's all there.

5 So we encrypted --

6 **THE COURT:** Hold on.

7 Is there any of the original encryption that is left
8 on top of which -- well, in other words, you would have to
9 access through this AES encryption, which you have it now on
10 your hard drive. And then, having penetrated that, do you
11 also, then, have to penetrate the original encryption that is
12 on the disc?

13 **MR. DIBOISE:** Yes.

14 **THE COURT:** Okay, somebody at your table agrees with
15 you.

16 **MR. SINGLA:** That's right, Your Honor.

17 The thing is, there are these layers of
18 protection --

19 **THE COURT:** Right. So some of the layers are gone.

20 **MR. SINGLA:** One layer is preserved; the other three
21 are gone. I mean, there is not really a dispute here. Their
22 argument is that is okay because we no longer have a drive
23 involved so we don't need to do it; our position is, I mean,
24 just very frankly, our position is, no, those are parts of the
25 CSS system. We use the drive to enforce them. When you take

1 the drive out of the loop, you have removed, deactivated,
2 impaired these protections we put in place. They say there is
3 no longer a drive, so we don't need to do it.

4 So I think, really, there is not a dispute of how it
5 works, sounds like. I think we agree with what most of what
6 Mr. DiBoise is saying. It's really is that circumvention from
7 our perspective; that is, you take the component that enforces
8 a lot of the protection, if you take it out of the loop, to us
9 that is circumventing, impairing the protections. They say
10 it's not.

11 **MR. DIBOISE:** Your Honor, the -- every DVD player
12 today -- I'm sorry, yeah, DVD player, stand-alone, buy it from
13 Matsushita, wherever you buy it from, takes that authentication
14 key and sticks it in its buffer. And, from that, pointed
15 forward as the movie is played back, it's not going to the
16 lead-in area to read the keys, but looking to its unencrypted
17 buffer.

18 So, if what they are saying is true here, then every
19 other DVD player is, you know, utilizing and not accessing the
20 actual lead-in area of the DVD when they play it back. It's
21 accessing the RAM of either the player or the computer that you
22 are playing it back on.

23 That's -- the reason I bring that up, and it's
24 hyper-technical, is because the license agreement permits DVD
25 players to do that. It doesn't say you shall not do that. And

1 they, those DVD player manufacturers use and implement the CSS
2 license to preserve the encryption content, just as Real DVD
3 uses and implements, which is what the contract says, those
4 encryption processes to make certain that no one can take that
5 copy and make thousands of other copies and play them back. We
6 lock down the copy to the system that makes the copy.

7 **THE COURT:** Well, but, do the same provisions that
8 apply to manufacture of a DVD player under this agreement apply
9 to someone who manufactures software of this nature, of the
10 nature we are talking about here?

11 **MR. DIBOISE:** There are -- sorry, I don't know if
12 you are finished.

13 **THE COURT:** Yeah, no, that's okay.

14 **MR. DIBOISE:** There are additional specifications, I
15 believe, technical specifications that must be complied with by
16 the stand-alone DVD players that we, as a software
17 implementation, don't have to comply with.

18 Is that correct?

19 **MR. SINGLA:** That's right. And visa-versa; there
20 are specifications that the software players comply with that
21 the hardware players don't have to comply with because it's a
22 different environment, different risks of copying, different
23 ways they work. So there is overlap in the specifications, but
24 there is differences also.

25 **MR. WILLIAMS:** And the reason -- if I may, the

1 reason why it matters, that those layers of bus encryption and
2 authentication that are removed after the copy is made, the
3 reason that matters is that the whole purpose of the CSS system
4 is to prevent unauthorized consumer copying. It all works
5 together so that the consumer may not make a copy.

6 Under this system, the consumer is allowed to make a
7 playable copy where you don't even have a DVD in the system
8 whatsoever. That is the vice. That is the reason why it is a
9 violation.

10 And, you don't have to take our word for it, there
11 are those provisions we put in front of you, the technical
12 spec, that talks specifically about the personal computer
13 environment and the notion that the whole purpose is to prevent
14 digital-to-digital copying in the personal computer
15 environment.

16 **THE COURT:** Now, where does this leave us with
17 respect to what we need to do what we need with respect to a
18 motion for preliminary injunction?

19 **MR. DIBOISE:** Your Honor, before we get there --

20 **THE COURT:** We are on the tail end of, or in the
21 middle, I guess, of a TRO here.

22 **MR. WILLIAMS:** We did some discussing in the
23 hallway.

