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 Counterclaim Defendants
 10 REALNETWORKS, INC. and
 REALNETWORKS HOME
 11 ENTERTAINMENT, INC.

12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA

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

17 Plaintiffs,

18 v.

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

25 Defendants.

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**REALNETWORKS' OPPOSITION TO
 DEFENDANTS' ADMINISTRATIVE
 MOTION FOR EXTENSION OF TIME
 TO RESPOND TO REALNETWORKS'
 SECOND AMENDED COMPLAINT**

26 AND RELATED CASES
 27

1 The Defendants' administrative requests for a further extension of time to answer
2 RealNetworks, Inc. and RealNetworks Home Entertainment, Inc.'s ("Real's") antitrust claims
3 should be denied. Missing from Defendants' briefs is an acknowledgment that Real already gave
4 Defendants a *six-week extension* to file a response to Real's claims, providing the Defendants
5 with a total of *more than two months* to respond.¹ Steer Decl, Exh. 1 (Dkt. 414) (stipulation and
6 order extending time); *id.* at ¶2 (admitting that Real filed antitrust claims on May 13, 2009).
7 Two months is more than enough time for the numerous Studio and DVD CCA counsel to
8 research relevant legal issues, consider strategic options and prepare a well-planned response.
9 There is no legitimate basis for the further delay that Defendants seek to introduce into the
10 schedule.

11 Given that Defendants have already obtained from Real a significant extension of time to
12 respond, their current request for even more time is not driven by any actual need. Instead,
13 Defendants seek an open-ended extension, tethered to a single event that has nothing to do with
14 the merits of Real's antitrust claims: this Court's decision on Defendants' preliminary injunction
15 motion. In short, Defendants seek delay for delay's sake, presumably because they perceive a
16 strategic advantage in putting off for as long as possible adjudication of Real's antitrust claims
17 against them.

18 Defendants' principal "justification" for the requested extension is that Real's antitrust
19 claims supposedly "depend upon the construction of the CSS License." Studio Admin. Req. at 1.
20 They therefore contend that it would be more efficient to permit them to wait to file theoretical
21 Rule 12 motions to dismiss the claims until after the Court issues its preliminary injunction
22 ruling. But this justification has no merit. Real's Second Amended Complaint makes clear that
23 the illegality of Defendants' conduct is not dependant upon judicial interpretation of the CSS

24
25 ¹ Real granted an extension to the DVD CCA to respond to Real's antitrust counterclaims,
26 which were filed as of right, and a separate extension to the Studio Defendants to respond to
27 Real's motion for leave to amend the complaint to add the antitrust claims against the Studio
28 Defendants. Because the Studio Defendants have filed a statement of non-opposition to the
motion for leave to amend and are seeking to coordinate their time to respond to Real's antitrust
claims with the DVD CCA's time to respond, Real treats the Defendants' response time together
in this opposition.

1 License Agreement. *See, e.g.*, Second Amended Complaint at ¶128. As Real has pleaded, the
 2 Defendants' have engaged in *per se* illegal behavior, regardless of the Court's preliminary
 3 injunction ruling.

4 Moreover, the preliminary injunction ruling is not by its terms a final adjudication, and
 5 given the importance of this case to all concerned, will likely be appealed by one or more of the
 6 parties in any event. Permitting the Defendants to delay responding to Real's antitrust claims
 7 until after a preliminary ruling would therefore not achieve the certainty concerning the
 8 construction of the CSS License Agreement that Defendants claim to seek, and would prejudice
 9 Real to no purpose.

10 Real respectfully requests that the Court deny the Defendants' administrative requests for
 11 a further indefinite extension of time.

