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DVD COPY CONTROL ASSOCIATION, INC.

14 UNITED STATES DISTRICT COURT

15 NORTHERN DISTRICT OF CALIFORNIA

16 REALNETWORKS, INC., a Washington
Corporation; and REALNETWORKS HOME
17 ENTERTAINMENT, INC., a Delaware corporation,

18 Plaintiffs,

19 v.

20 DVD COPY CONTROL ASSOCIATION, INC., a
Delaware nonprofit corporation, et al.

21 Defendants.

23 AND RELATED CASES

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Case No. C08 04548 MHP
Related Case No. C08 CV 04719 MHP

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION OF DVD COPY CONTROL
ASSOCIATION, INC. FOR
PRELIMINARY INJUNCTION**

**[Filed concurrently herewith:
Declarations of Jacob Pak, Maria
Ellinikos and Dr. John P.J. Kelly]**

Date: April 1, 2009
Time: 9:00 A.M.
Ctrm: 15

The Honorable Marilyn H. Patel

PUBLIC REDACTED VERSION

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Today, hundreds of millions of people worldwide take for granted the technology that allows
4 them to watch movies and television programs at their convenience on DVDs. But this stunningly
5 successful breakthrough -- virtually unimaginable a generation ago -- did not develop spontaneously. It
6 is the product of a delicate set of agreements achieved through painstaking negotiation among the
7 companies that provide the content for DVDs, on the one hand, and the consumer electronics and
8 information technology companies that make the devices consumers use to play back and enjoy DVDs,
9 on the other. Declaration of Andrew Parsons (“Parsons Dec.”) ¶ 4.

10 The advent of DVDs dates back to the early 1990s. At that time, the companies that provide
11 content for movies and television started to consider distributing content in a digital format on DVDs,
12 but were concerned about the dangers posed by the ease with which DVDs could be copied. Without
13 some means of copy-protection, an infinite number of perfect duplicates could be made of any DVD,
14 including borrowed DVDs. And if that happened, individuals could use, copy, and even distribute
15 DVDs without paying for the copyrighted material on the DVD. Faced with this prospect, content
16 providers individually decided not to distribute movies on DVDs, until and unless there was a workable
17 technology that would render it very difficult for typical consumers to make unauthorized copies of the
18 providers’ copyrighted materials. Parsons Dec. ¶ 4; King Dep. 76:19-77:10 (Declaration of Maria
19 Ellinikos (“Ellinikos Dec.”), Exh. I). For their part, the consumer electronics and information
20 technology companies that were spending great resources developing products for playing DVDs
21 needed a content protection system to give them assurances that there would be content available to be
22 played back on their products and that would not add unduly to the price of those products. Parsons
23 Dec. ¶ 4.

24 Enormous effort across industries with widely differing perspectives produced a solution to the
25 problem of protecting copyrighted works at a manageable cost – the DVD-Video Content Scramble
26 System (“CSS”). Parsons Dec. ¶ 4; King Dep. 51:19-52:24 (Ellinikos Dec., Exh. I). This system
27 encrypts the video information on a DVD and creates layers of protection against casual user copying,
28

1 including an interlocking series of cryptographic keys and encryption and playback process
2 requirements to prevent duplication of copyrighted content. The fundamental purpose of the CSS
3 system is to ensure that a playable digital copy of protected content on a DVD cannot be made by a
4 casual user. Parsons Dec. ¶ 5; King Dep. 79:25-82:2 (Ellinikos Dec., Exh. I); [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 The anti-copying objective of the CSS system is memorialized in an Agreement that is
9 administered and enforced by the DVD Copy Control Association, Inc. (“DVD CCA”).¹
10 RealNetworks, Inc. (“RealNetworks”) is a CSS Licensee. By executing the Agreement, RealNetworks
11 bound itself to comply with the detailed requirements that were carefully designed to prevent users
12 from making and keeping playable copies of CSS-protected DVD content. The Agreement stipulates
13 that a breach of these anti-copying obligations would cause irreparable injury to DVD CCA,
14 warranting the entry of injunctive relief.

15 From the outset, however, RealNetworks sought to undermine the CSS system. As its own
16 documents show and its witnesses admit, RealNetworks’ shameless objective all along was to create a
17 product that would defy the core anti-copying purpose of CSS. RealNetworks ultimately achieved this
18 illicit goal by concocting “RealDVD” -- software specifically designed to enable a consumer to easily
19 make lasting, digital copies of CSS-protected DVDs (including copies made from DVDs that the
20 consumer has borrowed or rented) on a computer hard drive or other storage media and later watch the
21 copied DVD content without any further need for the physical DVD.² RealNetworks insists that
22 RealDVD is a “100% legal” DVD copying product. This is false. There is no doubt that RealDVD
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25 ¹ All references herein to the “Agreement” are to the CSS License Agreement, together with
interrelated contractual documents that contain CSS Specifications. *See infra* pages 4-5.

26 ² As explained below, RealNetworks has created two versions of RealDVD, one code named
27 “Vegas,” and the other code named “Facet.” The Vegas application is built to run on the Microsoft
28 Windows Operating System; whereas Facet is designed to run on the Linux Operating System. Because
Facet and Vegas have the same basic functionality, DVD CCA refers to them interchangeably as
RealDVD, except where specific distinctions between the two versions of RealDVD are expressly noted.

1 materially breaches the Agreement. This Court should therefore enter a preliminary injunction
2 blocking RealNetworks from distributing RealDVD, and thereby prevent the irreparable injury to DVD
3 CCA that flows from RealNetworks' brazen violations of the CSS safeguards.