24 **THE COURT:** What did you come up with?

25 **MR. DIBOISE:** Your Honor, part of it -- I think

1 we're pretty much in agreement with what I -- the parts of our
2 discussion that we have heard. I think it should be a
3 reasonable schedule, to get the information, present it to you
4 in an orderly fashion, and with enough time for us to make
5 certain that we can present to you clear arguments and clear
6 facts.

7 **THE COURT:** And testimony.

8 **MR. DIBOISE:** Sorry?

9 **THE COURT:** And testimony.

10 **MR. DIBOISE:** And, we are also happy to embrace your
11 idea, if the Court wants its own technical expert to vet what
12 each side presents, we are happy to do that as well. And, I
13 think we could probably work out an agreement subject to
14 whatever your court calendar is like.

15 But the issue, from our perspective that I didn't
16 want to lose sight of is the harm, the balance of the harms
17 here if you continue the temporary ban. We don't believe that
18 they are suffering anywhere near the harm that Real suffers by
19 continuing this temporary ban on the availability of the
20 product.

21 Crucial issues on that are two-fold. One, it's the
22 incremental harm that Real DVD presents to them that you should
23 take into account, not this billions of dollars of copying the
24 are thrown about by the MPAA and other entities. It is solely
25 the incremental threat caused by Real DVD.

1 That's the point that Mr. Klein, Dr. Bresnahan's --
2 sorry, Dr. Klein and Dr. Bresnahan's testimony to you in our
3 declarations. There are so many copies out there.

4 If there was one thing that I would suggest that
5 Your Honor read, we submitted in Mr. Klein -- Dr. Klein's
6 original declaration, in Dr. Bresnahan's declaration in our
7 opposition brief, there's an article, a short review in *PC*
8 *Magazine*, a mainstream computer publication reviewing this
9 product, in which the author literally says that comparing Real
10 DVD to be locked down to the same extent as Hannibal Lecter was
11 locked down; this product does not present any incremental harm
12 to the studios. You can go to download.com and find dozens of
13 DVD rippers that will do everything and plus that Real DVD
14 does.

15 So, unless they can point to any specific
16 incremental harm caused by our product, they can't show any
17 injury. And there is no injury caused specifically by this
18 product. The only thing that they say in their briefing is
19 that there is some reputational harm, that some how or another
20 RealNetworks is such a force in the marketplace that we are
21 going to charge the consumer's perceptions about what is or
22 isn't available -- what is or isn't legal about making a copy
23 of a DVD.

24 I mean, if you step back and think about it, every
25 movie that you watch tells you not to make a copy. They and

1 the studios might empower -- in controlling this marketplace
2 has so much more effect than RealNetworks can possibly have on
3 this issue.

4 You know, we have a product; other people are out
5 there readying another product that is going to look just like
6 it. We are heading into the Christmas season; we anticipate
7 making at least half of our profits off this product by being
8 able to set sell it, at this point in time, as we head into the
9 season. And, to stop us from being able to make sales now when
10 the harm to them, you know, I don't think they can really even
11 quantify it in the context of whether or not we cause any more
12 harm or any incremental additional harm.

13 And then finally, on the harm issue, you know, if we
14 did, I think that they would be able to have experts and people
15 try and come up with a methodology to quantify it. They can
16 quantify the overall harm and have it come back to specific
17 countries, specific, you know, profiled users. And, I think
18 that there is obviously a way to take survey data and other
19 methods to be able to quantify this harm, should they prevail
20 at trial, not at a TRO proceeding, that the harm in the short
21 term is much greater to RealNetworks than it is to the studios.

22 **MR. WILLIAMS:** Your Honor, the harm --

23 **THE COURT:** Yes.

24 **MR. WILLIAMS:** -- to the studios is enormous, as the
25 Court, I believe was concluding at the last hearing, and here

1 is the reason: In the last month, last month 175 million DVDs
2 were rented, and another 30 -- or, excuse me, 50 million
3 newly-released DVDs were purchased. What this product allows
4 people to do is to rent a DVD and make the copy without having
5 to purchase it, that is point number one.

6 Point number two: There are already 4000 -- 3000,
7 excuse me -- copies of this product in the marketplace; there
8 will be thousands and thousands more, presumably, if they are
9 allowed to sell it. Every single person who buys it will have
10 the unlimited capacity to make copies of DVDs that they own,
11 rent or borrow. That is undisputed.

