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RealDVD or Steal DVD?

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Speakers

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DVD Lockdown: A Discussion of RealNetworks, Inc. v. DVD CCA

Robert Greenlees

Since the passage of the Digital Millennium Copyright Act (DMCA), courts have been faced with deciding the extent to which consumers and software manufacturers may access and duplicate copyrighted material contained on Digital Versatile Discs ("DVD"s). Recently at the forefront is an on-going dispute, in the US District Court in the Northern District of California, involving RealNetworks, Inc. ("Real"), the DVD Copy Control Association, Inc. ("DVD CCA"), and assorted Hollywood film studios ("Studios").¹ The case has centered around Real's controversial creation and sale of "RealDVD," a software product that enables consumers to backup DVD content.

The RealDVD case presents interrelated issues concerning the licensing agreement for the copy control technology, the DMCA anti-circumvention regulations and fair use rights. In August of 2009, the court granted the Studios' and the DVD CCA's motions for preliminary injunction to extend the previously-imposed temporary restraining order (TRO) enjoining the sale of the software. This discussion will focus on Judge Patel's decision on the preliminary injunction motion and cases cited by the court, and the parties, that provide precedent for the decision.

CASE BACKGROUND

On September 30, 2008, Real filed for declaratory judgment sanctioning the sale of its software product, "RealDVD."² The Studios also filed a preliminary injunction motion asserting Real's breach of contract and violations of the DMCA. The court issued a TRO temporarily enjoining the product in October 2008.³

¹ RealNetworks, Inc. v. DVD CCA, 641 F.Supp. 2d 913, 918 (N.D. Cal., 2009) (the film studios jointly involved in the case are: "Disney Enterprises, Inc., Paramount Pictures Corp., Sony Pictures Entertainment, Inc., Twentieth Century Fox Film Corp., NBC Universal, Inc., Warner Bros. Entertainment, Inc., Viacom, Inc., Universal City Studios Productions L.L.P., Universal City Studios L.L.P., Sony Pictures Television, Inc., Columbia Pictures Industries, Inc., and Walt Disney Pictures")

² RealNetworks, 641 F.Supp. 2d at 917 (TRO also applied to other Real products implementing similar technology.)

³ RealNetworks, 641 F.Supp. 2d at 917.

At the core of this case is the licensing agreement granting use of the technology used to prevent illicit DVD copying. Judge Patel explained that DVD CCA licenses the Copy Scramble System (“CSS”) software technology to hardware and software creators so that their devices and applications may access and use the content of the DVDs.⁴ Real licensed this technology from DVD CCA for the production of RealDVD.⁵ DVD CCA, which the Studios joined as a 3rd party beneficiary under the agreement, asserts a violation of the license, and the studios separately claim a violation of the DMCA for circumvention of the CSS and other encryption technologies.⁶

The threshold issue in this case is a question of first impression for the court: What liberties with the CSS technology does the license afford the licensees?⁷ Previous cases had addressed dissemination of CSS specifications and products that utilize it for purposes of circumvention, but those cases did not involve licensees.⁸ Real argued that it was not its intent to design a system that eradicated all CSS protection -- its intent was to extend the utility of a DVD beyond the limitations of the physical media, to provide additional levels of convenience for the consumer. Real also argued that the product complied with the CSS license and provided *additional* protection, while also providing the ability to backup the DVD content in a closed environment and offer services such as parental control options.⁹ The court however found these arguments unavailing.¹⁰

The court ultimately interpreted the license to require licensees to adhere to each step in the complex process of CSS encryption and authentication, specifically regarding the physical

⁴ RealNetworks, 641 F.Supp. 2d at 921.

⁵ RealNetworks, 641 F.Supp. 2d at 922.

⁶ RealNetworks, 641 F.Supp. 2d at 919 (standing under the license) Pl.’s (Studios) Mot. Prelim. Inj. 10:3 and 15:15, Mar. 19, 2009, <http://www.eff.org/files/filenode/RealDVD/Studio%20PI%20motion.pdf> (asserting DMCA claims).

⁷ RealNetworks, 641 F.Supp. 2d at 933, 934 (“While it is true that no case has ever held that a licensee to the CSS License Agreement with the DVD CCA can be held liable for circumventing that same technology under the DMCA, that is simply because no court has ever adjudicated the issue.”)

⁸ Universal City Studios, Inc. v. Reimerdes, 111 F. Supp.2d 294, 311-12 (S.D.N.Y. 2000), *aff’d*, Universal City Studios, Inc. v. Corley, 273 F. 3d 429 (2d Cir. 2001) (discussing circulation of the CSS code). 321 Studios v. Metro Goldwyn Mayer Studios, Inc., 307 F. Supp.2d 1085, 1089-90 (N.D. Cal. 2004) (considering DVD copy technology).

⁹ Pl.’s (Real) Opp. Mot. Prelim. Inj. (Revised) 10-13, Mar. 23, 2009, <http://www.eff.org/files/filenode/RealDVD/Real%20Opp%20to%20PI.0.pdf>.