4 **II. FACTUAL BACKGROUND**

5 **A. The Elements Of The CSS Copy Protection System.**

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

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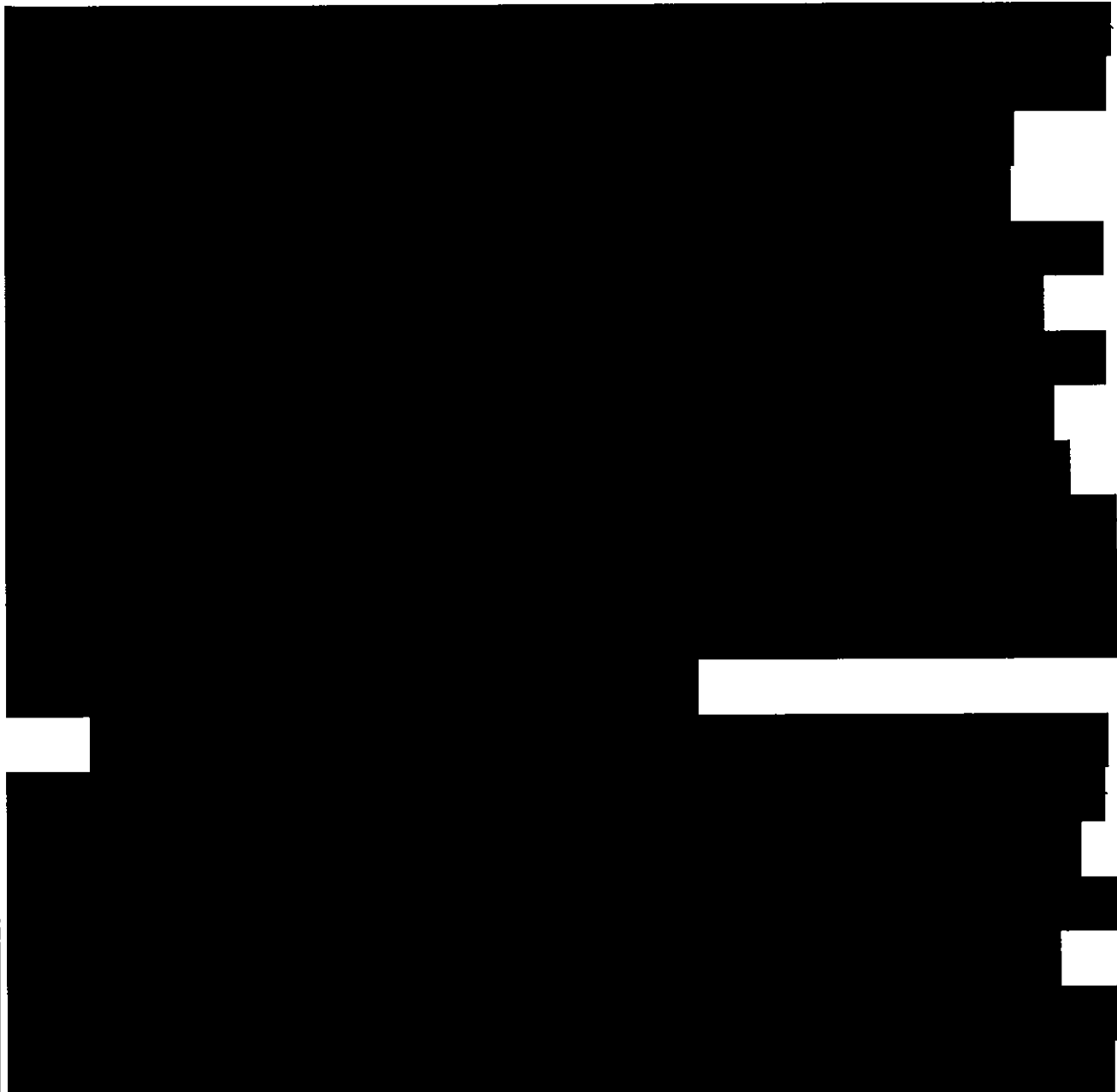
[REDACTED]

B. The Contractual Memorialization Of The CSS System.

[REDACTED]

³ All citations herein to the CSS License Agreement are to Version 1.2, which is the version that Real Networks executed. Pak Dec., Exh. J at Real001411, 001438.

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⁴ Section 2.1 of the License Agreement requires the licensee to select the membership category or categories appropriate for its product. Pak Dec., Exh. J at Real001415. Through this category selection process, the prospective licensee identifies the type (or types) of technology for which a license is sought – e.g., DVD Player, DVD Drive, Descrambler, Authenticator, etc. Pak Dec. ¶ 14.

⁵ In contrast to the publicly-available Procedural Specifications, the confidential CSS Specifications are sent to licensees only after they have executed the CSS License Agreement. Pak Dec. ¶ 17.