12 To the extent there is a perception issue that we
13 have raised, here's the perception, and it's a little different
14 than I think Mr. DiBoise said the perception is, that right now
15 those who rip or have this ripping software, people understand
16 that that is illegal. The entire advertising program of this
17 company is that this particular program is 100 percent
18 legitimate, 100 percent legal. They say you may now make
19 copies of DVDs in a legal fashion.

20 If we could just put up Slide No. 9?

21 The advertisements all say that. So, if they are
22 allowed to put this product on the market as it has been
23 marketed, they are trying specifically to take advantage of the
24 fact that there is a -- something different, something new
25 about this product, i.e., that it is 100 percent legitimate and

1 legal.

2 And they are basing all of that, of course, on the
3 Kaleidescape decision, which is not a decision that, by its
4 terms, even dealt with federal law, which is before Your Honor.

5 And so, in order to put this out on the market, what
6 would happen is that all of the current vehicles that people
7 have to download, rent a DVD onto their hard drive of their
8 computer, which can be done through *iTunes* or *amazon.com*, for
9 those our clients get paid. But, going into the future, if the
10 Court -- it's already lost three thousand of them, but if the
11 Court were to take off the TRO, then they continue to sell, and
12 people don't have to get rentals or purchases onto their
13 computer hard drive by paying our clients.

14 So, it's not just a harm to the studios, it's the
15 harm to the player manufacturers as well because the player
16 manufacturers go through this process of getting a license.
17 They are now going to be circumvented as well because people
18 will not want to use their products because they can use Real
19 DVD, a 100 percent legitimate, supposedly, program that allows
20 people to do the downloads.

21 So, the question is, what are the harms to them
22 under this scenario? And the harms to them are purely
23 self-inflicted. We suggested that before they release this
24 product that they wait and do exactly what we are doing right
25 now, have briefing, figure it out whether this thing is legal.

1 Did they wait? No. They put it out on the market
2 anyway, despite the fact that even though Mr. Pomerantz, our
3 partner, wrote them and said, look, why don't we just have a
4 shortened briefing schedule to figure this out in front of a
5 district judge, and they said, no. Why? Because they wanted
6 to get it out on the market.

7 One point I haven't made, and this goes to the
8 question of irreparable harm.

9 If we could have Slide No. 12, please.

10 This entire framework, Your Honor, is based upon the
11 notion that there is a wink and a nod to people in the
12 marketplace about what they can do. Slide No. 12 that we are
13 showing right now is a quote from the *Seattle Times* from
14 Mr. Rob Glaser, who is the CEO of RealNetworks.

15 What Mr. Glaser says is the equivalent, we would
16 argue, to a wink and a nod. He says, look, we have this
17 technology, we ask people, we say to them, "If you want to
18 steal, we remind you what the rules are and we discourage you
19 from doing it, but we are not your nanny."

20 I mean, it might as well be, what happens in Vegas
21 stays in Vegas. You don't tell my mom; I won't tell yours. He
22 might as well be winking in the photo because the point is that
23 although they say that the purpose is for people who buy the
24 DVD, the technology doesn't have any way of determining whether
25 someone bought it or ripped it or borrowed it or rented it.

1 There is no way they can do that. So, the people who will be
2 using the product under this system are people who have been
3 told it's legitimate and can use it in this other way.

4 The harm to the studios, to the manufacturers, would
5 be irreparable because they are losing for every single sale,
6 which we can't quantify. Once they're purchased, once people
7 download this product, it's on their computer forever. There
8 is no way that we can quantify how many DVDs they copied once
9 it's on the computer, the technology does not allow that.

10 So our ability to calculate those lost profit
11 damages is very suspect, and that is the reason why there would
12 be irreparable harm, and the TRO should be maintained for this
13 short period while we figure out -- while Your Honor satisfies
14 herself --

15 **MR. DIBOISE:** The period is not going to be that
16 short, Your Honor. And that is part of the problem here, it's
17 probably going to be 4 to 6 weeks. We don't know what your
18 schedule is. It may be longer, depending upon your schedule.

19 With respect to some of these comments, I mean, if
20 you go to Google and put in "DVD ripper" and just go to the
21 sponsored page sites, click on them and see the number of
22 rippers that are available that all say they are 100 percent
23 legal, legitimate. They market it the exact same way. There
24 is no difference in the way that the bad rippers market their
25 product versus Real DVD.

