

EXHIBIT 6

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7 Attorneys for Plaintiffs
REALNETWORKS, INC. and
8 REALNETWORKS HOME ENTERTAINMENT, INC.

9
10 UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 UNIVERSAL CITY STUDIOS)
12 PRODUCTIONS LLLP, UNIVERSAL)
CITY STUDIOS LLLP, PARAMOUNT)
13 PICTURES CORPORATION,)
TWENTIETH CENTURY FOX FILM)
14 CORPORATION, SONY PICTURES)
TELEVISION INC., COLUMBIA)
15 PICTURES INDUSTRIES, INC., SONY)
PICTURES ENTERTAINMENT INC.,)
16 DISNEY ENTERPRISES, INC., WALT)
DISNEY PICTURES, and WARNER)
17 BROS. ENTERTAINMENT INC.,)

CASE NO.:
2:08-cv-06412 SJO AJWx

DEFENDANTS
REALNETWORKS, INC. AND
REALNETWORKS HOME
ENTERTAINMENT, INC.'S
OPPOSITION TO
PLAINTIFFS' EX PARTE
APPLICATION FOR A TRO

18 Plaintiffs,)

19 v.)

20 REALNETWORKS, INC.; and)
REALNETWORKS HOME)
21 ENTERTAINMENT, INC.,)

22 Defendants.)
23)
24)
25)
26)
27)
28)

1 Defendants RealNetworks, Inc. and RealNetworks Home Entertainment, Inc.
2 (“Real” or “Defendants”) submit the following in opposition to Plaintiffs *Ex Parte*
3 Application for Temporary Restraining Order:

4 **INTRODUCTION**

5 Plaintiffs filed a complaint and sought a TRO today seeking to disrupt Real’s
6 in-progress launch of RealDVD this morning. Plaintiffs have known since the first
7 week of September that Real was planning to launch the RealDVD product by today,
8 and as is evident from the volume and content of Plaintiffs’ *ex parte* papers
9 (comprising a 25-page brief and four inches of supporting documents), they have
10 been preparing their papers for quite some time. Yet, they chose not to share those
11 papers with Real until approximately 10:00 am this morning, in an apparent effort to
12 block any possibility of a response from Real.

13 Given these time constraints, Real has only had enough time to address here a
14 few of the highlights demonstrating why Plaintiffs’ *ex parte* application should be
15 denied. Accordingly, Real requests that if the Court is inclined to grant Defendants’
16 *ex parte* application for a TRO, that Real be given an opportunity to appear before
17 the Court to address the issues more fully.

18
19 **I. This Action Should Be Dismissed In Favor Of The Action Filed by Real in**
20 **the Northern District of California.**

21 This action should be dismissed in favor of the first filed, properly venued
22 action initiated by Real today (September 30, 2008) at 9:04 a.m. in the Northern
23 District of California. The action initiated by Real raises issues virtually identical to
24 those presented here, but also includes a necessary party to the resolution of these
25 issues, the DVD Copy Control Association (“DVD CCA”), the party that licenses
26 the CSS technology at issue. Real’s action seeks a declaratory judgment that
27 RealDVD is in compliance with the CSS License Agreement and the DMCA.
28 Federal courts recognize a doctrine of federal comity that permits district courts to

1 decline jurisdiction when a complaint involving the same parties and issues has
2 already been filed in another court.

3 Plaintiffs suggest that Real’s declaratory judgment action should be dismissed
4 as an “anticipatory filing.” Plaintiffs are dead wrong. Pursuant to the agreement of
5 the parties, neither party could file an action until this morning, when Real filed its
6 declaratory judgment action.¹ More importantly, Real filed its declaratory judgment
7 action in the *only* county where all the necessary parties could be venued. Plaintiffs
8 filed in Los Angeles to avoid joining the DVD Copy Control Association (“DVD
9 CCA”) – a necessary party to the claim for breach of the CSS License Agreement –
10 because the DVD CCA was only amenable to suit in Santa Clara County. That
11 agreement is fundamental and dispositive to the parties’ dispute. Section 10.4(b) of
12 the CSS License Agreement *mandates* that actions between Real and the DVD CCA
13 be litigated in the state and federal courts in Santa Clara County. *See* Pomerantz
14 Decl., Exh. F. Thus, the Northern District of California is the only appropriate
15 venue for these claims. Real filed its declaratory judgment action in the Northern
16 District of California out of necessity, not out of bad faith or a desire to forum shop.

17 **II. RealDVD Fully Complies With The CSS License Agreement And**
18 **Therefore Is Not “Circumventing” The CSS Technology.**

19 Plaintiffs’ argument depends on the assertion that Real is “circumventing”
20 CSS technology. Plaintiffs’ assertions are both conclusory and wrong. Real’s use of
21 the CSS technology is licensed under the CSS License Agreement (“CSS
22 Agreement”), and Real complies with the requirements of that license. There is
23 therefore no legitimate argument that Real is circumventing the CSS technology
24 when it uses that technology pursuant to a valid license.

25 Plaintiffs seek to wave away the CSS Agreement and ask this Court to look
26

27 ¹ Prior to receiving any correspondence from Plaintiffs’ counsel, Real initiated its
28 preparation for filing its declaratory judgment action on the day it was to launch RealDVD.

1 solely to copyright law. But the CSS Agreement must be the starting point of the
2 analysis, as it sets forth the parameters of Real's obligations with respect to the CSS
3 technology. As set forth in the Declaration of Jeffrey Buzzard, Real has a license to
4 the CSS technology, received the technical specifications for implementing the CSS
5 technology, and designed its product in compliance with the CSS Agreement – all to
6 work with the CSS technology utilized on DVDs according to the specifications, not
7 to circumvent that technology. RealDVD is therefore fully compliant with the
8 requirements of that Agreement. Because Real is authorized by its licensor, DVD
9 CCA, to do everything it is doing with respect to the CSS technology, there is no
10 legitimate basis to contend that it is somehow “circumventing” that technology. The
11 entire basis for Plaintiffs' DMCA argument is based on this false premise – without
12 that premise, Plaintiffs' argument collapses.

13 In an effort to confuse the issue, Plaintiffs assert that – regardless of the terms
14 of the actual CSS Agreement and the actual performance and capabilities of CSS
15 technology for licensed users –CSS technology was (according to Plaintiffs)
16 *intended* to protect against any DVD copying whatsoever. Thus, Real must be
17 circumventing *something*. But, again, Plaintiffs are wrong. The question is not what
18 CSS is intended to do in the abstract, but what CSS permits *licensed* CSS users to
19 do.

20 First, if CSS were supposed to prevent copying by a licensed user, the CSS
21 Agreement would prohibit such conduct. But, the CSS Agreement does not contain
22 such a prohibition. Plaintiffs attempt to construct a copying prohibition from two
23 fragments in the CSS Agreement (one taken from a recital of the CSS Agreement
24 and another taken from a technical specification). But the recital relied upon by
25 Plaintiffs (Mot. at 8, citing Pomerantz Exh. F) describes the intention of two non-
26 parties to the contract, Matsushita and Toshiba, to prohibit *unauthorized* copying –
27 not all copying. And, the technical specification, which merely describes the
28 purpose of a certain type of authentication, suffers from the same flaw. (*See* Mot. at

1 4, citing Pomerantz Exh. G). RealDVD performs that authentication as required by
2 the license agreement. Whether that authentication process may prevent *unlicensed*
3 users from copying is simply irrelevant to what a licensed user may do under the
4 terms of the CSS Agreement.

5 Indeed, whether the CSS Agreement prohibits copying was recently litigated
6 by the actual licensor to the CSS Agreement (the DVD Copy Control Association),
7 and the Santa Clara Superior Court found after a full trial that there existed no such
8 prohibition. *DVD Copy Control Association, Inc. v. Kaleidescape, Inc.*, Santa Clara
9 Superior Court Case No. 1-04-CV031829. Kaleidescape continues to be accessible
10 today. Indeed, Plaintiffs have neither asserted any DMCA claims against
11 Kaleidescape nor sought an injunction against their product.