⁶ See, e.g., [redacted] CSS

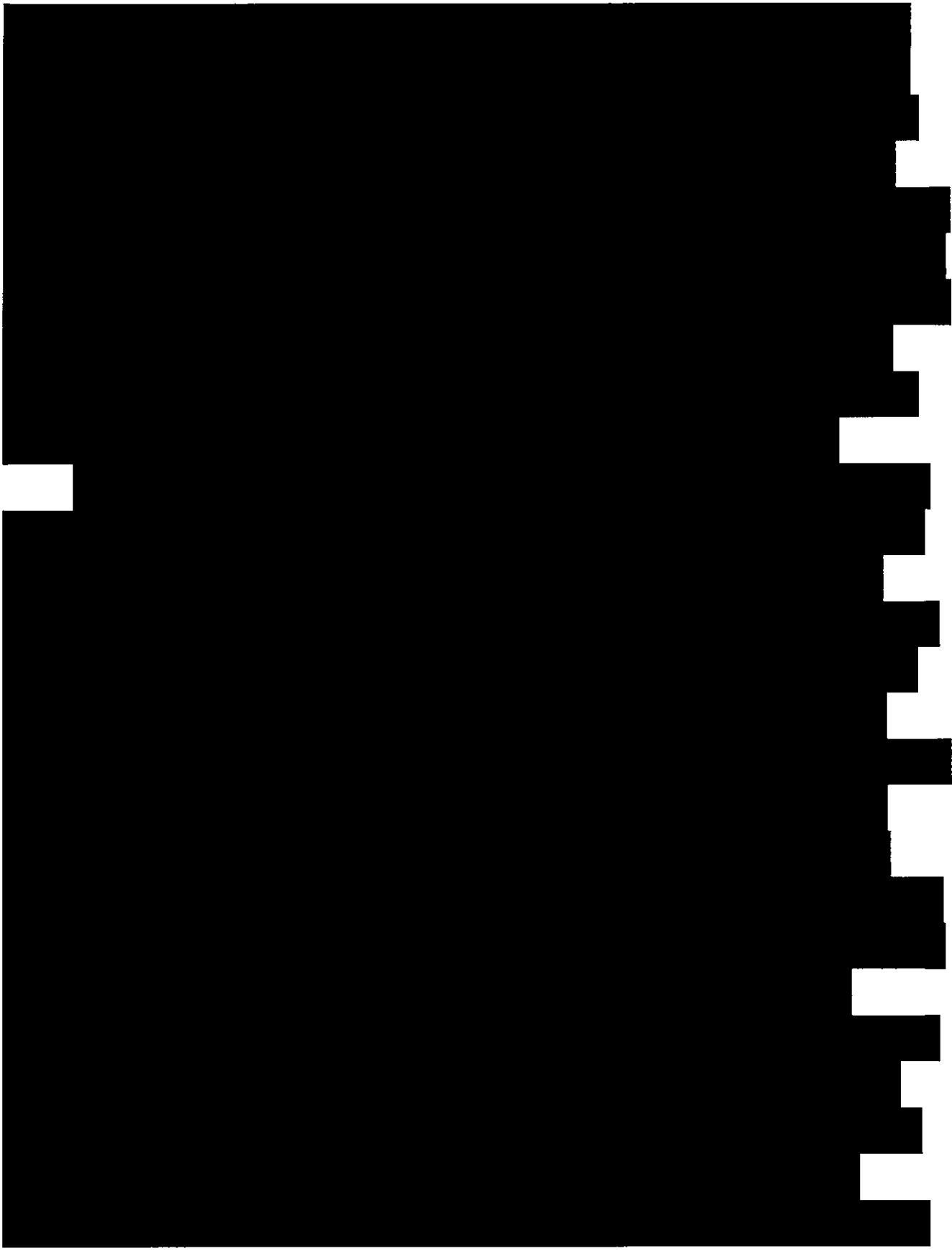
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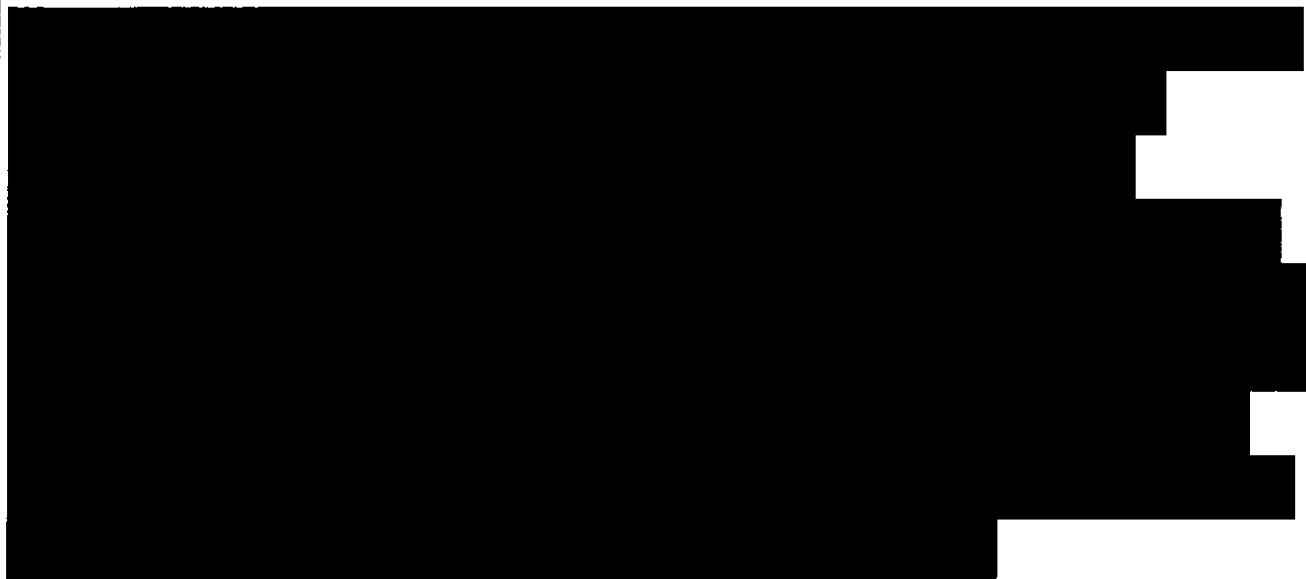
[REDACTED]

Procedural Specifications, § 6.2 (to promote "Copy Protection," CSS Licensees must adhere to "conditions . . . with respect to . . . playback of . . . CSS Data") (Pak Dec., Exh. P at DVD016768).

⁷
[REDACTED]

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10 **C. RealNetworks’ Execution Of The Agreement.**

11 RealNetworks became a CSS Licensee to obtain the decryption keys permitting playback of
12 CSS protected DVD content, so that it could make and sell its RealDVD software. Hamilton Dep.
13 235:12-20 (Ellinikos Dec., Exh. H); Chasen Dep. 46:21-49:3 (Ellinikos Dec., Exh. D). To begin the
14 licensing process, RealNetworks downloaded from the DVD CCA website in June 2007 the publicly-
15 available Procedural Specifications and the CSS License Agreement. Hamilton Dep. 38:15-24, 223:22-
16 224:7 (Ellinikos Dec., Exh. H); Pak Dec., Exh. E. DVD CCA provided additional information to
17 RealNetworks, including a description of the Membership Categories applicable to various DVD
18 playback technologies. Pak Dec. ¶ 18. RealNetworks executed the CSS License Agreement on August
19 13, 2007. Pak Dec., Exh. J at Real001438. DVD CCA countersigned the CSS License Agreement on
20 August 23, 2007. *Id.* at Real001438.