1 And, in fact, if you look at our actual product
2 literature that was submitted in the declaration of
3 Jacqueline Lang, we say right out front, you can only copy
4 this, we say only -- it's the reverse, if you don't own -- it
5 asks you if you own the DVD, if the answer is no, you are
6 supposed to press play, not save. We say you may not use your
7 DVD to copy others -- I mean, sorry, your Real DVD to copy
8 others.

9 The reputational harm issue is too ephemeral as well
10 as it's going to be subject to so many different
11 interpretations. But the key thing is, they are going to be
12 able to tell from the worse case scenario from their
13 perspective, rent, rip and return, if there is a significant
14 decrease in the number of purchases versus rental they are
15 going to be able to see that. And then, we are going to have
16 something we can talk about to be able to present to you and
17 say, hey, this fear is Real.

18 You know, we have out there a Real world in which if
19 you choose to make a copy of a DVD you can do it. That's what
20 these sales statistics and rental statistics all reveal. And
21 let's see if the products out there in a month or a month and a
22 half from now, if there a variance in those numbers. If there
23 is not --

24 **THE COURT:** But the purpose of a TRO is not to
25 provide some control data for some survey or a study. I mean,

1 the question is whether, you know, issues such as likelihood of
2 success on the merits and balance of hardships, you know all
3 those factors.

4 **MR. DIBOISE:** Right, but it's also to preserve the
5 status quo.

6 **THE COURT:** Well, the problem is how the status quo
7 came to be, for one thing. So, I am going to extend the TRO,
8 and here are the reasons: Because I'm not satisfied that, in
9 fact, this technology is not -- is not in violation of the
10 DMCA; that, in fact, it does comply with what is a very lengthy
11 contract and some specifications that apparently there is some
12 dispute about, you know, whether they apply or not, but
13 certainly, they raise questions as well.

14 There was an opportunity before rushing to market to
15 have had these issues revolved, but that didn't happen.

16 **MR. DIBOISE:** Your Honor --

17 **THE COURT:** And now, having rushed to market, you
18 throw yourselves on the Court -- hold on, I'm not finished.

19 **MR. DIBOISE:** I understand, Your Honor.

20 **THE COURT:** And, when I finish, there will be no
21 need to say anything.

22 **MR. DIBOISE:** But there is a factual
23 misunderstanding.

24 **THE COURT:** Hold on.

25 There was a rush to market when there didn't need to

1 be a rush to market. You could have waited to have that
2 decision made. Having only been out in the market a short
3 period of time, I think the harm is far less to RealNetworks in
4 this case than it would be to having who knows how many copies
5 out there, which might then be found to be unauthorized copies.

6 And, it's not very persuasive to say, well, you see,
7 you know, you're not saying maybe we're legitimate, you're
8 saying you are legitimate but comparing yourselves to all those
9 illegitimate companies out there. And this ought to be looked
10 at more favorably because you've got all those other people who
11 are ripping and doing these illegal things, and, therefore, I
12 should, apparently, in looking at the balance of hardships and
13 looking at whether -- you know, who is going to suffer the
14 greater injury, looking at the fact that you're apparently
15 going to supplant some part of the illegal market.

16 The problem is that there are serious questions here
17 about copyright violations, about DMCA violations, violations
18 of this contract, by a company who rushed to market and didn't
19 wait for any kind of an adjudication, by a company that can
20 stop right now, early in the inceptions of what it's doing,
21 rather than having us trying to figure out, down the road, how
22 many copies, and something that may be very difficult to
23 determine, how many copies of copyrighted material are out
24 there, and what the injuries are that are sustained as a result
25 of that.

1 I'm not persuaded that the TRO should not stay in
2 place.

3 **MR. DIBOISE:** Understood.

4 **THE COURT:** So, it will stay in place.

5 The question is, what needs to be done in order to
6 prepare for a hearing.

7 **MR. DIBOISE:** Your Honor, accepting your order --

8 **THE COURT:** Yes.

9 **MR. DIBOISE:** And understanding that the TRO stays
10 in place.

11 **THE COURT:** Um-hmm.

12 **MR. DIBOISE:** One, I just want to make certain the
13 Court is clear that there was at least about a 30-day period of
14 time in which the parties discussed this. And --

15 **THE COURT:** I understand that.

16 **MR. DIBOISE:** Fine.

17 **THE COURT:** I understand.

18 **MR. DIBOISE:** There was no rush, it just was the
19 earliest point --

20 **THE COURT:** Nobody rushed into court during that
21 period of time to try to get it resolved.

22 **MR. DIBOISE:** We couldn't. There was an agreement
23 not to.

24 **THE COURT:** Well, okay.