12 Second, as explained in Mr. Buzzard's declaration, it is simply not true that
13 the CSS protection scheme prevents copying by *licensed* CSS users. As Mr.
14 Buzzard explained, the CSS system controls access to a DVD and decryption of
15 content by licensed applications. This distinction is critical and removes this case
16 from the ambit of cases such as *Universal City Studios, Inc. v. Corley*, 273 F.3d 429
17 (2nd Cir. 2001) and *321 Studios v. MGM Studios, Inc.*, 307 F. Supp. 2d 1085 (N.D.
18 Cal. 2004), cited by Plaintiffs involving unlicensed products. In *321 Studios*, for
19 example, the Court recognized that CSS does not, in fact, prevent copying of DVD
20 content. Instead, the Court noted that the unlicensed copy would be useless without
21 licensed copies of the correct CSS keys. That reasoning simply does not apply here,
22 where Real is a licensed CSS user with licensed access to the correct content keys.²
23 Plaintiffs' reliance on case law regarding unlicensed users is entirely misplaced.

24 In sum, RealDVD fully complies with and functions within the scope of the
25 CSS Agreement, works with the CSS technology on a DVD, and does nothing to
26

27 ² Contrary to the claims of the Plaintiffs, RealDVD does not strip or remove the
28 CSS encryption from the image of the DVD created on a user's storage medium.
See Buzzard Decl., ¶9.

1 circumvent any such technology. There is therefore no DMCA violation.

2 **III. The Balance of Hardships Favors Defendants**

3 **A. The Harms Claims by Plaintiffs Are Compensable or Illusory.**

4 Plaintiffs contend that “starting today,” DVD users are able to copy for the
5 first time DVD content onto their computer drives as a result of the product launch
6 of RealDVD. Mot. at 1. According to Plaintiffs, this will suddenly change
7 consumers’ attitudes about DVD copying, irreparably harm sales of DVDs and the
8 rental market, and irreparably harm the Plaintiffs’ developing markets. Plaintiffs’
9 argument ignores reality. Unlicensed DVD software products that decrypt and
10 remove the encryption of CSS (“rippers”) have been available, widely used and
11 discussed in the media for years. Plaintiffs themselves claim to have “lost” \$2.3
12 billion in revenue to Internet piracy in 2005 alone (a statement which not only
13 illustrates the state of the industry prior to the launch of RealDVD, but also
14 undercuts Plaintiffs’ claim that alleged damages here are somehow new and
15 immeasurable). [See Motion Picture Association of America website,
16 www.mpa.org.].

17 As noted in the recent article in PC Magazine, unlicensed “rippers” provide
18 much greater flexibility, often for free, to those willing to use an unlicensed product:
19 Unfortunately, the resulting [RealDVD] movie files are locked up
20 tighter than Hannibal Lecter; you can play them on up to five licensed
21 PCs, but you can’t watch them on your iPod or other device. As such,
22 RealDVD doesn’t really give users what they want: a way to put their
23 purchased movies on their PCs and move them to iPods, iPhones, PSPs,
24 and network attached devices . . . Essentially, we want the same
25 freedom with DVDs that we have with CDs, and there are lots of DVD-
26 ripping and file-converting tools online that give users that freedom.

27
28

1 Many of the best ones are free or accept donations . . .”³
2 RealDVD does not offer any new or attractive options to users interested in piracy.
3 To the contrary, RealDVD is targeted precisely to those users who have avoided
4 rippers, and are instead simply looking to make a backup copy of what is notoriously
5 fragile, cumbersome and inconvenient to use in today’s digital world – a DVD disc.
6 See Declaration of Gordon Klein, ¶¶5-9. Backup copies made with RealDVD
7 simply will not work in any hard drive other than the one upon which they were
8 initially created and cannot be disseminated on the Internet to others for use. This is
9 not piracy – this use is well within the fair use exception to copyright infringement.
10 See, e.g., *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417
11 (1983).⁴

12 In addition, Plaintiffs undercut their own claims of irreparable harm.
13 Plaintiffs claim that RealDVD will upset Plaintiffs’ licensing schemes with others.
14 But, the fact of these licensing schemes with Apple or Amazon only confirms that
15 what is at issue here, if anything, is calculable damages, not unquantifiable harm. In
16 fact, as explained in the Klein Declaration, Plaintiffs’ declarant Dunn provides
17 specific data that could be used to quantify the alleged harm to Plaintiffs. See, e.g.,
18 *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (“The key word in this consideration is
19 irreparable. Mere injuries, however substantial, in terms of money, time and energy
20 necessarily expended . . . are not enough.”)

21 More importantly, Plaintiffs’ argument mixes the markets for digital
22 downloads with the market for sales or rentals of DVDs. For example, one does not
23 purchase a digital download of the same movie that one bought on DVD. The user
24

25 ³ Monson, Kyle, “Tools for Ripping Your DVDs,” 9/11/08 PC Magazine,
http://www.pcmag.com/print_article2/0,1217a%253D231870,00.asp

26 ⁴ Indeed, had there existed any real threat of irreparable harm from the violation of the
27 DMCA that Plaintiffs claim here, Plaintiffs should have brought this suit long ago against
28 Kaleidescape rather than acquiesce to Kaleidescape’s continued presence in the market to this
day.

1 can watch the DVD. At best, the user only purchases the digital download of a
2 previously purchased DVD for a transformative use, *i.e.*, to play on an iPod.
3 RealDVD does NOT permit transformative uses – a RealDVD will not work on an
4 iPod. Therefore claims of harm regarding the digital downloads are simply
5 misplaced.

6 Plaintiffs' claims of harm are at best compensable, but more likely entirely
7 illusory. Either way, Plaintiffs cannot and have not met their burden to justify the
8 entry of the extraordinary remedy of a temporary restraining order. *Oakland*
9 *Tribune, Inc. v. Chronicle Pub. Co., Inc.*, 762 F.2d 1374 (9th Cir. 1985) (“Under any
10 formulation of the test, plaintiff must demonstrate that there exists a significant
11 threat of irreparable injury.”)

12 **B. Real Would Suffer Irreparable Injury If An Injunction Were**
13 **Entered.**

14 An injunction against RealDVD would be devastating to Defendants, as they
15 would be forced to pull from the market a product which was announced and
16 publicized in early September, and whose launch was already delayed once in a
17 failed effort to appease the Plaintiffs. As explained in the Declaration of Jacqueline
18 Lang (“Lang Dec.”), Real initially planned to launch RealDVD upon the
19 announcement of the product at a technology conference on September 8, 2008.
20 Lang Dec., ¶ 2. Real made a tremendous public relations and advertising push to
21 prepare for the initial RealDVD launch, including securing press regarding
22 RealDVD in dozens of publications (including the New York Times, Business
23 Week, Newsweek, PC World and USA Today), giving demonstrations of the
24 product and answering technical questions. Lang Dec., ¶ 4.

25 Prior to the September 30th launch of RealDVD, Real attempted to recreate as
26 much as possible the initial publicity “buzz” that surrounded RealDVD at the time of
27 the planned initial September 8 launch. Lang Dec., ¶ 7. In the days leading up to
28 the September 30th launch, Real’s PR department and outside PR agencies again

1 contacted numerous media outlets encouraging them to write articles regarding
2 RealDVD. While Real made extensive PR efforts for the September 30th launch,
3 many of the publications which had already generated press regarding RealDVD
4 were not willing to run second articles on the product. *Id.*

5 If RealDVD were enjoined, thereby undermining its second effort to launch
6 the product, Real will lose credibility with its customers and potential customers,
7 shareholders, analysts, advertising partners, PR contacts and the market generally.
8 Much of the goodwill that Real has developed over the years would be lost. Even if
9 Real were ultimately allowed to resume sales of the product, the ultimate success of
10 RealDVD, Real's image, and perhaps other Real offerings, would be irreparably
11 impaired. Lang Dec., ¶ 8. Real would most certainly not be able to successfully
12 execute a "third" publicity blitz and launch of the product after having been tainted
13 with the mislabel of an illegal product following two aborted launches.

14 Most importantly, Real currently has a "first mover advantage" with respect to
15 the RealDVD product as there are no licensed competitive products at this price
16 point. Lang Dec., ¶ 9. In promoting the release of RealDVD, Real has explained its
17 product in detail to the market (and to its competitors), provided demonstrations and
18 answered technical questions. While the technical details of RealDVD have not
19 been released, competitors were alerted in early September both to the feasibility and
20 the attractiveness of a similar product. *Id.* Any further delay in the release of
21 RealDVD will pose an unacceptable business risk to Real, as Real could lose its first
22 mover advantage which could never be recovered.