21 When it executed the CSS License Agreement, RealNetworks selected two membership
22 categories: “Authenticator Module for CSS Decryption Module” and “Descrambler Manufacturer.”
23 Pak Dec. ¶ 20; Hamilton Dep. 225:18-230:2 (Ellinikos Dec., Exh. H); Ellinikos Dec., Exh. O. On
24 September 10, 2007, RealNetworks received from DVD CCA the CSS General Specifications and the

25
26 _____
27 ⁸ “Confidential Information” is defined in the CSS License Agreement to include the CSS
28 Specifications that are “marked ‘confidential,’ when disclosed in tangible form.” Pak Dec., Exh. J at Real001412.

1 Technical Specifications for the two membership categories RealNetworks joined.⁹ Later in 2007,
2 RealNetworks joined a third membership category: “Authenticator Module for DVD Drive
3 Manufacturer.” Hamilton Dep. 215:15-17 (Ellinikos Dec., Exh. H). DVD CCA thereafter sent
4 RealNetworks the Technical Specifications for that category. Pak Dec. ¶ 20.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 **D. RealNetworks’ Plan To Evade The Requirements Of The Agreement.**

10 By executing the CSS License Agreement, RealNetworks bound itself to comply with the anti-
11 copying requirements of the Agreement. But RealNetworks never intended to comply with those
12 obligations.

13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]

23 _____
24 ⁹ In particular, RealNetworks received the Authenticator Module for CSS Decryption Module,
25 Version 1.10 (defined, *supra*, as “Authenticator Specifications”) (Pak Dec., Exh. N); and “DVD-Video
26 Descrambler, Version 1.10 (defined, *supra*, as “Descrambler Specifications”) (Pak Dec., Exh. M). Pak
27 Dec. ¶¶ 21-22, Exh. K; Hamilton Dep. 38:11-14 (Ellinikos Dec., Exh. H).

28 ¹⁰ [REDACTED]

1 In devising RealDVD, RealNetworks was aware that consumers rent and borrow DVDs, as well
2 as purchase them. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 As it was crafting RealDVD, RealNetworks placed considerable stock in a March 2007
8 California state trial court decision that rejected a challenge brought by DVD CCA under the CSS
9 General Specifications to a device known as the "Kaleidescape system." [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 The trial court in the *Kaleidescape* case (erroneously, in DVD CCA's view) ruled that the CSS
14 General Specifications are not CSS Specifications with which licensees must comply under Section 4.2
15 of the CSS License Agreement. *DVD CCA v. Kaleidescape, Inc.*, No.1:04 CV 031829 (Cal. Superior
16 Ct., March 29, 2007). During the *Kaleidescape* litigation and in its response to the decision (which it
17 immediately appealed), DVD CCA publicly stated its view that, under the CSS License Agreement, the
18 CSS General Specifications are binding on all licensees and that the CSS General Specifications
19 require playback to be directly from a physical DVD Disc. [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 In devising RealDVD, RealNetworks was aware that consumers rent and borrow DVDs, as well
2 as purchase them. [REDACTED]

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 As it was crafting RealDVD, RealNetworks placed considerable stock in a March 2007
8 California state trial court decision that rejected a challenge brought by DVD CCA under the CSS
9 General Specifications to a device known as the "Kaleidescape system." [REDACTED]

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED] The trial court in the *Kaleidescape* case (erroneously, in DVD CCA's view) ruled that the CSS
14 General Specifications are not CSS Specifications with which licensees must comply under Section 4.2
15 of the CSS License Agreement. *DVD CCA v. Kaleidescape, Inc.*, No.1:04 CV 031829 (Cal. Superior
16 Ct., March 29, 2007). During the *Kaleidescape* litigation and in its response to the decision (which it
17 immediately appealed), DVD CCA publicly stated its view that, under the CSS License Agreement, the
18 CSS General Specifications are binding on all licensees and that the CSS General Specifications
19 require playback to be directly from a physical DVD Disc. [REDACTED]

20 [REDACTED]
21 [REDACTED]
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[REDACTED]

Nevertheless, RealNetworks forged ahead with its plan to create a software product that copies DVDs to computer hard drives to be played back without further need for the physical DVD Disc.

[REDACTED]

There is no evidence that RealNetworks ever communicated to DVD CCA that it intended to construe the *Kaleidescape* decision and the Agreement as authorizing the making of permanent playable copies of DVDs on a computer hard drive.

[REDACTED]

¹¹ [REDACTED]

¹² [REDACTED]

¹³ [REDACTED]

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[REDACTED]

E. How RealDVD Operates.

[REDACTED]

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III. DVD CCA IS LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIMS THAT REALNETWORKS HAS BREACHED THE AGREEMENT AND THE COVENANT OF GOOD FAITH AND FAIR DEALING.

A plaintiff is entitled to a preliminary injunction when it demonstrates that it will likely succeed on the merits of its claims; will suffer irreparable harm in the absence of interim relief; and equitable and public interest considerations weigh in its favor. *Winter v. National Resources Defense Council, Inc.*, 129 S. Ct. 365, 374 (2008). Applying this standard, DVD CCA is entitled to a preliminary injunction on its claims against RealNetworks for breach of contract and breach of the covenant of good faith and fair dealing that is implied in all contracts.