25 Then once that stand -- once that standstill

1 agreement came to an end, instead of going into court, you
2 rushed to market.

3 And, you are the new boys on the market, and I think
4 that there is far less -- I mean, it's not like some startup
5 company that doesn't have, you know, other -- other products
6 out there on the market, and so forth. But, the copying --
7 bringing back copies -- it's impossible to bring back that
8 which has been copied after it's been copied and copied
9 illegally, so we need to get those issues resolved. And, I'm
10 not persuaded to my satisfaction that they are resolved in
11 favor of RealNetworks at this point.

12 So what do you need to know and do before we could
13 have such a hearing? Do you need to take any depositions of
14 any of the experts?

15 **MR. SINGLA:** Yes, Your Honor. We have been thinking
16 about this quite a bit during the break and since the break,
17 and as I understand what the Court is asking, if I'm
18 understanding correctly, the Court wants to get to the bottom
19 of what exactly does Real DVD do.

20 **THE COURT:** And I think cross-examination helps, you
21 know?

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

23 **THE COURT:** There is something about that process
24 that seems to help, you know?

25 (Laughter.)

1 **MR. DIBOISE:** I think there are some folks in
2 England the came up with that.

3 **THE COURT:** Yeah, yeah.

4 **MR. SINGLA:** We are all for cross-examination.

5 **THE COURT:** Doesn't always get to the truth, but it
6 sheds light, anyway.

7 **MR. SINGLA:** We are at a real disadvantage on that
8 issue because they obviously know exactly how their product
9 works, and we don't. We haven't done any discovery. Our
10 papers and our arguments have been based on -- as I said, we
11 have taken them at their word about how their product works.
12 We have had no way to test it. And there is a lot of details
13 about it that we haven't -- you know, they are not in the
14 product or promotion literature.

15 So, to answer the question the Court has raised, as
16 I understand it, we are going to need details about their
17 product, design documents, specifications, source code. I
18 think if the Court appoints it own special master or expert in
19 the case, he is going to need their source code and have time
20 and the ability to analyze and see exactly what it does.

21 For example, just as an example, they say they
22 maintain the CSS encryption on the copies; we haven't disputed
23 that because we believe them. But, we have no way to test that
24 right now. If we are going to litigate this and have a
25 hearing, we need the ability to make sure that's true. And the

1 only way to do that, that I know of, is to have access to their
2 source code, to their design specifications, and to be able to
3 depose their people.

4 **THE COURT:** Would it move things faster if, instead
5 of all of that, I just appointed a court-appointed expert that
6 everybody agreed to do the delving and digging, and so forth,
7 to make a report? But that, then, that would be in lieu of
8 having your experts testify and, you know, having them deposed,
9 and all of that, and I don't know whether you want to do that.

10 **MR. SINGLA:** Our view, Your Honor, we have thought
11 about that, is that would make sense, except I think the
12 difficulty for the special master is not going to be he is not
13 going to have a record on which to make the analysis. I think
14 that we're going to need to -- he is going to need the same
15 data and documents.

16 **THE COURT:** Right.

17 **MR. SINGLA:** But, I think he is also going to need
18 deposition records, testimony. So we may get source code and
19 design records to understand those, even for him to understand
20 them.

21 I've been involved in cases involving source code
22 and these kinds of design specifications, and someone like
23 Mr. Buzzard, he might not be the right person, whoever it is,
24 we will need to depose that person and make sure we understand
25 what is going on and make sure the special master can then, you

1 know, read the deposition and make sure he understands what is
2 going on so he can report back to the Court.

3 So that is our concern, is that we are going to need
4 some discovery from RealNetworks.

5 **MR. DIBOISE:** Your Honor, we don't dispute this. I
6 think we don't need to take the Court's valuable time on this
7 sort of issue. We agree that discovery is appropriate as long
8 as it's going to be equal, as long as the issues we delve into
9 are equal.

10 **THE COURT:** That's fine. The problem is that we
11 have a TRO --

12 **MR. DIBOISE:** We understand, Your Honor.

13 **THE COURT:** -- and time limits. And it's going to
14 have to be extended beyond that.

15 **MR. DIBOISE:** We understand that.

16 **THE COURT:** You want to stay here today, and work
17 with Mr. Bowser on your schedule --

18 **MR. DIBOISE:** That sounds terrific, Your Honor.

19 **THE COURT:** -- and a date with him? Although he has
20 family responsibilities as well, so --

21 **MR. DIBOISE:** Your Honor, the real issue is what
22 your availability is.

