

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

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

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA

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

15 Plaintiffs,

16 v.

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

23 Defendants.
 24

25
 26 AND RELATED CASES
 27
 28

Case Nos. C08 04548 MHP;
 C08 04719 MHP

**NOTICE OF MOTION AND MOTION
 TO STRIKE DVD COPY CONTROL
 ASSOCIATION, INC.'S MOTION FOR
 PRELIMINARY INJUNCTION
 PURSUANT TO CIVIL LOCAL RULES
 65-2 AND 7-2 AND F.R.C.P. 7(b)(1)**

**Before: Hon. Marilyn Hall Patel
 Dept: Courtroom 15
 Date: December 22, 2008
 Time: 2:00 p.m.**

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE THAT, on December 22, 2008 at 2:00 p.m. or at such date and
4 time as the Court may establish, and pursuant to Civil L.R. 65-2 and 7-2, as well as Fed. R. Civ.
5 P. 7(b)(1), Plaintiffs and Counterclaim Defendants RealNetworks (“Real”) hereby move before
6 the Honorable Marilyn Hall Patel for an Order striking the Notice of Motion and Motion of DVD
7 Copy Control Association, Inc. for Preliminary Injunction.

8 This Motion is based on the memorandum immediately below, the argument of counsel
9 and any other matters properly before the Court.

10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **INTRODUCTION**

12
13 On November 10, 2008, Defendant and Counterclaimant DVD Copy Control
14 Association, Inc. (“DVD CCA”) filed with this Court a purported Notice of Motion and Motion
15 for Preliminary Injunction. DVD CCA’s one-page filing fails to provide any notice of the
16 grounds upon which its motion is based. It also fails to include any supporting memorandum of
17 points and authorities, stating instead that the motion will be based upon a memorandum to be
18 filed at some indefinite time in the future. Notice at 2 (motion is based upon “the supporting
19 Memorandum of Points and Authorities and related declarations *to be filed on a date to be set by*
20 *the Court.*”) (emphasis added). DVD CCA purports to notice its preliminary injunction motion
21 for January 27, 2009—the same date on which the hearing on the Studio Defendants’
22 preliminary injunction motion is scheduled. However, unlike the Studio Defendants’ motion,
23 which follows a fully-briefed and argued motion for temporary restraining order, the factual and
24 legal arguments upon which the DVD CCA seeks to enjoin Real are entirely unknown to Real.

ARGUMENT

A. The DVD CCA's Notice of Motion and Motion for Preliminary Injunction Should be Stricken as Failing to Comply with the Federal And Local Rules

The DVD CCA's notice of motion and motion for preliminary injunction is fatally defective in several respects and therefore should be stricken.

First, although the DVD CCA purports to bring its notice of motion and motion pursuant to Rule 65 of the Federal Rules of Civil Procedure and Civil Local Rule 65-2, it wholly fails to comply with the requirements of those rules. Federal Rule of Civil Procedure 7(b) requires that DVD CCA's motion "state with particularity the grounds for seeking the order." Fed. R. Civ. P. 7(b)(1)(B). DVD CCA's motion does nothing more than describe the injunction sought, while offering not a single reason why the Court should grant its motion. It therefore does not satisfy the particularity requirements of Rule 7(b)(1), and for this reason alone, should be stricken.

Compare Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 690 F.2d 1240, 1249 (9th Cir. 1982) (65-page memorandum of point and authorities which addressed the substantive legal questions at issue on the motion satisfied Rule 7(b) particularity requirement).

Second, the DVD CCA's notice of motion and motion also fails to comply with the local rules. Pursuant to Civil Local Rule 65-2, the motion is governed by Civil Local Rule 7-2 because the DVD CCA never filed a motion for temporary restraining order. *See* Civil L. R. 65-2 ("Motions for preliminary injunctions unaccompanied by a temporary restraining order are governed by Civil L.R. 7-2."). Among other things, all motions governed by Civil Local Rule 7-2 *must contain the points and authorities relied upon by the moving party in support of the motion.* Civil L.R. 7-2(b)(4) ("In *one filed document* not exceeding 25 pages in length, a motion must contain . . . the points and authorities in support of the motion.")(emphasis added). This rule makes sense. If, as here, the moving party never filed a motion for temporary restraining order, the defending party simply does not and cannot know the legal or factual arguments upon which the injunction is being sought unless the moving party concurrently files the points and

1 authorities with its motion for preliminary injunction.¹ Because the DVD CCA did not file a
2 motion for temporary restraining order setting forth its arguments, and also did not file “the
3 points and authorities relied upon” with its notice of motion, its notice fails to comply with Civil
4 L.R. 7-2(b). For this additional reason, the notice of motion and motion should be stricken.