12 **I. Real's Antitrust Claims Do Not Turn On the Court's Preliminary Injunction Ruling**

13 The Defendants' contention that Real's antitrust claims depend on the Court's
 14 construction of the CSS Agreement is incorrect. Real alleges that the Studios and DVD CCA
 15 agreed to claim that the CSS License Agreement prohibits CSS licensees from competing in the
 16 market for technology that enables consumers to make secure back-up copies of DVDs that they
 17 own.² This is an illegal group boycott. *See, e.g.*, [Proposed] Second Amended Complaint, ¶¶39-
 18 54, 77-85, 107-108, 118-129; *Fashion Originator's Guild v. Federal Trade Commission*, 312
 19 U.S. 457, 467-68 (1941).

20 As alleged, the illegality of the Studios and DVD CCA's conduct does not depend on
 21 judicial interpretation of the CSS License Agreement, because what is at issue is the Defendants'
 22 conduct, not the meaning of the CSS License Agreement.³ Whether or not the Court interprets

23
 24 ² In its fourth cause of action, Real also alleges a collective refusal deal under Section 1 of
 25 the Sherman Act against the Studio Defendants only based on the Studios' collusive agreement
 to refuse to negotiate with Real in advance of Real's release of the RealDVD product.

26 ³ Nor does the illegality of Defendants' conduct turn on adjudication of the "fair use" issue.
 27 Even if Real needed a license to the DVD content from the Studios, the law does not permit the
 Studios to refuse to negotiate those rights except on collective terms. *See Fashion Originator's*
 28 *Guild*, 312 U.S. at 468.

1 the CSS License Agreement in the Defendants' favor for purposes of the preliminary injunction
2 ruling, the Defendants' group conduct is nevertheless *per se* illegal. As alleged by Real:

3 [T]he Studio Defendants' and DVD CCA's interpretation of the CSS License
4 Agreement, by which they have denied RealNetworks the right to use the
5 encryption technology that it has licensed from the DVD CCA unless and until
6 RealNetworks assents to the DVD CCA's and the Studio Defendants' demands that
it exit the relevant market, have rendered the CSS License Agreement void under
Section 1 (if their interpretation is held to be correct), or amounted to a *de facto*
agreement in violation of Section 1 (if their interpretation is held not to be correct).

7 [Proposed] Second Amended Complaint at ¶128; *see also id.* at ¶¶83-84.

8 The Defendants cite incomplete snippets of the allegations against them to support their
9 claim that Real's antitrust case stands or falls on the Court's interpretation of the CSS
10 Agreement. Studios' Admin. Req. at 2. However, read in their entirety, the passages quoted by
11 Defendants make clear that the Defendants' collective interpretation of the CSS Agreement and
12 corresponding collective conduct are prohibited by the antitrust laws regardless of the Court's
13 ultimate interpretation of the CSS License Agreement. [Proposed] Second Amended Complaint,
14 ¶¶83-84; Motion for Leave at 3. In short, there is no need to delay litigation of Real's claims
15 based on any supposed dependence on construction of the CSS License Agreement.

16 Moreover, the Defendants' suggestion that the Court's preliminary injunction ruling will
17 resolve all uncertainty regarding the ultimate construction of the CSS Agreement, allowing them
18 to file more "efficient" motions to dismiss, ignores reality. A preliminary injunction ruling is not
19 a final ruling on the merits and is an appealable ruling in any event. Thus, even if construction
20 of the CSS License Agreement were relevant to the antitrust claims, a preliminary injunction
21 ruling could not afford any finality sufficient to justify the delay sought by the Defendants.

22 Finally, if the Defendants for whatever reason feel they need to see the Court's
23 preliminary injunction ruling before attacking Real's antitrust claims on the merits, there is a
24 much more straightforward solution to the one they offer. The Defendants should answer Real's
25 claims forthwith. If, after receiving the Court's preliminary injunction ruling they are still
26 interested in attacking Real's antitrust claims on the merits, they have not lost the ability to do
27 so: they can simply file Rule 12(c) motions for judgment on the pleadings. There is no need to
28 delay adjudication of Real's antitrust claims.