23 We have talked about it, they have talked about it
24 with us; we believe it's going to be in November, you know, or
25 maybe even late November. So it's just a question of trying to

1 match our schedules with counsels' schedules and with the
2 Court.

3 **THE COURT:** After -- I'll be back here after
4 November 17th.

5 **MR. DIBOISE:** I think that is enough to tell us what
6 we need to do.

7 **MR. SINGLA:** Perhaps what we could do is counsel and
8 we could speak in the next couple of days, try to work out,
9 hash out a process. They can tell us how long they need to
10 give us the discovery we need. We can think about exactly what
11 we would ask for and what your master, if you appoint one,
12 would need. We can talk about whether the special master makes
13 sense, try to map out the time line, and maybe have a phone
14 conference, or something, and try to figure out a date.

15 Does that make sense?

16 **MR. DIBOISE:** Sure. The only thing I can think of
17 that would involve the Court is if we can't agree on whatever
18 discovery everybody wants.

19 **THE COURT:** Let's keep it to what is absolutely
20 necessary for preliminary injunction. And, we might not even
21 need to plug a special master in, at this point, but see how
22 things look in connection with a preliminary injunction and
23 then make a ruling there. And, if we need to go beyond that
24 with the special master, we could do it at that time.

25 **MR. DIBOISE:** I don't want to sandbag anyone: We

1 also have a slight problem in getting to the DVD CCA CSS
2 license specifications.

3 **THE COURT:** Um-hmm.

4 **MR. DIBOISE:** The entity is a defendant, but hasn't
5 appeared yet. They have very onerous controls over who can see
6 the documents from the DVD CCA. Half of the board of the DVD
7 CCA I believe is represented by their clients.

8 We are going to need access to those folks, as well
9 in the discovery process, so I don't want to have a fight and
10 come back to you, we might as well have it now, if they are
11 going to contest our ability to take testimony from the folks
12 who implemented it and wrote these specifications.

13 And, I think we are happy to enter into whatever
14 protective order we need and present it to Your Honor to
15 preserve the security of this information, but we need to have
16 access to these folks.

17 **THE COURT:** Well, first of all, if there are DCAA --

18 **MR. DIBOISE:** DVD CCA.

19 **THE COURT:** DVD --

20 **MR. DIBOISE:** DVD CC --

21 **THE COURT:** The DVD I got, but it's how many As?

22 **MR. DIBOISE:** One A.

23 **MR. SINGLA:** Copy Control Association.

24 **THE COURT:** Oh, oh, that's easy, then. I was
25 putting on more As. Okay, CCA, let's call it CCA.

1 If, in fact, there were CCA specifications that you
2 did not see, then I don't know how you can be held, you know,
3 liable for not complying with them.

4 **MR. DIBOISE:** We are talking about the lawyers here.

5 **THE COURT:** No.

6 **MR. DIBOISE:** We haven't seen them.

7 **THE COURT:** Oh, you haven't seen them.

8 **MR. DIBOISE:** Mr. Buzzard, who has submitted a
9 declaration, has seen them.

10 **THE COURT:** And the principles of the company, they
11 signed off, they saw them, et cetera.

12 **MR. DIBOISE:** No, they didn't see them. So there
13 are very few people that the DVD CCA actually permits --

14 **THE COURT:** I see.

15 **MR. DIBOISE:** -- access to those specifications.

16 So, for example, as I understand it, the lawyers to
17 my right here don't have access to the complete set of
18 specifications, either.

19 **THE COURT:** Okay, I noticed, for example, on the
20 agreement there were several employees; I have no idea what
21 their respective positions were, but I assume they were
22 employees of RealNetworks that signed off on these --

23 **MR. DIBOISE:** Yes.

24 **THE COURT:** -- license agreement authorizations.

25 **MR. DIBOISE:** To make that issue crystal clear --

1 **THE COURT:** Um-hmm?

2 **MR. DIBOISE:** Exhibit G that we talked about a
3 lot --

4 **THE COURT:** Yeah?

5 **MR. DIBOISE:** -- is in the technical specifications.

6 **THE COURT:** Um-hmm.

7 **MR. DIBOISE:** The only lawyers that got to see them
8 before they were filed with the Court --

9 **THE COURT:** Um-hmm --

10 **MR. DIBOISE:** -- were the folks for the studios.
11 The DVD CCA would not permit us to see that document. And the
12 first time saw it was when it was filed on September 30.