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CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Plaintiffs' *ex parte* application be denied.

Dated: September 30, 2008

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/Colleen Bal
Colleen Bal
cbal@wsgr.com

Attorneys for Defendants
REALNETWORKS, INC. AND
REALNETWORKS HOME
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EXHIBIT 7

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7
 8 Attorneys for Defendants
 REALNETWORKS, INC. and
 REALNETWORKS HOME
 9 ENTERTAINMENT, INC.

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION

13 UNIVERSAL CITY STUDIOS)
 14 PRODUCTIONS LLLP, UNIVERSAL)
 15 CITY STUDIOS LLLP, PARAMOUNT)
 16 PICTURES CORPORATION,)
 17 TWENTIETH CENTURY FOX FILM)
 CORPORATION, SONY PICTURES)
 18 TELEVISION INC., COLUMBIA)
 PICTURES INDUSTRIES, INC., SONY)
 19 PICTURES ENTERTAINMENT, INC.,)
 20 DISNEY ENTERPRISES, INC., WALT)
 DISNEY PICTURES and WARNER)
 21 BROS. ENTERTAINMENT, INC.,)

Case No: CV-08-06412 SJO AJW

**DECLARATION OF
 JACQUELINE LANG IN
 OPPOSITION TO *EX PARTE*
 APPLICATION OF
 PLAINTIFFS FOR
 TEMPORARY RESTRAINING
 ORDER AND ORDER TO
 SHOW CAUSE RE
 PRELIMINARY INJUNCTION**

22 Plaintiffs,

23 v.

24 REALNETWORKS, INC., and
 REALNETWORKS HOME
 25 ENTERTAINMENT, INC.

26 Defendants.

1 I, Jacqueline Lang, declare as follows:

2 1. I am the Vice President of Marketing for Real Networks, Inc.
3 (“Real”), and have been employed by Real since February of 2001. I have
4 personal knowledge of the facts stated herein. I am over the age of eighteen, and
5 would and could testify truthfully thereto if called as a witness.

6 2. Real was ready to officially release its RealDVD product on
7 September 8, 2008 (“initial launch”). Real carefully planned the release of
8 RealDVD for months, and timed the initial launch to coincide with the “DEMO
9 Fall 08” Conference on September 8, where Real’s Chairman and CEO, Rob
10 Glaser, was a speaker. The DEMO Fall 08 Conference was held in San Diego,
11 California, and promoted itself as “The Launchpad for Emerging Technology.”
12 Real intended for Mr. Glaser to announce RealDVD while speaking at the
13 conference, and at the same time, Real would release the product and make it
14 available to consumers. Real has consistently followed this practice, as timing the
15 release of a new product with a technology conference permits Real to capitalize
16 on the publicity surrounding a conference and reach an interested audience.

17 3. Shortly before the initial launch, Real was contacted by various studio
18 plaintiffs, who objected to the release of the product, and expressed concerns that
19 RealDVD violated the terms of the standard CSS license agreement with the DVD
20 Content Control Association, as well as copyright law. The evening before the
21 initial launch date of September 8, Real decided to abort the initial launch in order
22 to try to resolve its differences with the studios in good faith. Instead of releasing
23 RealDVD as planned on September 8, Real made last minute changes to its
24 September 8, 2008 press release, announcing that the product would “be available
25 this month.” This was the first time that Real had ever announced a product
26 without simultaneously making it available to end users, and therefore, Real stated
27 that it would release RealDVD during the month of September.
28

1 4. Real expended considerable effort and resources to prepare for the
2 initial launch of RealDVD that ultimately were not optimized when the launch was
3 pulled in order to address the studios' concerns. For example, in preparation for the
4 planned September 8 launch, Real's public relations department worked with an
5 outside PR agency to reach dozens of different publications and encourage them to
6 generate press regarding RealDVD. Leading up to the planned September 8 initial
7 launch, Real's PR department and outside agency worked furiously promoting the
8 product, giving demonstrations of the product and answering technical questions.
9 Upon the September 8 announcement of RealDVD and in the days that followed,
10 press regarding RealDVD appeared in the New York Times, Business Week,
11 Newsweek, PC World and USA Today, among others. While these articles
12 undoubtedly generated interested potential customers, such customers had no way
13 to purchase RealDVD as the product was being held back by Real in an attempt to
14 resolve the concerns of the studios.

15 5. Real also committed advertising resources to the planned initial
16 September 8 launch. Real purchased approximately \$175,000 of web media and
17 ads throughout the Internet to be run on certain specific days around September 8 to
18 promote RealDVD. When Real decided to abort the initial product launch, Real
19 was forced to pull back all of its advertising efforts and ask its advertising partners
20 to delay the committed-to advertising. Such advertisers were under no obligation
21 to delay the planned RealDVD advertising, and Real expended significant goodwill
22 in asking its advertising partners to try to find other sponsors on virtually no notice
23 to fill the ad spots for the committed days.

24 6. In keeping with its public statements that it would release the RealDVD
25 product during the month of September, Real released and made the RealDVD
26 product available for download on September 30, 2008, at 8:00 a.m. EST.

27 7. In anticipation of the September 30 launch, Real made a tremendous
28 PR push to attempt to recreate as much as possible the initial publicity "buzz" that

1 surrounded RealDVD at the time of the planned initial September 8 launch. In the
2 days leading up to the September 30 launch, Real's PR department and outside PR
3 agencies again contacted numerous media outlets encouraging them to write
4 articles regarding RealDVD. While Real made extensive PR efforts for the
5 September 30 launch, many of the publications which had already generated press
6 regarding RealDVD were not willing to run second articles on the product. Real
7 also engaged in extensive advertising efforts related to the September 30 launch of
8 RealDVD, including purchasing advertising space and key word searches.

9 8. If Real were enjoined from distributing RealDVD, the results to Real
10 would be devastating. Particularly in light of Real's good faith decision to pull the
11 September 8 launch to try to accommodate the plaintiff studios, the failure to
12 successfully launch RealDVD on this second effort would cause Real irreparable
13 loss of credibility with its customers and potential customers, shareholders,
14 analysts, advertising partners, PR contacts and the market generally. Much of the
15 goodwill and trust Real has developed over the years would be lost. Even if Real
16 were ultimately allowed to resume sales of the product, the ultimate success of
17 RealDVD, and perhaps other Real offerings, would be irreparably impaired.

18 9. In addition, Real currently has a "first mover advantage" with respect
19 to the RealDVD product as there are no legal competitive products at this price
20 point. In promoting the release of RealDVD, Real has explained its product in
21 detail to the market (and to its competitors), provided demonstrations and answered
22 technical questions. While the technical details of RealDVD have not been
23 released, competitors have been alerted both to the feasibility and the attractiveness
24 of a similar product. Any further delay in the release of RealDVD will pose an
25 unacceptable business risk to Real, as Real could lose its first mover advantage
26 which could never be recovered.

27 10. Further, it is critical for the success of RealDVD that the product gain
28 traction in the market prior to the holiday season. As is the case with most

1 companies, Real's financial expectations for RealDVD include strong holiday sales
2 which it would almost certainly fail to achieve if the product were not available to
3 consumers during the next few months leading up to the holidays (when holiday
4 purchases are made). Real expects that sales of RealDVD in the fourth quarter of
5 2008 will account for 25%-40% of its sales of that product on an annual basis.

6 11. Finally, if distribution of the newly-released RealDVD product were
7 enjoined, Real would be forced to cancel its advertising commitments and halt its
8 media campaign for a second time. If the distribution of RealDVD were enjoined,
9 Real would almost certainly not be able to engage in a successful PR campaign
10 relating to RealDVD for a third time, which would irreparably impair the ultimate
11 success of RealDVD in the market.

12
13 I declare under penalty of perjury that the foregoing is true and correct.
14 Executed at Bellevue, Washington on September 30, 2008.

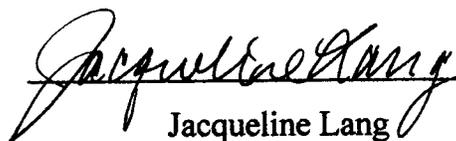
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18 Jacqueline Lang
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EXHIBIT 8

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9 UNITED STATES DISTRICT COURT
 10 CENTRAL DISTRICT OF CALIFORNIA

11 UNIVERSAL CITY STUDIOS
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 PICTURES ENTERTAINMENT INC.,
 16 DISNEY ENTERPRISES, INC., WALT
 DISNEY PICTURES, and WARNER
 17 BROS. ENTERTAINMENT INC.,

18 Plaintiffs,

19 v.