1 **A. RealNetworks Has Breached the Agreement.**

2 Under California law, contracts are interpreted to reflect the mutual intent of the parties at the
3 time of contracting. Cal. Civ. Code § 1636; *Cedars-Sinai Medical Ctr. v. Shewry*, 137 Cal. App. 4th
4 964, 979 (2006).¹⁵ The starting point for ascertaining the parties' intent is the language of the
5 agreement. Cal. Civ. Code § 1638; *Crawford v. Weather Shield Mfg. Inc.*, 44 Cal. 4th 541, 552 (2008).
6 If the language of the contract is reasonably susceptible to more than one interpretation, it is deemed
7 ambiguous, and the court is then required to consider extrinsic evidence of the parties' respective
8 understandings of the contract. *Morey v. Vannucci*, 64 Cal. App. 4th 904, 912 (1998). If there is
9 extrinsic evidence that one party understood that the other party interpreted the contract in a particular
10 way, then the latter's interpretation shall control. Cal. Civ. Code § 1649; *see United Teachers of*
11 *Oakland, Local 771 v. Oakland Unified School Dist.*, 75 Cal. App. 3d 322, 330 (1977). The principle
12 that one party's interpretation controls when the other party was aware of it is also reflected in the
13 *Restatement of Contracts*,¹⁶ which states: "Where the parties have attached different meanings to a
14 promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by
15 one of them if at the time the agreement was made . . . that party did not know of any different meaning
16 attached by the other, and the other knew the meaning attached by the first party." *Restatement*
17 *(Second) of Contracts* § 201(2)(a) (1981); *see Merced County Sheriff's Employee's Assn. v. County of*
18 *Merced*, 188 Cal. App. 3d 662, 673 (1987) (applying *Restatement* § 201(2)(a) and holding that parties
19 were bound by contractual understanding of plaintiff when defendant had reason to know of plaintiff's
20 understanding and never communicated its understanding to the plaintiff); *Johnston v. Comm'r*, 461
21 F.3d 1162, 1165 (9th Cir. 2006) (same).

22 Applying these rules of contract interpretation, the language of the Agreement evinces one
23 overriding contractual objective: to prevent casual users from copying CSS-protected DVD content.
24 The principal means of carrying out that objective is to require protected content to flow only from the
25 physical DVD in an authorized DVD Drive through the authentication process and directly to the

26 ¹⁵ The CSS License Agreement states that it is governed by California law. *See* CSS License
27 Agreement, § 10.4(a), Pak Dec., Exh. J at Real001436.

28 ¹⁶ California courts look to the *Restatement of Contracts* for guidance on contract law issues.
See, e.g., Binder v. Aetna Life Ins. Co., 75 Cal. App. 4th 832, 850, n.8 (1999).

1 Descrambler software for display. The CSS Specifications emphasize that this process must ensure that
2 the data is not intercepted in a manner that allows a user to create a digital copy of a movie. The
3 objective of the Agreement and the means for accomplishing it are reinforced by the contractual
4 language expressly preventing licensees from circumventing the purpose of the contract.

5 Even if the language of the Agreement were ambiguous or susceptible to more than one
6 interpretation, the undisputed extrinsic evidence demonstrates that DVD CCA interpreted the
7 Agreement as memorializing the central anti-copying objective of the CSS system, and that DVD CCA
8 considered the requirement of the physical presence of the DVD Disc to be a primary tool for achieving
9 that objective. [REDACTED]

10 [REDACTED] The extrinsic evidence also conclusively shows that, at the time it executed
11 the CSS License Agreement, RealNetworks was fully aware that DVD CCA interpreted the Agreement
12 in this way. [REDACTED]

13 [REDACTED] There is no evidence whatsoever that RealNetworks ever
14 conveyed a contrary interpretation to DVD CCA. Therefore, even if the language of the Agreement
15 were ambiguous or susceptible to more than one interpretation, DVD CCA's interpretation would carry
16 the day under California rules of contract interpretation, thus precluding RealNetworks from producing
17 and selling a device that copies DVDs for playback from a source other than the physical DVD Disc.¹⁷

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20 ¹⁷ Under California law, uniform contracts, such as the Agreement, are generally subject to the
21 same rules as any other contract. *See, e.g., Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1264
22 (1992) (“While insurance contracts have special features, they are still contracts to which the ordinary
23 rules of contract interpretation apply.”); *Badie v. Bank of Am.*, 67 Cal. App. 4th 779, 798-99 (1998)
24 (applying normal rules of contract interpretation, including rules governing use of extrinsic evidence, to
25 a standardized consumer banking contract); *Independent Ass’n of Mailbox Ctr. Owners, Inc. v. Superior
26 Court*, 133 Cal. App. 4th 396, 407 (2005) (applying normal rules of contract interpretation to
27 standardized franchise contract); *Adobe Sys., Inc. v. One Stop Micro, Inc.*, 84 F. Supp. 2d 1086, 1092
28 (N.D. Cal. 2000) (using extrinsic evidence to resolve ambiguity in uniform software licensing
agreement). The doctrine of *contra proferentem*, which states that ambiguities in a contract should be
construed against its drafter, Cal. Civ. Code. § 1654, is inapplicable because it is a rule of last resort that
comes into play only when (unlike the case here) the meaning of a contract cannot be ascertained
through other canons of interpretation, including through the use of extrinsic evidence. *See Rainier
Credit Co. v. W. Alliance Corp.*, 171 Cal. App. 3d 255, 263 (1985); *Pacific Gas & Elec. Co. v. Superior
Court*, 15 Cal. App. 4th 576, 596 (1993), *abrogated on other ground in Advanced Micro Devices, Inc. v.
Intel Corp.*, 9 Cal. 4th 362, 376 (1994).