13 **THE COURT:** But my question is who in the company,
14 then, saw this? Because how could you comply with something if
15 you never saw it?

16 **MR. DIBOISE:** Four to five engineers.

17 **THE COURT:** I see. And is that -- would that be the
18 people that signed off on these authorization agreements?

19 **MR. DIBOISE:** Yes.

20 **THE COURT:** I see.

21 So, first of all, certainly, you should have access
22 to, and I'm sure you can come up with a confidentiality
23 agreement that would allow you to have access to this
24 information so that you can review it in preparation. But, I
25 say that if, in fact, the persons who signed off and agreed to

1 this on behalf RealNetworks never saw certain documents, I'd
2 have a real problem with saying that they are bound by those
3 documents because that -- but that's another issue, I guess.

4 **MR. DIBOISE:** It may not be. We'll have to wait and
5 see, Your Honor, what comes out.

6 **THE COURT:** But certainly for those that you have
7 not been privy to and that you need to have, you should be able
8 to come up with some kind of air protective order.

9 **MR. SINGLA:** Your Honor, if I could just try to --

10 **THE COURT:** Yes.

11 **MR. SINGLA:** Some facts on this: So there is the
12 license; there is the procedural specifications; that is all
13 public, we all have that. And then, there are these technical
14 specifications.

15 **THE COURT:** Um-hmm.

16 **MR. SINGLA:** Now, the technical specifications their
17 clients have that, our clients didn't have, don't have today,
18 we didn't have.

19 **THE COURT:** Have you ever seen them?

20 **MR. SINGLA:** We just got them yesterday morning.

21 **THE COURT:** Um-hmm.

22 **MR. SINGLA:** When RealNetworks convinced --

23 **MR. DIBOISE:** I'm sorry, sir, you filed one of them.

24 **MR. SINGLA:** We got one page. The lawyers got one
25 page from DVDCC.

1 **THE COURT:** Was that Exhibit G?

2 **MR. SINGLA:** Exactly. I stand corrected. Other
3 than that one page, we haven't seen them until yesterday
4 morning.

5 And then, the further -- so those documents, now, I
6 think both sides' lawyers have and their client has. Our
7 clients don't yet, but we'll have to deal with that issue if we
8 have to deal with it.

9 Then, there is a further level of specifications
10 that our clients don't have, we don't have, their client does
11 have. These are these highly confidential, they're actually
12 literally the codes, you know, that we are talking about that
13 go another level of detail: the secret codes. And so, we'll
14 have to deal with DVD CCA and RealNetworks and figure it out.

15 But, I just want to make clear: The only party who
16 doesn't have those are the studios; we are the ones who don't
17 have those documents.

18 **MR. DIBOISE:** Except for Dr. Bell, who is part of
19 the committee who helped draft -- Your Honor, I don't know why
20 we're arguing about that.

21 **THE COURT:** I'm just trying to get some framework.

22 If they are necessary to the adjudication, then they
23 are going to have to be turned over under confidentiality
24 orders. And so, I don't want to hear any noise that this is so
25 top secret that we can't -- but it be under confidentiality

1 orders, eyes only. Or, I would say eyes only and expert's
2 plus, you know --

3 **MR. DIBOISE:** In-house counsel?

4 **THE COURT:** A couple of experts.

5 **MR. DIBOISE:** The two in-house counsel in the room
6 with us?

7 **MR. SINGLA:** I think this is an issue that should be
8 litigated. And then, why don't we talk about this offline with
9 DVD CCA and then --

10 **THE COURT:** Come to some agreement. The fewer
11 people, the better.

12 **MR. SINGLA:** We don't have these documents.

13 **MR. DIBOISE:** I understand that point. I think he
14 is trying to say that they don't control the DVD CCA. Whether
15 they do or don't I don't know, but we need some access to them.
16 They are a party to this litigation.

17 **THE COURT:** Who is representing them?

18 **MR. DIBOISE:** They just haven't appeared. We just
19 served them --

20 Anybody know?

21 **THE COURT:** Who generally represents them; do you
22 know?

23 **MR. DIBOISE:** We know that Mr. Coats said -- White &
24 Case represented them in the Nichols trial and he represents
25 them on the appeal -- I'm sorry, the Kaleidescape case.

1 **THE COURT:** Um-hmm.

2 **MR. DIBOISE:** I could call them and ask if he's been
3 engaged.

4 We have spoken to a lawyer, at Bryan Cave in
5 St. Louis, who was representing them. We can ask them.
6 They've told us that they're representing them. We can ask
7 them as well. We can all work with them.