20 REALNETWORKS, INC.; and
 REALNETWORKS HOME
 21 ENTERTAINMENT, INC.,

22 Defendants.
 23
 24
 25
 26
 27
 28

CASE NO.:
2:08-cv-06412 SJO AJW

**DECLARATION OF JEFFREY
 BUZZARD ON BEHALF OF
 DEFENDANTS
 REALNETWORKS, INC. AND
 REALNETWORKS HOME
 ENTERTAINMENT, INC.
 OPPOSITION TO TRO**

1 I, Jeff Buzzard, declare as follows:

2 1. I am a Software Engineer. I have personal knowledge of the facts
3 stated herein. I am over the age of eighteen, and would and could testify truthfully
4 to the facts and matters stated in this declaration if called as a witness in this matter.

5 2. RealDVD has been in development for approximately the last 12
6 months. I have been involved in the development process of RealDVD from the
7 beginning.

8 3. RealDVD is software that can be purchased and downloaded from
9 Real Home's website on the Internet. RealDVD has a variety of different functions,
10 including the playback of DVDs placed into a computer's DVD drive, looking up
11 information about the DVD from Internet databases, providing links to various
12 information websites relevant to the chosen DVD, and storing an image of the
13 copy-protected DVD to a computer hard drive for safekeeping and later playback
14 purposes.

15
16 **RealDVD is CSS Compliant**

17 4. The sellers of DVDs utilize a technological access protection measure
18 termed the Content Scramble System ("CSS") on their DVDs to prevent
19 unauthorized access to the content of a DVD. CSS was developed by Matsushita
20 Electric Industrial Co., Ltd. and Toshiba Corporation, and intellectual property
21 associated with CSS has been licensed to the DVD Copy Control Association
22 ("DVD CCA") to license to others to use in the manufacture and use of DVDs.

23 5. For DVDs to be useful, an end-user must be able to access the content
24 of the DVD to, for example, play the DVD. For DVDs that use CSS protection
25 such protection must be navigated by licensed and authorized playback
26 mechanisms. Just like all other DVD players, RealDVD is a licensed and
27 authorized DVD player that appropriately navigates the CSS protection on the DVD
28 to permit access to the DVD contents on a computer or other similar device. There

1 are many DVD Players on the market who, like RealDVD, allow interaction with
2 DVD content from a personal computer.

3 6. RealDVD was designed to be compliant with the DVD CCA license
4 agreement and designed to work with and not circumvent the CSS technology
5 utilized on the DVDs. Specifically, after RealNetworks, Inc. obtained a license from
6 the DVD CCA, engineers received the technical specifications for the Descrambler
7 and the Authenticator Module for CSS Decryption Module. These specifications
8 allowed us to design a DVD CCA-compliant system for accessing DVD content. In
9 designing RealDVD, we reviewed the technical specifications provided with the
10 DVD CCA license and followed those specifications precisely in order to make sure
11 that we were compliant with the technical specifications of the license.

12 7. Because RealDVD allows the user to make a personal copy of the
13 DVD on the user's own storage device, Real Home designed RealDVD so that it
14 would preserve the CSS protection included on the original DVD on the back-up
15 copy saved to the target storage medium. In other words, when RealDVD makes a
16 copy of the content on a DVD, it copies the CSS-encrypted data in the same format
17 onto the storage device without decrypting the CSS protection, so that the licensed
18 CSS decryption scheme must still be used in order to play back the encrypted file
19 from the storage device.

20 8. RealDVD does not circumvent or bypass the CSS authentication
21 process for accessing DVD content, as provided by the DVD CCA license and
22 technical specifications. Instead, RealDVD follows the outlined procedures for
23 authentication of a DVD drive and, in the authentication process, receives from the
24 DVD the keys necessary for decryption of DVD content. Then, when accessing
25 DVD content (whether on a disc drive or on a hard drive) RealDVD uses the
26 provided keys from the DVD to access the DVD contents consistent with the
27 technical specifications of the DVD CCA license.

28

1 9. RealDVD does not circumvent or bypass CSS protections in copying
2 DVD content to a backup copy on a hard drive. RealDVD performs the
3 authentication required by the technical specifications to be allowed access to the
4 contents of the DVD and, once access has been properly granted under the technical
5 procedures outlined in the DVD CCA license, RealDVD provides an option to play
6 the DVD content and/or make a backup copy of the content. CSS protection does
7 not prevent or prohibit the ability to copy DVD content once RealDVD has
8 performed the licensed CSS authentication procedures. Indeed, in performing a
9 requested back-up copy function, RealDVD copies the DVD content with the CSS
10 protections intact.

11

12 **RealDVD Adds Additional Security To Complement CSS And Prevent**
13 **Dissemination of Digital Copies of DVDs**

14 10. RealDVD adds additional levels of security to the CSS protection to
15 ensure not only that the back-up copy of a DVD cannot be accessed without CSS,
16 but also that the copy cannot be played on a different RealDVD account than the
17 account of the user and the copy cannot be used on any storage device other than
18 the storage device onto which the encrypted DVD content was originally copied.

19 11. As part of the additional security measures, RealDVD encrypts the
20 CSS encrypted content on the DVD and the keys to unlock the CSS encryption with
21 its own proprietary encryption system. Real's encryption system utilizes the
22 highest level of security permitted by the United States government for commercial
23 entities.

24 12. RealDVD also "locks" the playback of the encrypted copies to a
25 single RealDVD user account. This protection prevents the RealDVD copy from
26 being played back from another user's computer with another user's RealDVD
27 account.

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I declare under penalty of perjury under the laws of the State of California
that the foregoing is true and correct.

Executed on September 30, 2008 in Seattle, Washington.


Jeffrey Buzzard

EXHIBIT 9

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Email: cbal@wsgr.com
3 MICHAEL A. BERTA, State Bar No. 194650
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6 Telephone: (415) 947-2000
Facsimile: (415) 947-2099
7

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

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 UNIVERSAL CITY STUDIOS
14 PRODUCTIONS LLLP, UNIVERSAL
CITY STUDIOS LLLP, PARAMOUNT
15 PICTURES CORPORATION,
16 TWENTIETH CENTURY FOX FILM
CORPORATION, SONY PICTURES
17 TELEVISION INC., COLUMBIA
18 PICTURES INDUSTRIES, INC., SONY
PICTURES ENTERTAINMENT, INC.,
19 DISNEY ENTERPRISES, INC., WALT
20 DISNEY PICTURES and WARNER
BROS. ENTERTAINMENT, INC.,
21

22 Plaintiffs,

23 v.

24 REALNETWORKS, INC., and REAL
NETWORKS HOME
25 ENTERTAINMENT, INC.

26 Defendants.
27
28

CASE NO.:
CV 08-06412 SJO AJWx

**DECLARATION OF
GORDON KLEIN IN
OPPOSITION TO EX PARTE
APPLICATION OF
PLAINTIFFS FOR
TEMPORARY RESTRAINING
ORDER AND ORDER TO
SHOW CAUSE RE
PRELIMINARY INJUNCTION**

1 I, Gordon Klein, declare as follows:

2 1. I am a faculty member at UCLA's Anderson School of Management,
3 where I have taught 11 accounting, tax, business law, and entrepreneurship courses
4 in the undergraduate program and MBA Program since 1981. In addition, I was a
5 faculty member from 1987 to 2000 at UCLA's Law School, where I taught courses
6 in accounting, taxation, and financial analysis. I taught similar courses as an
7 Adjunct Professor in the LLM in Taxation Program at Loyola Law School in Los
8 Angeles, California during fall 2001 and 2002. I am a member of the California Bar
9 (inactive), admitted in 1979, and a C.P.A., certified in the state of Illinois in 1976. I
10 have conducted executive education seminars in financial and tax aspects of
11 business management to, among others, partners at PricewaterhouseCoopers,
12 members of the German Bundestadt governing body, and the Finance Committee of
13 the People's Republic of China. I have authored several books concerning
14 managerial accounting, cost accounting, introductory accounting, and managerial
15 finance, as identified in my curriculum vita. I earned a B.B.A. from the University
16 of Michigan Business School in 1976, graduating Phi Beta Kappa, and I earned a
17 J.D. from the University of Michigan Law School in 1979. My curriculum vita,
18 including a list of my publications over the last ten years, is attached at the end of
19 this report as Exhibit 1.