1 As set forth above, RealDVD saves and copies DVDs to computer hard drives and plays them
2 back in the absence of the DVD Disc itself, bypassing multiple layers of the CSS protection system.
3 Thus, RealNetworks has breached the Agreement. In particular, RealDVD does not comply with the
4 anti-copying requirements of the Agreement in at least the following material respects.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 [REDACTED]

4 [REDACTED]

5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED] Its complaint against DVD CCA interposes the *Kaleidescape* decision as a defense

12 to charges that RealDVD breaches the Agreement. RealNetworks Amended Complaint ¶ 5. But that

13 decision furnishes no shield to RealNetworks for two reasons. First, DVD CCA’s theory of breach in

14 the *Kaleidescape* trial was confined to the assertion that the Kaleidescape system violated Sections 1.5

15 and 2.1.2 of the CSS General Specifications. DVD CCA’s charges against RealNetworks are not so

16 limited. DVD CCA has alleged here that, in designing RealDVD, RealNetworks violated not only the

17 CSS General Specifications, but also the Procedural Specifications, the CSS License Agreement, and

18 the category-specific CSS Specifications that RealNetworks selected, each of which contain multiple

19 provisions (cited above) which rely on and require the presence of the physical DVD disc when

20 decrypting and playing back its contents. The trial court’s ruling in *Kaleidescape* that the CSS General

21 Specifications are not part of the CSS Specifications has no conceivable bearing on the applicability of

22 _____

23 ¹⁸ CSS Licensees are required to select the appropriate membership category or categories for

24 their products. CSS License Agreement, § 2.1, Pak Dec., Exh. J at Real001415. One of the three

25 categories that RealNetworks selected was Authenticator Module for DVD Drive Manufacturer.

26 Hamilton Dep. 215:15-17 (Ellinikos Dec., Exh. H); Pak Dec. ¶ 21. [REDACTED]

27 [REDACTED] (Ellinikos Dec., Exh. H). This inappropriate

28 selection constitutes a breach of the Agreement, CSS License Agreement, § 2.1, Pak Dec., Exh. J at

Real001415-16, entitling DVD CCA to preliminary relief. *See infra*, p. 20 (noting that a breach of

Section 2.1 warrants injunctive relief under Section 9.2 of the CSS License Agreement). RealNetworks

further breached Section 2.1 of the License Agreement in failing to select the membership category for

CSS Decryption Modules. *See Kelly Dec.* ¶¶ 47, 68 [REDACTED]

1 the other CSS Specifications to RealDVD.¹⁹ Second, even as to the CSS General Specifications
2 themselves, the trial court decision in *Kaleidescape* does not shelter RealDVD.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

20 By contrast, there is
11 no evidence that DVD CCA was aware that RealNetworks had a contrary understanding of the
12 Agreement. On these uncontested facts, the principles of Section 1649 of the California Civil Code
13 and Section 201(2) of the *Restatement* bind RealNetworks to its understanding of DVD CCA's
14 understanding, *i.e.* that the Agreement requires that devices play back CSS protected content from a
15 DVD that is in the DVD Drive of the playback system.

16 **B. RealNetworks Has Breached the Covenant of Good Faith and Fair Dealing.**

17 An implied duty of good faith and fair dealing is part of every contract. *Egan v. Mutual of*
18 *Omaha Ins. Co.*, 24 Cal. 3d 809, 818 (1979). The obligations imposed by this covenant preclude one
19 party from taking action that frustrates the other party's contractual expectations. *Guz v. Bechtel Nat'l*
20 *Inc.*, 24 Cal. 4th 317, 349 (2000). Put another way, "[t]he implied covenant imposes upon each party

21 _____
22 ¹⁹ The distinct and expanded theories of breach in this case follow from the fact that

23 [REDACTED]
24 [REDACTED] Accordingly, the contractual constraints to which the two products are subject,
while overlapping, are not identical.

25 ²⁰ [REDACTED] Because the appeal is still pending, the
26 trial court ruling is not a final judgment for purposes of California law regarding the application of the
27 doctrines of *res judicata* and collateral estoppel to bar relitigation of claims and issues previously
28 litigated and decided. *Franklin & Franklin v. 7-Eleven Owners For Fair Franchising*, 85 Cal. App. 4th
1168, 1174 (2000). California's rules on those doctrines govern here because federal courts must apply
state law principles to ascertain the preclusive effect of decisions rendered by courts of that state. *Intri-
Plex Tech., Inc. v. Crest Group, Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007).

1 the obligation to do everything that the contract presupposes they will do to accomplish its purpose.”
2 *Schoolcraft v. Ross*, 81 Cal. App. 3d 75, 80 (1978).

3 Here, DVD CCA expected that, to accomplish the Agreement’s purpose of preventing copying
4 of protected content, RealNetworks would use the CSS technology it obtained from DVD CCA under
5 the license to produce a device that plays back protected content from the physical DVD Disc, and that
6 does not copy protected content to a hard drive or other storage media for playback without the DVD
7 Disc. DVD CCA thus expected that RealNetworks’ device would preclude consumers from making
8 lasting digital copies of DVDs, including, for example, the compilation of a permanent DVD library on
9 a computer from rented or borrowed DVDs. By producing a device that does exactly the opposite,
10 RealNetworks has frustrated DVD CCA’s contractual expectation. RealNetworks

11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

committed a
17 paradigmatic breach of the covenant of good faith and fair dealing.²¹

18
19
20
21
22
23
24
25 ²¹ See *Lippman v. Sears, Roebuck & Co.*, 44 Cal. 2d 136, 142-43 (1955) (retailer breached
26 covenant of good faith and fair dealing by failing to maintain retail store on shopping center premises;
27 retailer’s payment of rent for the space failed to make up for frustration of lessor’s expectation that
28 retailer had leased space to serve as the center’s anchor tenant); *Universal Sales Corp. v. California
Press Mfg. Co.*, 20 Cal. 2d 751, 771 (1942) (seller of machine breached covenant of good faith and fair
dealing by failing to share information regarding an improved machine and thus frustrating expectation
of partner in joint venture to develop and market the machine).