8 **THE COURT:** However you are going to do this.

9 At any rate, with respect to -- I don't know how
10 large this board is, I would certainly say if you are going to
11 have to depose any of them, fine, but it should be a discreet
12 number. So try to pick the ones who are most knowledgeable. I
13 hope you don't have to do a PMK deposition just to figure that
14 out.

15 **MR. DIBOISE:** We don't want to spend any more money
16 than we have to. I'm sure they don't, either.

17 **THE COURT:** Or time.

18 **MR. DIBOISE:** Or time.

19 We'll try and do that. I just don't think we
20 need -- other than having the broad outlines of what we want to
21 do, as I said, I didn't want them to be sandbagged, or the
22 Court to understand that we might need some information outside
23 the control of the lawyers here in this room.

24 **THE COURT:** No, I understand. I understand.

25 **MR. SINGLA:** I think we can get all these issues --

1 **THE COURT:** So with all of those issues -- you know,
2 and I don't do discovery motions. And I don't want to you
3 waste your time on them, because that takes too much paper, and
4 it's unnecessary, and some of them are silly. Really try to
5 work them out. If you have made an effort to and you get
6 stuck, then contact Mr. Bowser, my courtroom deputy, and we'll
7 have a phone conference and we will deal with it.

8 And even though I'm not going to be available some
9 of this time, I will be in the country back in DC and New York,
10 and you can contact me by phone, or they can contact by phone
11 and let me know, and we'll set up a phone conference.

12 **MR. SINGLA:** One thing, I think, would be helpful
13 is, just to confirm my understanding with the Court, that the
14 focus of the hearing of the Court is asking for, or is
15 ordering, is on sort of these technical issues we've been
16 talking about and going back and forth. In other words, how
17 does it work, how many copies can be made, how those copies
18 function, what do the specifications say, maybe some license
19 issues? It's all of that.

20 **THE COURT:** But, it's also some interpretation of
21 the license.

22 **MR. SINGLA:** Certainly.

23 **THE COURT:** And, any arguments, you know, that may
24 be appropriate about the license and its intersection with the
25 DMCA.

1 **MR. SINGLA:** Thank you.

2 **THE COURT:** Okay?

3 **MR. DIBOISE:** Understood, Your Honor.

4 **THE COURT:** Does that take care of it?

5 **MR. DIBOISE:** I think so.

6 **THE COURT:** So, then, under the same terms and
7 conditions the TRO will remain in effect. And --

8 **MR. DIBOISE:** The bond will continue?

9 **THE COURT:** And the bond will continue.

10 And, you'll get a date from Mr. Bowser about as soon
11 as you think, you know, you are ready for it, but, of course,
12 when I get back.

13 **MR. WILLIAMS:** We just want to make the point that
14 the last hearing was confidential; we wanted to point out that,
15 even at the last hearing, there was some press here. I'm sure
16 there is some press here today as well.

17 **THE COURT:** Well, the courtroom is packed. I have
18 no idea who is here.

19 **MR. DIBOISE:** That's right. So I just wanted to --

20 **THE COURT:** Lawyers with nothing better to do or the
21 press, I'm not sure.

22 **MR. DIBOISE:** Your Honor, unfortunately the hearing
23 that was sealed, I didn't know since I participated by
24 telephone from Chicago, there was a reporter here, in the
25 courtroom.

1 **THE COURT:** Was there?

2 **MR. DIBOISE:** And, an article appeared on Monday
3 that revealed the number, which is why I didn't object when
4 they talked about the 3000 sales.

5 So at this point, Your Honor, we don't believe there
6 should be any restrictions --

7 **THE COURT:** Well, I don't think you can do that
8 anymore. I think what happened --

9 **MR. DIBOISE:** What happened, happened. And, I think
10 both sides, if they want to talk -- I mean, we are going to get
11 so many questions, I think we ought to be able to respond to
12 the press if they have any more inquiry.

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

14 **MR. DIBOISE:** So, we are content to have a chat with
15 the reporters, and I'm sure they'll love it, too.

16 **THE COURT:** What happened was -- this can be off the
17 record now. You want to go back to record, let me know.

18 **(Proceedings concluded at 4:59 p.m. with**
19 **off-the-record discussion.)**

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings were reported by me, a certified shorthand reporter, and were thereafter transcribed under my direction into typewriting; that the foregoing is a full, complete and true record of said proceedings as bound by me at the time of filing. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

October 9, 2008