5 **B. Allowing the DVD CCA to Proceed on the Defective Notice Would be**
6 **Prejudicial to Real**

7 Requiring the DVD CCA to comply with the federal and local rules is not mere formality.
8 To the contrary, the DVD CCA’s effort to schedule a hearing on a motion for preliminary
9 injunction against Real without providing Real with timely notice of the facts and arguments
10 upon which the DVD CCA seeks to rely is extremely prejudicial to Real.

11 The DVD CCA seeks to schedule its unknown motion for preliminary injunction on the
12 same January 27-29, 2009 dates on which the Studio Defendants’ motion for preliminary
13 injunction is scheduled to be heard. But that hearing date – and pre-hearing discovery deadlines
14 agreed upon by Real and the Studio Defendants – came about under very different circumstances
15 than those at issue here. As this Court and the DVD CCA are aware, the Studio Defendants filed
16 an application for temporary restraining order supported by a 25-page memorandum of points
17 and authorities and several declarations in early October. *See* Docket No. 8. The Court heard
18 argument on the Studios’ application on October 7, and advised the parties that the restraining
19 order against Real would stay in effect until the Court had a fuller opportunity to consider the
20 issues in the form of an evidentiary preliminary injunction hearing and related briefing.

21 Thereafter, because Real was on notice of the grounds on which the Studios’ motion would be
22 based, Real and the Studios could and did engage in negotiations regarding the length and scope
23 of discovery, the deadlines to exchange documents, witness lists and expert reports, and a

24
25 ¹ In contrast, if the moving party files a motion for temporary restraining order, Local Rule
26 65-1 requires that such motion be accompanied by “[a] separate memorandum of points and
27 authorities in support of the motion” and “[s]uch other documents in support of the motion which
28 the party wishes the Court to consider.” Thus, the local rules contemplate that the opposing
party be put on notice of the legal and factual arguments supporting a request for an injunction
with the application for a TRO, or if there is no application for a TRO, at the time the
preliminary injunction is noticed.

1 briefing schedule in advance of the January 27-29, 2008 hearing. Under that schedule, Real and
2 the Studios are in the process of exchanging documents, will depose each others' witnesses and
3 exchange expert reports from early December to early January, and will simultaneously
4 exchange opening and responsive briefs supplementing the TRO papers in the weeks prior to the
5 January hearing.²

6 The DVD CCA apparently intends to "piggyback" on the existing schedule without
7 having filed any papers in support of a motion for preliminary injunction. The burden of an
8 additional motion for preliminary injunction while Real is already defending against the Studios'
9 motion would be substantial under any circumstances. But here, the situation is impossible
10 because the DVD CCA has filed only a placeholder notice of motion and has concealed its
11 arguments in support of the motion. Thus, Real knows only that it is charged by the DVD CCA
12 with breach of the CSS License Agreement. There is no way for Real to try to anticipate all the
13 arguments that the DVD CCA might make against Real, particularly where the agreement
14 asserted by the DVD CCA comprises close to 200 pages of convoluted definitions and technical
15 specifications. Under these circumstances, Real cannot reasonably be expected to depose the
16 DVD CCA's witnesses (or even to know which witnesses are most relevant to the DVD CCA's
17 claims); to provide expert reports addressing the DVD CCA's factual arguments; or to
18 simultaneously exchange opening briefs with the DVD CCA prior to the hearing.

19
20 _____
21 ² Real and the Studios are close to finalizing the pre-hearing deadlines. The currently
22 contemplated schedule is as follows:

- 22 • November 24: deadline to produce documents
- 23 • November 24 and December 1: deadline to disclose witnesses
- 24 • December 1 – December 16: fact depositions
- 25 • December 19: deadline to exchange expert reports
- 26 • December 22 – January 7: expert depositions
- 27 • January 13: simultaneous opening briefs
- 28 • January 20: simultaneous reply briefs