20 2. I have served as an expert witness in various cases, including cases in
21 Federal Court and in Los Angeles Superior Court, and I have served as a Superior
22 Court referee in Los Angeles and Orange Counties. I have testified in several major
23 tax matters, including testifying on behalf of the US Attorney's Office in the case
24 *United States v. Mitchelson*. A list of my expert testimony experience for the last
25 four years is attached hereto as Exhibit 2. I am being compensated at a rate of \$550
26 per hour for my independent review and analysis provided in this case.
27
28

1 3. I have been asked to address issue of the Studios' claims that
2 RealDVD's presence in the marketplace threatens immediate and irreparable harm
3 to the Studios.

4 4. I understand that the Studios have represented that the threat of "rent-
5 rip-return" behavior is the most obvious and ominous.¹ I further understand that the
6 Studios have represented that RealDVD is improperly holding itself out to
7 consumers as a "legal" product.

8 5. Based on my understanding, it is my opinion that the Studios' analysis
9 confuses two distinct markets: the legal market which RealDVD addresses and the
10 illegal market.

11 6. I have examined the characteristics of several products which enable
12 the copying of DVD files. Attached as Exhibit 3 is a table comparing these
13 products.

14 7. From an economic point of view, these products represent two
15 different markets because consumers who wish to operate in an illegal environment
16 are not aided by RealDVD.

17 8. In a recent article published in PC Magazine, the author states,
18 "Unfortunately, the resulting [RealDVD] movie files are locked up tighter than
19 Hannibal Lecter; you can play them on up to five licensed PCs, but you can't watch
20 them on your iPod or other device. As such, RealDVD doesn't really give users what
21 they want: a way to put their purchased movies on their PCs and move them to
22 iPods, iPhones, PSPs, and network attached devices....Essentially, we want the same
23 freedom with DVDs that we have with CDs, and there are lots of DVD-ripping and
24 file-converting tools online that give users that freedom. Many of the best ones are
25

26
27 ¹ Declaration of Michael Dunn in support of *Ex Parte* Applications of Plaintiffs for
28 Temporary Retraining Oder and Order to Show Cause re: Preliminary Injunction Thereof, p. 4
Ins. 10-11.

1 free or accept donations...”² Another article states that RealDVD is “a [really] more
2 cumbersome way of doing something that [consumers have] already been doing for
3 years now with DVD Decrypter, AnyDVD, Handbrake, MacTheRipper, RipIt and
4 the like.”³

5 9. Based on this information, it is my opinion that RealDVD wouldn’t
6 have any significant impact on the end-user’s choice between illegal encryption-
7 stripping products which enable a bit-for-bit copying of a DVD file and RealDVD
8 player which 1) is more expensive (\$30 compared to mostly freeware) and 2) has
9 results which are inferior (i.e., more restrictive) compared to those obtainable by one
10 of the other products.

11 10. In addition, I have been asked to address the Studios’ allegations that
12 damages are not quantifiable if they are significant at all. In his declaration, Mr.
13 Michael Dunn articulates many facts that assist in this exercise. For instance, he
14 states that last month DVD rentals were 175 million at an average price of \$3.25.
15 He also states that 50 million new DVD movies were sold at an average price of
16 \$18.50. Assuming *arguendo* that the RealDVD player might increase the number of
17 “rent-rip-return” events, Mr. Dunn’s information provides important data to quantify
18 lost revenues associated with consumers’ actions in copying a rented DVD in lieu of
19 purchasing it outright.

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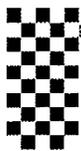
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26 ² Monson, Kyle, "7 Tools for Ripping Your DVDs," 9/11/08, PC Magazine, accessed
27 9/25/08, http://www.pcmag.com/print_article2/0,1217,a%253D231870,00.asp

28 ³ Paczkowski, John, "Rent. Rip. Return.", 9/8/08, All Things Digital, accessed 9/30/08,
<http://digitaldaily.allthingsd.com/20080908/rent-rip-return/>



11. It is my opinion that there are also a number of ways to quantify damages which meet the legal requirement of reasonable certainty. For example, one could conduct surveys of potential users to estimate possible diverted units. This data, when coupled with pricing data and cost data customarily maintained by the Studios in the ordinary course of business, would allow for damages to be ascertained with a reasonable degree of certainty.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct.

Gordon Klein

September 30, 2008

EXHIBIT 1

Exhibit 1

GORDON L. KLEIN

24724 Calle Conejo
Calabasas, CA 91302

Phone: (818) 222 8357
Fax: (310) 825 3165
gklein@anderson.ucla.edu

SUMMARY

Gordon Klein has 25 years' experience as a faculty member at UCLA's Law School and Anderson School of Management, CPA, lawyer, court-appointed referee, arbitrator, State Bar consultant, and television commentator. He has extensive experience teaching and testifying in the areas of accounting, finance, damages, intellectual property, commercial law, marital dissolutions, professional responsibilities, and entrepreneurship.

PROFESSIONAL DESIGNATIONS

- Certified Public Accountant (registered in Illinois)
- Attorney (non-practicing, California)

EDUCATION

University of Michigan Law School (J.D., 1979)

University of Michigan Business School (B.B.A, 1976)

HONORS

- Phi Beta Kappa
- Beta Alpha Psi
- Burroughs Corporation Scholar
- Branstrom Scholar
- Regents-Alumni Scholar

Exhibit 1

EMPLOYMENT

UCLA, Anderson School of Management (1981 - present)

Teach 15 different courses in accounting, business law, tax planning, financial statement analysis. Topics include compensation planning, cost accounting, quantitative aspects of marketing, financial derivatives, LLC and partnership dissolution, investments, valuation, new venture initiation, contracts, profit forecasting, and entrepreneurship. Granted security of employment in 1988.

UCLA School of Law (1987 – 2000)

Law and Financial Analysis instructor. Course emphasizes how financial and statistical data should be analyzed and presented in trial advocacy. Topics include damage calculations, profit forecasting, valuation, bankruptcy, and marital dissolutions.

Loyola Law School (2001 - 2002)

Adjunct Professor, LL.M. in Taxation Program. Tax Planning and Accounting for Lawyers. Courses focus on structuring corporate, partnership, and LLC transactions, financial statement analysis, professional and fiduciary duties, and trial advocacy.

Expert Witness/Arbitrator/Referee (1986-present)

Have testified as an expert in federal and state court in several well-publicized cases, including US v. Marvin Mitchelson and Rothenberg v. Roseanne Barr.

Have served as an arbitrator in over 150 commercial cases, involving contract, securities, and partnership disputes. Member of the Accounting, Commercial Arbitration, and IRS Tax Shelter Dispute Panels of the American Arbitration Association. Also have served as an LA Superior Court referee and Orange County Superior Court referee.

Public Speaker/Media Commentator (1986-present)

Conducted seminars for numerous organizations, including the California Society of CPAs, Deloitte and Touche, the Finance Ministry of the People's Republic of China, members of the German Bundestadt (Parliament), Head Start Advanced Management Conference, JP Morgan, KPMG, Merrill Lynch, and Price Waterhouse Coopers.

Expert on the CPA exam and accountant liability. Have trained over 14,000 California financial professionals to pass the CPA exam.

Nationally recognized investment and accounting expert who frequently appears on CNBC and CNN Radio. Has also has appeared in the Wall Street Journal, New York Times, Forbes, Fortune, Business Week, Los Angeles Times, People, Bloomberg News, and on CNN, NPR, MTV, and ABC Nightly News.

Exhibit 1

Corporate Officer/Director (1989 – present)

Co-founder, director, or CFO of various closely-held enterprises, including Accounting Opportunities Advisors, Inc, a hedge fund management company; Accounting Opportunities Fund, LLC, a hedge fund; Accounting Value Fund, LLC, a hedge fund; BackupNet International, a data backup software licensor; and Westin Communications, a financial publishing company.

Investment Banking Consultant (2004 –present)

Serve as an expert consultant to investment banks, hedge funds, and other pooled investment organizations. Affiliated with the Gerson Lehrman Group.

California State Bar Enforcement Division (2001)

Forensic investigator. Evaluated whether a suspended attorney had complied with the financial and ethical requirements to merit reinstatement.