¹⁰ RealNetworks, 641 F.Supp. 2d at 935.

DVD itself.¹¹ The CSS technology scrambles the video content on the DVDs and encrypts the data, preventing access by non-CSS licensed hardware and software. CSS technology incorporated in the software and DVD playback devices then enables access to the encrypted files and use of “keys” that render the video playable. This access process occurs each time the DVD is used. The court found it to be an important way for content owners to protect the financial interest in the valuable digital content stored on the discs.¹²

The critical question for the court was whether extricating the physical disc from the access process, and therefore removing a significant amount of the CSS protections, constituted a breach of the CSS license. The court found that RealDVD runs afoul of the CSS specifications because it allows its users to save backup copies DVD content for later use *without* a DVD disc. RealDVD, also referred to as “Vegas” by the court and Real, uses CSS technology to access the content, saves it to a personal computer hard drive with some of the CSS encryption intact and adds another layer of encryption known as Advanced Encryption System 128 (“AES”).¹³ By eliminating the physical disc from content playback, Real DVD avoids the following elements of CSS protection contained in the DVD: “DVD drive-locking, secure storage of keys on a DVD, CSS authentication or CSS bus encryption.”¹⁴

In reaching the above conclusion, the court relied on parts of the agreement that were in dispute between the parties.¹⁵ When a company wishes to license the CSS technology from the DVD CCA, it signs a License Agreement and is provided with Procedural Specifications. The licensee is provided with additional confidential documentation, depending upon the category of license it has chosen.¹⁶ Real argued that the specifications it received from DVD CCA after executing the License Agreement, including the General Specifications, were not properly

¹¹ RealNetworks, 641 F.Supp. 2d at 934.

¹² RealNetworks, 641 F.Supp. 2d at 919-20.

¹³ RealNetworks, 641 F.Supp. 2d at 924, 927.

¹⁴ RealNetworks, 641 F.Supp. 2d at 927.

¹⁵ RealNetworks, 641 F.Supp. 2d at 923-24.

¹⁶ RealNetworks, 641 F.Supp. 2d at 921-22.

incorporated by reference.¹⁷ The court found that the tiered system of disclosure of confidentiality was acceptable and that Real forfeited this defense by not rejecting the agreement at the time it received the supplemental specifications.¹⁸ Therefore, the court found that the agreement comprised all of the above referenced documents, including the General Specifications.

The General Specifications establish as an explicit goal, "To prevent digital-to-digital copying in a personal computer environment."¹⁹ The court inferred that the language in the General Specifications expressing a need for maintaining the confidentiality of the CSS keys that unlock the video, coupled with the need for a physical DVD in the authentication process, foreclosed opportunities to manipulate the CSS technology to allow access to the DVD content without the DVD present. Thus, based on the entirety of the licensing documents, the court concluded that the physical DVD was a required element of adherence to the CSS license.²⁰

BREACH OF DVD CCA LICENSE AGREEMENT

In analyzing DVD CCA's breach of contract claim, the court decided that Real's interpretation of the contract was unreasonable. Real had asserted that the license agreement constituted a contract of adhesion and that Real's "reasonable expectations" should govern the terms.²¹ The court, however, found that Real failed to convey its expectations to DVD CCA. DVD CCA argued that the mutual expectations of the parties should dictate the terms of the agreement and, beyond that, "If there is extrinsic evidence that one party understood that the other party interpreted the contract in a particular way, then the latter's interpretation shall

¹⁷ RealNetworks, 641 F.Supp. 2d at 945.

¹⁸ RealNetworks, 641 F.Supp. 2d at 945-46 (Applying precedent to consider the behavior of each party with regards to their expectations (citing *Kennecott Corp. v. Union Oil Col.*, 196 Cal. App. 3s 1179, 1190 (Cal. Ap. 1987)))

¹⁹ RealNetworks, 641 F.Supp. 2d at 923. (citing to General Specifications § 1.2).

²⁰ RealNetworks, 641 F.Supp. 2d at 923-24.

²¹ Pl.'s (Real) Opp. Mot. Prelim. Inj. (Revised) 22:26-23:12, Mar. 23, 2009,

http://www.eff.org/files/filenode/RealDVD/Real%20Opp%20to%20PI_0.pdf (for the argument that an "adhesive agreements will be interpreted according to the reasonable interpretation of the adhering party." (quoting *Acorn v. Household Int'l, Inc.*, 211 F. Supp. 2d 1160, 1173 (N.D. Cal. 2002))).

control.”²² However, the court did not adopt DVD CCA’s argument that Real was put on notice of DVD CCA’s interpretation of the contract by the organization’s opposition to very similar use of the CSS license technology in DVD CCA v. Kaleidescape.²³