1 **IV. ENTRY OF A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT**
2 **IRREPARABLE INJURY TO DVD CCA, AND PUBLIC INTEREST**
3 **CONSIDERATIONS AND THE BALANCE OF EQUITIES WEIGH IN FAVOR OF**
4 **INTERIM RELIEF.**

5 **A. The Agreement Stipulates That A Breach Of Key Provisions Safeguarding CSS-**
6 **Encrypted Content, Which RealNetworks Has Violated, Will Cause Irreparable**
7 **Injury To DVD CCA.**

8 RealNetworks' multiple breaches of the Agreement trigger application of the remedial provision
9 of the CSS License Agreement, Section 9.2. In that provision, the parties expressly stipulated that
10 DVD CCA would suffer "lasting effect . . . and harm [arising] from a breach" of certain specified
11 contract terms safeguarding CSS-encrypted content, including Sections 2.1, 4.2 (which, as indicated
12 above, requires compliance with the CSS Specifications), and 5 of the CSS License Agreement,
13 because such breaches would "mak[e] available the means for widespread unauthorized copying of
14 copyrighted content intended to be protected." Pak. Dec., Exh. J at Real001432. In recognition of the
15 magnitude of this threat to the central objective of the Agreement, the parties further stipulated in
16 Section 9.2 that the harm flowing from a breach of these contract terms "[would] be irreparable," and
17 that "monetary damages [would] not [be] sufficient to remedy the injury." *Id.* Accordingly, to provide
18 a sufficient remedy for injury, the parties stipulated in Section 9.2 that DVD CCA would be entitled to
19 "specific performance or other temporary, preliminary, or permanent injunctive relief . . . (whether or
20 not there have been commercial sales of products subject to the requested relief)." *Id.* Because
21 RealNetworks has breached (*inter alia*) Sections 2.1, 4.2 and 5 of the CSS License Agreement, DVD
22 CCA is entitled to a preliminary injunction pursuant to the stipulated remedy of Section 9.2.

23 Most of the courts nationwide that have addressed the enforceability of stipulated irreparable
24 injury provisions like Section 9.2 of the CSS License Agreement have held that such provisions are
25 dispositive and should be honored, without any need to evaluate the evidentiary basis for the
26 irreparable injury claim.²² This Court should follow suit and enforce the stipulated irreparable injury

27 ²² See *Cirrus Holding Co. Ltd. v. Cirrus Indus., Inc.*, 794 A.2d 1191, 1209 (Del. Ch. 2001);
28 *Concept, Inc. v. Thermotemp, Inc.*, 553 So. 2d 1325, 1326-28 (Fla. Dist. Ct. App. 1989); *Mann v.*
Johnson Mem. Hosp., 611 N.E.2d 676, 679 (Ind. Ct. App. 1993); *Hockenberg Equip. Co. v.*
Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 158 (Iowa 1993); *Stanley Works v. Newell Co.*, No.
2:91CV00488, 1992 WL 345622, *1-2 (D. Conn. Oct. 2, 1992). Other courts have held that, while not
dispositive, stipulated irreparable injury provisions must be given significant weight in crafting relief;
these courts honor the provisions, except when there is absolutely no evidence of potential harm to the

1 provision in the CSS License Agreement by entering a preliminary injunction against RealNetworks.
2 Indeed, enforcement of the stipulated remedy provision is central to the functioning of the Agreement
3 as a whole. DVD CCA's insistence that licensees adhere to the licensing requirements ensures the
4 maintenance of the delicate balance that the Agreement strikes to accommodate the interests of content
5 providers, on the one hand, and the consumer electronics and information technology companies that
6 make the devices consumers use to play back DVDs, on the other. If licensees are permitted to get
7 around those requirements by making unlawful copies of DVD content, the entire system is
8 undermined. Parsons Dec. ¶¶ 5-6. Instead of trying to guess upfront in a liquidated damages
9 provision as to the amount of damages such harm would cause or leave that decision to a jury, the
10 parties here came up with a simple and equitable solution: they agreed in advance that a breach would
11 result in irreparable injury and that the remedy for that breach would be injunctive relief. The
12 stipulated remedy to which they agreed comprehensively assesses the injury that DVD CCA will suffer
13 from the degradation of its system for protecting intellectual property, from the attendant risk that other
14 licensees will forsake their obligations and follow the violator's lead, and from the destruction of
15 critical trust relationships with other businesses.²³

16 **B. The Release of RealDVD Will Cause Irreparable Injury To DVD CCA.**

17 Even without the stipulated irreparable injury provision in the CSS License Agreement, DVD
18 CCA is entitled to injunctive relief because RealNetworks' release of RealDVD will cause irreparable
19 injury to DVD CCA. The threat posed to DVD CCA by the specter of the unauthorized copying of
20 DVDs by RealDVD is manifest in the record. RealNetworks has touted RealDVD as a cheap and easy
21 way to watch and store DVDs. It has proclaimed that, for less than \$30, consumers can permanently
22 download RealDVD on to their personal computers, store copies of DVDs on their computers, and
23

24 party seeking to enforce the stipulation. *See, e.g., Dominion Video Satellite, Inc. v. EchoStar Satellite*
25 *Corp.*, 356 F.3d 1256, 1265 (10th Cir. 2004); *Traders Int'l, Ltd. v. Scheuermann*, No. H-06-1632, 2006
WL 2521336, *9 (S.D. Tex. Aug. 30, 2006).

26 ²³ The stipulated irreparable injury provision in the CSS License Agreement is akin to liquidated
27 damages provisions in contracts, which California courts regularly honor because "they remove the
28 uncertainty factor from determining damages from a breach of contract and reduce litigation." *Utility*
Consumers' Action Network, Inc. v. AT&T Broadband of Southern California, Inc., 135 Cal. App. 4th
1023, 1038 (2006).