Attorney (1979-1980)

Tax attorney. Ervin, Cohen, and Jessup, Beverly Hills, CA. Currently non-practicing status.

BOOKS AUTHORED

- Business Law
- Business Statistics
- Cost Accounting
- Introductory Accounting
- Introductory Economics
- Managerial Finance
- Managerial Accounting
- Contributing Editor, The Knowledge Exchange's Encyclopedia of Business

Exhibit 1

UNIVERSITY COURSES TAUGHT / EXPERTISE

Accounting for Lawyers

The record-keeping process, auditor's liability, asset valuation, financial ratios, liability determination, discount rate determination, contract interpretation of financial covenants and accounting, usury and interest rate analysis, cash flow analysis, and accrual determinations of income and expense.

Advanced Accounting

Mergers and acquisition techniques, consolidated reporting, professional responsibilities, fiduciary reporting, foreign currency transactions, bankruptcy and insolvency reporting, partnership accounting, intangibles valuation, government-wide statements, nonprofit accounting, earn-outs, contingent price adjustments, and goodwill determination.

Business Plan Development

The venture capital process, structuring the marketing, sales, and general business strategy of an emerging or expanding business enterprise

Cost Accounting

Sales and operational budgeting, profit forecasting, cost behaviors and allocations, breakeven analysis, net present value analysis, evaluating division and executive performance.

Intermediate Accounting I

Revenue recognition, accounting estimates, intangibles valuation including goodwill, contingent liabilities, realization and matching principles, royalty income, accounting theory, asset swaps, depreciation, time value of money, research and development, patents, and trademarks.

Intermediate Accounting II

Bonds and other financing instruments, convertible securities, stock options, equity, Statement of Cash Flows, operating and capital leases, sale-leasebacks, and real estate financing techniques, pensions, and deferred taxes.

Exhibit 1

Law for Entrepreneurs

Contract liability and remedies, enterprise organization, agency, secured financing, bankruptcy, debt collection, the Uniform Commercial Code, unfair competition, price discrimination, antitrust, and the rights and duties of partners, officers, directors and shareholders.

Managerial Accounting

Core principles of accounting. Required of all MBA candidates.

Small Business Management

Quantitative analysis with imperfect information, market analysis, statistical analysis of data, Internet and e-commerce opportunities, workers' compensation, independent contractors, intellectual property, business strategy, franchises, goodwill valuation and determination, OSHA, personnel issues, labor relations, wrongful termination, employment contracts, and the regulatory environment.

Structuring Entrepreneurial Deals

Valuation and organization of closely-held enterprises, bootstrap financing, ownership and profit allocation, nontraditional valuation techniques, valuing unproven technologies, valuing intellectual property, the cost of capital, capital structure decisions, estate planning, retirement planning, securities laws, insider trading, and Section 1244 stock.

Tax Principles and Policy

Individual tax planning, tax return preparation, the alternative minimum tax, tax aspects of real estate investing and financing, timing assets acquisitions and dispositions, like-kind exchanges, capital gains versus ordinary income characterizations, professional duties of tax preparers, defined benefit and defined contribution plans, tax aspects of the employment and independent contractor relationships, and deferred compensation.

Taxation and Management Decisions

The formation and liquidation of enterprises, dividend distributions, stock redemptions, acquisition techniques, and analyzing partnership, S corporation, and LLC agreements.

EXHIBIT 2

Exhibit 2

PREVIOUS TESTIMONY

Within the past four years, I have served as a testifying expert in the following matters:

Daut v. Eastern Star Homes, Superior Court, Orange County, case #05CC09116

Summary: Wrongful termination in violation of public policy; tax fraud; damages

DR Management, LLC v. United States, US District Court, Northern District of California, Oakland Division, case #05-01010 MMC

Summary: real estate tax planning; existence of income and character as capital gain

Kerr, et al v. CBIZ Southern California LLC, Superior Court, Los Angeles County, case #BC356298

Summary: Investors' reasonable reliance on financial data; trustee's fiduciary duty

Swain, et al v. American Capital Strategies, Superior Court, Los Angeles County, case #BC352310

Summary: Damages; llost business opportunities; business valuation

PHC Sharp Holdings, Inc. v. Wenk, Superior Court, Orange County, case #07CC09285

Summary: Damages re fraud; business valuation

Lechter v. Kiyosaki, et al, District Court, Clark County, NV, case #A549886

Summary: Fiduciary duty; reasonableness of compensation

Wilson v. Alterna, Inc., Superior Court, Los Angeles County

Summary: Securities law; damages; fiduciary duty

Exhibit 2

BHE v. MTS Products and Ben Hsia, Superior Court, Los Angeles County,
case #EC 041097

Summary: Damages; business valuation

Auerbach Acquisition Assoc., Inc v. Daily, Superior Court, Los Angeles County,
case # BC285134

Summary: Venture capital; business valuation; derivatives valuation; financial
resources; borrowing capability

Williams, Trustee v. Gannon, Second District Court, Montana, case #DV 02 201

Summary: Bankruptcy; cash flow; business forecasting

Casey, Trustee v. US Bank

Summary: Damages; embezzlement, cash flow forecasting and tracing

EXHIBIT 3

Exhibit 3 Feature Matrix of RealDVD Competitors

PC Software

No.	Name of Product	Cost	Copies	CSS Discs	Burns DVDs	Playback Option	Conversion	Transfer	Format
1	Me Too Software 1 Copy DVDs 2 Standard Edition	\$29.99 - \$89.99	Yes		Yes	No		Yes	
2	Slysoft AnyDVD	\$72.25	Yes		No	No		No	
3	Slysoft Clone DVD	\$59.50	Yes		Yes	No		No	
4	Roxio Easy DVD Copy 4	\$49.99	No		Yes	No		Yes	
5	Corel DVD Copy 6	\$29.99 - \$49.00	No		Yes	No		Yes	
6	RealDVD	\$39.99	Yes		No	Yes		n/a	
7	Magic DVD Ripper	\$34.97	Yes		Yes	No		Yes	
8	Bling Software Limited 123 Copy DVD '08	\$29.99	Yes		Yes	No		Yes	
9	Bling Software Limited 123 Movies 2 PsP	\$9.99	Yes		No	No		Yes	
10	Handbrake 0.9.2	Free	Yes		No	No		Yes	
11	DVD43Free	Free	Yes		No	No		No	
12	DVD Decrypter	Free	Yes		No	No		No	
13	Boooya.com add in	Free	Yes		No	No		No	
14	Lightning UK	Free	Yes		Yes	No		No	

Home Media Servers

No.	Name of Product	Cost	Copies	CSS Discs	Burns DVDs	Playback Option	Conversion	Transfer	Format
1	Fusion Research	Approx. \$8,000 and up	Yes		No	Yes		No	
2	Escient	Approx. \$1,000 and up	Yes		No	Yes		No	
3	Kaleidescape	Approx. \$10,000 and up	Yes		No	Yes		No	
4	AMX	Approx. \$14,000 and up	Yes		No	Yes		No	

EXHIBIT 10

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5 Los Angeles, CA 90071-1560
Tel: (213) 683-9100; Fax: (213) 687-3702
6

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Tel: (818) 995-6600; Fax: (818) 285-4403

16 Attorneys for Plaintiffs
17

18 UNITED STATES DISTRICT COURT
19 CENTRAL DISTRICT OF CALIFORNIA
20 WESTERN DIVISION

21 UNIVERSAL CITY STUDIOS
22 PRODUCTIONS LLLP, UNIVERSAL
CITY STUDIOS LLLP, PARAMOUNT
23 PICTURES CORPORATION,
TWENTIETH CENTURY FOX FILM
24 CORPORATION, SONY PICTURES
TELEVISION INC., COLUMBIA
25 PICTURES INDUSTRIES, INC., SONY
PICTURES ENTERTAINMENT INC.,
26 DISNEY ENTERPRISES, INC., WALT
DISNEY PICTURES and WARNER
27 BROS. ENTERTAINMENT INC.,

28 Plaintiffs,

CASE NO. CV 08-06412 SJO AJWx

PLAINTIFFS' REPLY BRIEF IN
SUPPORT OF PLAINTIFFS'
EX PARTE APPLICATION FOR TRO

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vs.
REALNETWORKS, INC. and
REALNETWORKS HOME
ENTERTAINMENT, INC.,
Defendants.

