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 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.  
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25  
 26 AND RELATED CASES  
 27  
 28

Case Nos. C08 04548 MHP;  
 C08 04719 MHP

**PLAINTIFFS' REPLY IN SUPPORT OF  
 MOTION TO STRIKE DVD COPY  
 CONTROL ASSOCIATION, INC.'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION**

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

**INTRODUCTION**

1  
2 The DVD CCA claims that it should be allowed to piggyback onto the schedule  
3 negotiated by Real and the Studio Defendants in order to reduce “extra filings,” maximize  
4 “efficient coordination” (Opp. at 4) and that the DVD CCA’s improper and incomplete one-page  
5 Motion for Preliminary Injunction was filed to give Real “ample time to prepare” to respond.  
6 (Opp. at 3; Notice at 2). None of these claims have merit. Rather, the DVD CCA’s proposed  
7 end-run around the Local Rules would both multiply the filings that Real must oppose and would  
8 prejudice Real’s ability to efficiently coordinate its response to the Studio Defendants’  
9 preliminary injunction papers. Further, the DVD CCA’s view of “ample time to prepare” is to  
10 cut in half the minimum 35-day noticed motion period required in this District. The DVD CCA  
11 seeks to grant itself the right to wait until the eleventh hour to file a memorandum identifying  
12 any basis for its claims that the DVD CCA is entitled to claim relief at the preliminary injunction  
13 proceeding on January 27, 2009 – claims that are dubious from the get-go since the DVD CCA  
14 claims to be moving for injunctive enforcement on a contract of adhesion.

15 At a minimum, the DVD CCA should have followed the procedural rules applicable to a  
16 motion—rules that ensure fair and timely notice to the party defending a motion for preliminary  
17 injunction of the legal and factual arguments it will have to counter. Indeed, the DVD CCA  
18 previously represented to this Court that the DVD CCA would at least comply with the 35-day  
19 schedule for noticed motions (*see* Steer Decl., Ex. C at 1), but is now stating that it will not file  
20 any papers at all until mid-January on the schedule agreed by Real and the Studio Defendants.  
21 (Opp. at 2). The DVD CCA’s attempt to piggyback on the Studio Defendants’ motion and  
22 negotiated schedule is both presumptuous and unfair. Real negotiated the schedule for the  
23 Studio Defendants’ motion based on the assumption that Real would be defending against the  
24 grounds laid out in the TRO application by one moving party in one brief. Not two moving  
25 parties, with two separate briefs, appendices, witnesses and theories. If the DVD CCA wished to  
26 avoid extra filings and achieve efficient coordination, it should at least be required to join with  
27 the Studio Defendants on one brief with one set of witnesses. Further, the DVD CCA should be  
28 required to file a memorandum 35 days in advance of any preliminary injunction hearing setting

1 forth the basis for its claim for preliminary injunctive relief so that Real can assess whether to  
2 seek leave of Court to modify the schedule. This is what is required of all movants, and the  
3 DVD CCA has no justification for being treated any differently.

#### 4 **ARGUMENT**

5 In response to Real's Motion to Strike its preliminary injunction motion, the DVD CCA  
6 merely avers that the rules governing preliminary injunction motions in this Court do not apply  
7 to the DVD CCA "in the circumstances that exist in this litigation." None of the four arguments  
8 DVD CCA advances in support of this extraordinary assertion provide any justification for  
9 excusing it from compliance with the Rules; indeed, each of the arguments illustrates why the  
10 Rules are necessary to ensure adequate notice to a party defending a motion for preliminary  
11 injunction, particularly in the circumstances of this litigation.

12 First, the DVD CCA asserts that its placeholder "motion," which reveals only that it  
13 intends to ask the Court to determine that RealDVD violates the CSS License Agreement,  
14 adequately specifies the grounds for its motion. (Opp. at 3.) That is simply not true: the DVD  
15 CCA's "notice" leaves Real to guess at how many and which specific provisions of the  
16 agreement the DVD CCA will ask the Court to determine Real has violated. This is especially so  
17 where even the identity of the operative agreement is an issue in dispute, since many of the close  
18 to 200 pages of convoluted definitions and technical specifications authored by the DVD CCA  
19 were even not provided to Real until after execution of the License Agreement itself. In any  
20 event, the unsurprising fact that Real believes it is *not* in breach of the CSS License Agreement,  
21 and has brought an action against the DVD CCA for a declaratory judgment to that effect, does  
22 not render Real clairvoyant and therefore able to discern what the DVD CCA is thinking. Nor  
23 should Real have to serve (and hope for a timely and adequate response to) discovery to obtain  
24 adequate notice as to the grounds for the DVD CCA's motion.

25 Second, the fact that the DVD CCA purports to force itself into the schedule for  
26 conducting discovery, briefing, and argument already established for the Studio Defendants'  
27 motion (Opp. at 3) provides no comfort to Real, but rather is cause for concern. The schedule to  
28 which Real agreed for the Studio Defendants' motion presumed two parties, not three,

1 particularly where the third party indicates it will conceal the grounds for its motion for as long  
2 as possible.

3 Third, the fact that the DVD CCA believes it has an “urgent and significant interest” in  
4 the entry of a preliminary injunction (Opp. at 4) does not translate into a right to append its  
5 motion to that of the Studio Defendants by means of a skeletal notice, with the required  
6 supporting memorandum to follow nearly two months later and a mere two weeks prior to the  
7 hearing. (Motion at 4 n.2.) The DVD CCA presumably determined the grounds for its motion  
8 when deciding to bring it; the mystery is why it has decided to conceal those grounds from Real  
9 for as long as possible, while simultaneously attempting to take advantage of the opportunity to  
10 have its motion heard promptly by the Court. Since the DVD CCA did not state any grounds at  
11 all, its Notice is simply defective and should be stricken.

12 Fourth, the fact that the DVD CCA provided the barest notice of its intention to move for  
13 a preliminary injunction on November 17 by filing a one-page document, rather than waiting  
14 until 35 days before the hearing, or December 23, provides no actual benefit to Real under the  
15 “circumstances that exist in this litigation.” If the DVD CCA is permitted to join the briefing  
16 schedule currently contemplated for the Studio Defendants’ motion, the DVD CCA will not have  
17 to file an opening brief until January 13—leaving Real in the dark. That is hardly an efficient  
18 approach to a substantive and significant motion—once again illustrating the need for adequate  
19 notice at the beginning, rather than near the end, of the preliminary injunction process.

20 The rules are not a mere formality, and the DVD CCA should not be permitted to flout  
21 them at Real’s expense. For the foregoing reasons, and those stated in its Motion to Strike, Real  
22 respectfully requests that this Court strike the DVD CCA’s Motion for Preliminary Injunction. If  
23 the DVD CCA thereafter files a motion for preliminary injunction that complies with applicable  
24 local and federal rules, the Court and the parties may address at that point when the motion  
25 should be heard.

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1 Dated: December 8, 2008

WILSON SONSINI GOODRICH & ROSATI  
Professional Corporation

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By: /s/  
Michael Berta

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Attorneys for Plaintiffs  
REALNETWORKS, INC. AND  
REALNETWORKS HOME  
ENTERTAINMENT, INC.

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