1 watch them later at their convenience. [REDACTED]

2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 As the Motion

12 Picture Studio Plaintiffs have shown in their brief, consumer perception that it is “legal” to copy DVDs
13 on computers through RealDVD is likely to take hold in the marketplace because of RealNetworks’
14 well-known brand name and mainstream distribution networks.

15 If RealNetworks is permitted to launch its product and test its prediction of a strong consumer
16 response to a device that can make playable copies of DVDs, the integrity of the CSS system will be
17 fatally undermined, thus vitiating the purpose and mission of DVD CCA. Parsons Dec. ¶ 7; [REDACTED]

18 [REDACTED] DVD CCA was formed to create an
19 environment in which content providers could release their intellectual property on the DVD format
20 without fear of copying, and in which the consumer electronics and information technology companies
21 would be assured that there would be content available to be played back on their products and that
22 their products would be affordable. Parsons Dec. ¶¶ 4, 6. Allowing RealNetworks to market a product
23 capable of copying would compromise the environment of trust essential to DVD CCA’s mission. *Id.*

24
25 _____
26 24 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 at ¶ 6. And absent that collective trust, DVD CCA will be irreparably injured because its value as an
2 organization turns entirely on its ability to enforce the Agreement and ensure compliance with the CSS
3 safeguards. *Id.* at ¶ 7. Simply put, the raison d'être of DVD CCA will be gutted if licensees are
4 permitted freely to violate the Agreement by selling a DVD copying machine. This injury to DVD
5 CCA's reputation and goodwill alone warrants injunctive relief. *See eBay, Inc. v. Bidder's Edge, Inc.*,
6 100 F. Supp. 2d 1058, 1066 (N.D. Cal. 2000) (loss of customer goodwill is irreparable "because it is
7 neither easily calculable, nor easily compensable and is therefore an appropriate basis for injunctive
8 relief").²⁵

9 **C. Public Interest And Equitable Considerations Support Injunctive Relief.**

10 Public interest considerations strongly support the entry of the interim relief that DVD CCA is
11 requesting. The effects of the demise of efforts to prevent copying of CSS-encrypted content through
12 the proliferation of products like RealDVD will ultimately be felt by consumers. As content providers
13 lose confidence in DVD CCA's ability to control unauthorized copying, they could be forced to switch
14 to other media or adopt other more costly means of protection -- all of which will curtail the vitality or
15 increase the cost of one of the most successful consumer products in history. The millions upon
16 millions of members of the public who rent or purchase DVDs for their personal home viewing thus
17 will lose out. Dunn Dep. 177:23-180:1 (Ellinikos Dec., Exh. F) (discussing consumer demand).

18 The balance of equities tips sharply in DVD CCA's favor as well. In essence, RealNetworks
19 seeks to rewrite the Agreement to generate a whole new contract -- one that allows it to reap the
20 benefits of CSS encryption technology, but without abiding by the legal framework governing use of
21 that technology. The equities cannot be balanced through an order requiring RealNetworks to pay

22 _____
23 ²⁵ The threat to the fabric of the CSS License Agreement is all the more ominous because it
24 comes at an especially critical moment for DVD CCA. In response to marked changes in the way the
25 public today watches films and television programs, content providers and consumer electronic and
information technology companies are devoting substantial resources to delivering content in new
forms, such as through internet download and video-on-demand services. [REDACTED]

26 [REDACTED] The 21st century technological innovations already have proven to be
economically fruitful, and the potential for further development of novel means for consumers to enjoy
27 CSS-protected content legally is bright. [REDACTED] But these breakthroughs are now imperiled by
the emergence of RealDVD, which seeks to stake out its place in the digital download market by
28 eviscerating the content protection system that has given comfort to content providers and provided a
level playing field on which technology companies may operate and innovate.

1 damages for its ongoing breaches of the Agreement, but permitting RealNetworks to sell RealDVD.
 2 Even assuming (contrary to the premise of the contract’s stipulated irreparable injury provision) that
 3 damages could be calculated, the notion that damages payments would strike a happy medium flies in
 4 the face of the time-honored principle that “[no] man should be required to contract a second time with
 5 one who has without cause breached a prior contract with him.” *Zanker Dev. Co. v. Cogito Sys. Corp.*,
 6 215 Cal. App. 3d 1377, 1382 (1989) (internal quotation and citation omitted.) Permitting a damages
 7 remedy here would create a new contract by enabling RealNetworks to do what the original contract
 8 forbade it from doing (so long as it is able to pay for it), to the great detriment of DVD CCA.

9 By comparison, RealNetworks will incur relatively modest burdens if it is preliminarily
 10 enjoined from selling RealDVD. RealNetworks has admitted that it does not know of other companies
 11 that may be poised to market products that could compete with RealDVD: it therefore cannot show
 12 that competitors will capitalize on its absence from the market to gain an advantage over the company
 13 while the preliminary injunction is in place. [REDACTED]

14 Furthermore, RealNetworks produces a number of different products, the sales of which will not be
 15 constrained by a preliminary injunction barring sales of RealDVD. [REDACTED]

16 [REDACTED]
 17 [REDACTED]; see also *Ellinikos Dec.*, Exh. Y at 40-43
 18 (discussing revenue RealNetworks earned from its products).

19 **V. CONCLUSION**

20 For the foregoing reasons, DVD CCA respectfully submits that the Court should grant its
 21 motion for a preliminary injunction.

22 Dated: March 19, 2009

Respectfully submitted,
 AKIN GUMP STRAUSS HAUER & FELD LLP
 WHITE & CASE LLP

26 By _____ /s/
 27 Reginald D. Steer
 Attorneys for Defendant and Counterclaimant
 28 DVD COPY CONTROL ASSOCIATION, INC.

ATTACHMENT A

**ATTACHMENT
FILED UNDER SEAL**

ATTACHMENT B

ATTACHMENT
FILED UNDER SEAL