1 Plaintiffs submit this reply brief to correct misstatements of fact and law in
2 Real's opposition papers.

3 **Timing of TRO Request:** In the introductory paragraph of its opposition
4 brief, Real asserts that Plaintiffs knew "since the first week of September" that
5 RealDVD would be launched on September 30. Opp. at. 1. Based on that
6 statement, Real suggests throughout their papers that the Plaintiffs held off filing a
7 request for a TRO for tactical reasons. Real knows the facts are otherwise.

8 Here's what really happened: Real and Plaintiffs entered into a standstill
9 agreement on September 6, to facilitate settlement discussions. In that agreement,
10 the parties expressly agreed that neither party would argue "that any delay in
11 asserting any claim during the [t]olling period is germane" to any issue in any
12 litigation. Real's suggestion in its papers that Plaintiffs delayed in seeking the TRO
13 runs afoul of this commitment.¹

14 The truth is that Plaintiffs have acted promptly and in the utmost good faith.
15 The parties tried for two weeks to resolve their dispute without Court intervention.
16 On September 22, Real terminated the standstill agreement, which under the terms
17 of the agreement meant that the parties were free to file a lawsuit on Tuesday,
18 September 30. Three days after the September 22 termination notice, Plaintiffs
19 asked Real to delay its launch by a few weeks to allow for expeditious and orderly
20 briefing and consideration of Plaintiffs' request for immediate injunctive relief.
21 Pomerantz Decl. Ex. A. Real refused to do so, and also refused to provide details
22 on the ease with which it can disable the RealDVD software from its servers once
23 the software has been distributed (a fact it still fails to disclose in its opposition
24 papers). Plaintiffs also informed Real last week that they would file their lawsuit
25 Tuesday morning in this Court, and then worked around the clock to draft TRO

26 _____
27 ¹ The parties also agreed that the standstill agreement was confidential (which is
28 why Plaintiffs did not mention it in their opening papers), but could be disclosed to
enforce its terms. If the Court would like to review a copy of the standstill
agreement, Plaintiffs will file it promptly under seal.

1 papers, which were finalized in the early morning hours of Tuesday, September 30,
2 and provided to Real’s counsel as soon as they were completed, even before they
3 were filed.

4 **Venue:** Footnote 2 of Plaintiffs’ opening papers explains why Real’s
5 anticipatory declaratory action brought in the Northern District (which it brought
6 only after Plaintiffs told Real it would be filing in Los Angeles) is an improper
7 attempt to forum-shop. *See also Xoxide, Inc. v. Ford Motor Co.*, 448 F. Supp. 2d
8 1188, 1192-93 (C.D. Cal. 2006) (“Anticipatory suits . . . are viewed with disfavor
9 as examples of forum shopping and gamesmanship.”). Also, Real’s opposition
10 never explains why venue of its *contract* claim against the DVD CCA matters to
11 this TRO request, which is based *solely* on a *DMCA* claim by Plaintiffs against
12 Real, over which venue is clearly proper in this district. And even as to the contract
13 claim, Real’s opposition overlooks the dispositive venue provision in the CSS
14 license. Real itself has signed a license agreement that expressly provides that
15 Plaintiffs, as third-party beneficiaries of the CSS license, can file an action in Los
16 Angeles to enforce the terms of the license. Pomerantz Decl. Ex. F at 23-25 (§ 9.5).
17 That is precisely what Plaintiffs have done in their second cause of action.²

18 **Likelihood of Success on Merits:** Real does not seriously dispute that
19 RealDVD evades the technological protections of CSS. It artfully says that
20 “RealDVD does not strip or remove the CSS *encryption* from the” copy it creates.
21 Opp. at 4 n.2 (emphasis added). But Plaintiffs have demonstrated that RealDVD
22 avoids and bypasses all the *other* technological protections—e.g., drive locking,
23 authentication, bus encryption, the secure lead in area—that CSS provides and that
24 RealDVD circumvents CSS’s core copy protection function. *See* Pls’ Memo. at 13-
25 14. Neither Real nor its declarants deny that.

26 _____
27 ² Indeed, Plaintiffs have filed 10 other CSS lawsuits against other CSS licenses in
28 Los Angeles under the third-party beneficiary venue provisions of the CSS license,
and not one of those licensees claimed that venue was improper or that the DVD
CCA was a necessary party.

1 Real’s central argument is that it is not circumventing CSS because it
2 “complies with the requirements” of the CSS License Agreement, and “if CSS were
3 supposed to prevent copying by a licensed user, the CSS Agreement would *prohibit*
4 *such conduct.*” Opp. at 2-3 (emphasis added). Real does not dispute, however, that
5 under federal law the question is not whether the license *prohibits* the conduct, but
6 rather whether it affirmatively *authorizes* it. See Pls’ Memo. at 16-19 (citing *S.O.S.*
7 *Inc. v. Payday, Inc.*, 886 F.2d 1081 (9th Cir. 1989); *LGS Architects, Inc. v.*
8 *Concordia Homes of Nevada*, 434 F.3d 1150, 1156-57 (9th Cir. 2006)). Real points
9 to no language in the license that *affirmatively authorizes* a CSS licensee to enable
10 consumers to freely make permanent, playable copies of DVDs. And for good
11 reason, because that is contrary to the entire purpose of CSS—developed by the
12 *Copy Protection* Technical Working Group and managed by the *DVD Copy*
13 *Control* Association. All the language regarding copying in the license is designed
14 to prohibit consumer copying. See Pls’ Memo. at 18 (quoting Pomerantz Decl. Ex.
15 F at 1 (Recital A), 22 (§ 9.2)); see also *id.* at 4 (quoting Pomerantz Decl. Ex. G).

16 Real’s Buzzard Declaration only confirms this. He admits RealDVD is a
17 “licensed and authorized *DVD player.*” Buzzard Decl. ¶ 5 (emphasis added). He
18 does not suggest that Real has been licensed to distribute a *DVD copier*. As he
19 admits, once “access has been properly granted” under the playback license,
20 RealDVD uses that access to “make a backup copy of the content.” *Id.* ¶ 9.
21 Because RealDVD exceeds the scope of its license, Real is using the CSS keys for a
22 prohibited purpose and, under well-settled law, is liable under the DMCA. See Pls’
23 Memo. at 15 (citing *321 Studios v. Metro Goldwyn Mayer Studios, Inc.*, 307 F.
24 Supp. 2d 1085, 1098 (N.D. Cal. 2004); *Microsoft Corp. v. EEE Business Inc.*, 555
25 F. Supp. 2d 1051, 1059 (N.D. Cal. 2008)).

26 **Irreparable Injury:** The thrust of Real’s argument on irreparable injury is
27 that Plaintiffs will suffer no harm because *illegal* DVD ripping software has been
28 available for years, and already costs the Plaintiffs dearly. The argument misses the

1 point entirely. RealDVD is the *first* such branded product from a recognized
2 company that holds itself out as “legal.” As Real frankly concedes, it is “targeted
3 precisely to those users who have avoided rippers[.]” Opp. at 6. That is exactly the
4 concern expressed by Mr. Dunn in his declaration: that the broad sweep of *law-*
5 *abiding* consumers will now be likely to start copying DVDs, causing Plaintiffs
6 irreparable injury above and beyond that caused by illegal rippers. Dunn. Decl. ¶¶
7 5, 27-28. Real simply does not address that serious threat. Real’s “two wrongs
8 make a right” argument should be rejected.

9 The only supposed “evidence” submitted by Real regarding irreparable injury
10 is a declaration by Gordon Klein, a lawyer and accountant. There is nothing
11 apparent in Mr. Klein’s background that even *might* permit him to opine
12 authoritatively or reliably about the marketplace for home video products or
13 services, or the effect of RealDVD on that marketplace. His declaration does not
14 set forth any relevant work or academic experience that would qualify him as an
15 expert in any area relating to the market for entertainment products or, specifically,
16 home entertainment products. Nor does he indicate that he has previously qualified
17 as an expert in the area.

