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 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
 21 REALNETWORKS HOME
 ENTERTAINMENT, INC.,

22 Defendants.
 23
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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.

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

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