18 In any event, in opining that damages are likely to be quantifiable, Mr. Klein
19 simply points to the fact that there are *some numbers* in Mr. Dunn’s declaration,
20 and completely ignores the specific factors that Mr. Dunn points to in explaining
21 why economic damages would be extraordinarily difficult to measure in this
22 specific market, which he knows well after twenty-one years. He also does not
23 even purport to address Mr. Dunn’s testimony about the irreparability of harm to
24 nascent markets, or harm flowing from changes in consumer attitudes and behavior.
25 The numerous cases cited on page 22 of Plaintiffs’ opening brief make clear that
26 this is precisely the type of harm that warrants immediate injunctive relief.

27 **Balance of Hardship:** The only evidence of harm that Real even purports to
28 offer is the Lang Declaration. Ms. Lang, however, points to supposed harm that

1 flowed from the decision to delay the launch of RealDVD past September 8. To
2 her credit, Ms. Lang acknowledges that the decision was *Real's*. Lang Decl. ¶ 3.
3 This hardship, however, has nothing to do with the granting or denying of
4 injunctive relief; it is something Real voluntarily chose to do. The only issue now
5 is what harm, if any, Real will suffer if the launch is pushed back by a few more
6 weeks to allow for consideration of the merits of a preliminary injunction motion.
7 As to that issue, Ms. Lang's declaration offers very little.

8 Ms. Lang says that Real tried to re-interest the press in advance of the
9 September 30 re-launch, but candidly admits that many publications "were not
10 willing to run second articles." *Id.*, ¶ 7. Although she alludes to some unspecified
11 "advertising efforts" around the September 30 re-launch, she does not quantify or
12 detail any.

13 Ms. Lang also insists that Real will suffer hardship because it will lose its
14 "first mover advantage." The law is clear, however, that a party is not entitled to
15 any advantage as a result of being the "first mover" in the market for an unlawful
16 product or service.³

17 Perhaps most important, Real's opposition papers do nothing to respond to
18 the risk of irreparable harm that the Plaintiffs explained in detail in the declaration
19 of Mr. Dunn and that other courts have found exists when they have addressed
20 similar situations. *See* Pls' Memo. at 22. The balance of hardships clearly tilts in
21 favor of issuance of a temporary restraining order.

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26 ³ *See, e.g., Power-One, Inc. v. Artesyn Techs., Inc.*, 2008 WL 1746636, *1, n.1
27 (E.D. Tex. 2008); *Warrior Sports, Inc. v. STX, L.L.C.*, 2008 WL 783768, *12 (E.D.
28 Mich. 2008); *Tivo, Inc. v. Echostar Communications Corp.*, 446 F. Supp. 2d 664,
669-670 (E.D. Tex. 2006); *Lyrick Studios, Inc. v. Big Idea Prods., Inc.*, 2002 WL
32157203, *1 (N.D. Tex. 2002).

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DATED: October 1, 2008

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EXHIBIT 11

UNITED STATES DISTRICT COURT
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settlement discussions. (Pls.' Reply 1, Defs.' Opp'n 2.) According to Plaintiffs, RealNetworks terminated the standstill agreement on September 22, 2008, which under the terms of the agreement meant the parties could bring suit beginning September 30, 2008. Plaintiffs then asked RealNetworks to delay its release of RealDVD until late October so they could seek injunctive relief, and informed RealNetworks that they intended to file suit in Los Angeles on September 30, 2008. (Letter from Glenn Pomerantz to Robert Kimball, Sept. 25, 2008, filed as Pomerantz Decl. Ex. A.) RealNetworks refused to delay the launch. (Pls.' P. & A. 1.)

On September 30, 2008, at 9:05 a.m. in the Northern District of California, RealNetworks filed a complaint seeking a declaratory judgment against Plaintiffs, DVD CCA, and Viacom, Inc., that RealDVD does not violate the Digital Millennium Copyright Act ("DMCA") or the CSS License Agreement. (08-04548, Docket No. 1.) At 10:21 a.m., Plaintiffs filed their Application in the Central District of California.

II. DISCUSSION

The "first to file" rule is a generally recognized doctrine of federal comity that permits a district court to decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district. *Mediostream, Inc. v. Priddis Music, Inc.*, No. 07-2127, 2007 U.S. Dist. LEXIS 73707, at *6 (N.D. Cal. Sept. 24, 2007) (citing *Pacesetter Systems, Inc. v. Medtronic, Inc.*, 679 F.2d 93, 94-5 (9th Cir. 1982)). The rule allows a court to dismiss, transfer, or stay an action when a similar complaint has been filed in another district. *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 623 (9th Cir. 1991). This doctrine "serves the purpose of promoting efficiency well and should not be disregarded lightly." *Church of Scientology of California v. United States Dep't of Army*, 611 F.2d 738, 750 (9th Cir. 1979). In applying the "first to file" rule, courts look to three threshold factors: (1) the chronology of the two actions; (2) the similarity of the parties; and (3) the similarity of the issues. *Greenline Industries v. Agri-Process Innovations, LLC*, No. 08-2438, 2008 U.S. Dist. LEXIS 60504, at *8 (N.D. Cal. July 28, 2008). Even if the threshold factors are met, a court may dispense with the "first to file" rule if the first suit filed is anticipatory, meaning the plaintiff filed it "upon receipt of specific, concrete indications that a suit by [the] defendant was imminent." *Xioxide, Inc. v. Ford Motor Co.*, 448 F. Supp 2d. 1188, 1192 (C.D. Cal. 2006).

In deciding whether to transfer an action based on the "first to file" rule, the court in the second-filed action normally does not consider the respective convenience of the two courts. *Alltrade*, 946 F.2d at 628 ("As for the respective convenience of the two courts, normally this argument should be addressed to the court in the first-filed action. Apprehension that the first court would fail to appropriately consider the convenience of the parties and the witnesses should not be a matter for our consideration.")

Here, RealNetworks filed suit in the Northern District at 9:05 a.m. on September 30, 2008 ("Case 1"). Plaintiffs filed their action and Application at 10:21 a.m. on the same day, in the

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Central District. ("Case 2"). The parties in both cases are substantially the same: in Case 1, RealNetworks brought suit against Plaintiffs and two additional parties, DVD CCA and Viacom, Inc. In Case 2, Plaintiffs brought suit against RealNetworks. In addition, the issues in both cases are identical. In Case 1, RealNetworks seeks a declaratory judgment that its RealDVD violates neither the CSS License Agreement nor the DMCA. (08-4548 Compl. 9.) In Case 2, Plaintiffs allege RealNetworks violates both the CSS License Agreement and the DMCA. (Compl.15.) Thus, the threshold requirements are met.

Plaintiffs contend that the Court should disregard the "first to file" rule because Case 1 was anticipatory. (Pls.' Reply 2.) In support, they point to the fact that RealNetworks filed its action "only after Plaintiffs told RealNetworks it would be filing in Los Angeles." *Id.* Indeed, Plaintiffs informed RealNetworks that it would be filing suit in Los Angeles in a letter dated September 25, 2008. (Letter from Glenn Pomerantz to Robert Kimball, filed as Pomerantz Decl. Ex. A.) However, Plaintiffs and RealNetworks had a "standstill agreement" under which all parties agreed to refrain from filing suit until September 30, 2008. (Pls.' Reply 1.) In this agreement, the parties agreed that "neither party would argue that any delay in asserting any claim during the tolling period is germane to any issue in any litigation." *Id.* Despite this, Plaintiffs now argue that because RealNetworks waited to file suit until the date agreed upon by the parties, that suit is improper. *Id.* RealNetworks maintains that it "initiated its preparation for filing its declaratory judgment action prior to receiving any correspondence from Plaintiffs' counsel" and that the only reason it did not file earlier is because of the standstill agreement. (Defs.' Opp'n 2.) Plaintiffs themselves rely on this agreement to explain their delay in seeking a TRO. (Pls.' Reply 1.) In other words, both parties intended to file suit on September 30, irrespective of Plaintiffs' letter to RealNetworks. As such, it does not appear that RealNetworks filed suit in response to Plaintiffs' letter, and thus the action was not anticipatory.

In addition, the Court finds that judicial economy favors transferring Case 2 to the Northern District, because that is the only district where DVD CCA may be joined as a party, pursuant to the CSS Licensing Agreement. Therefore, were this Court to decline to transfer Case 2, Case 1 and Case 2 could not be consolidated and the identical issues of the legality of RealDVD under the DMCA and the CSS License Agreement would have to be litigated twice, in two separate courts.

III. RULING

For the foregoing reasons, the Court hereby TRANSFERS this action to the Northern District of California.

IT IS SO ORDERED.