Ultimately, the court found that the physical DVD was a required part of the CSS authentication process.²⁴ It found that authentication was required each time DVD content is accessed, and by modifying that requirement, RealDVD technology breaks the CSS process.²⁵ The court wrote, “That Real preserves CSS encryption on DVD content copied to a hard drive does not forgive Real’s other violations and breaches of the CSS License Agreement. The RealDVD products, by their very nature, open a veritable Pandora’s box of liability for Real.”²⁶ The court also held that Real violated the implied covenant of good faith and fair dealing.²⁷

DMCA – PRECEDENT

The DMCA prohibits technology that circumvents certain protection methods employed by content owners to protect their intellectual property. It prohibits circumvention of “access-control” technology under 1201(a)(2), and products that enable unauthorized copying of copyrighted content through circumvention methods under 1201(b)(1).²⁸

The RealDVD court relied on the thorough explanation of CSS and its relationship to the DMCA provided by Judge Kaplan of the US District Court for the Southern District of New York in Universal City Studios, Inc. v. Reimerdes.²⁹ In that case, finding that defendants’ distribution of computer code that enabled bypassing the CSS encryption technologies constituted a violation of the DMCA anti-circumvention provisions, Judge Kaplan described the application of the

²² Def’s (DVD CCA) Mot. Prelim. Inj. 14:1-3, Mar. 19, 2009, <http://www.eff.org/files/filenode/RealDVD/DVDCCA%20motion%20for%20PI.pdf> (for precedent that mutual intent should guide interpretation (citing Cedars-Sinai Medical Ctr. v. Shewry, 137 Cal. App. 4th 964, 979 (2006)). 14:7-10 (for support that interpretation should be guided by the party with less knowledge of the other’s expectations citing United Teachers of Oakland, Local 771 v. Oakland Unified School Distr., 75 Cal. App. 3d 322, 330 (1977)).

²³ RealNetworks, 641 F.Supp. 2d at 948, 950-51. (discussing DVD CCA v. Kaleidescape, Inc., No. 1:04 CV 031829 (Cal. Sup. Ct., March 29, 2007) a state court decision with similar contractual issues that the court here did not dwell on but Real apparently had relied on).

²⁴ RealNetworks, 641 F.Supp. 2d at 950.

²⁵ RealNetworks, 641 F.Supp. 2d at 952.

²⁶ RealNetworks, 641 F.Supp. 2d at 952.

²⁷ RealNetworks, 641 F.Supp. 2d at 952-53.

²⁸ RealNetworks, 641 F.Supp. 2d at 931.

²⁹ RealNetworks, 641 F.Supp. 2d at 932.

DMCA's access-control provision.³⁰ The defendants there argued that the CSS offered technically weak protection and therefore did not meet the threshold to "effectively control" content access under 1201(a)(2)(A).³¹ In light of the statutory definition of effective control and the legislative history, the court found that the access-control technology must merely control access to some degree, without being so narrowly focused on the strength or weakness of the technology.³² Therefore, the court found the CSS is an effective form of access control.³³

In analyzing the claims under DMCA 1201(b) allegation, the RealDVD court also relied on the holding in 321 Studios, which presented similar issues under the DMCA.³⁴ There, 321 Studios had also sought a declaratory judgment, arguing that the sale of a product that allowed users to backup DVDs to a series of Compact Discs (CDs) did not violate the anti-circumvention provisions.³⁵ The court in 321 Studios concluded that the CSS technology in fact was covered by both 1201(a)(2), and also 1201(b)(1).³⁶ 321 Studios argued that CSS was only an access-control system, covered under 1201(a)(2), and not *copy-control* system under 1201(b), based on the fact that copying of a disc was still *possible* despite the CSS protections. The court in 321 Studios rejected that argument, however, because CSS circumvention was still necessary to create a *usable* copy of the content.³⁷

The court RealDVD court summarized, "It is evident to this Court, as it has been to previous courts, that CSS is a technological measure that both effectively controls access to DVDs and effectively protects the right of a copyright holder."³⁸

³⁰ Reimerdes, 111 F. Supp.2d 294 at 303-04.

³¹ Reimerdes, 111 F. Supp.2d 294 at 317, 318.

³² Reimerdes, 111 F. Supp.2d 294 at 317, 318.

³³ Reimerdes, 111 F. Supp.2d 294 at 318.

³⁴ RealNetworks, 641 F.Supp. 2d at 934-35. (discussing 321 Studios, 307 F. Supp.2d at 1095).

³⁵ 321 Studios, 307 F. Supp.2d at 1089-1090.

³⁶ 321 Studios, 307 F. Supp.2d at 1095.

³⁷ 321 Studios, 307 F. Supp.2d at 1096, 1097.

³⁸ RealNetworks, 641 F.Supp. 2d at 935 (quoting 321 Studios, 307 F. Supp.2d at 1095).

DMCA – APPLICATION IN THE PRESENT CASE

The Studios claim that RealDVD violates DMCA Section 1201(a)(2) and 1201(b).³⁹ 1201(a)(2) prohibits trafficking in technology that thwarts *effective* access control provisions. Real argued that because the confidentiality of the CSS code had been weakened by hackers previously, it did not qualify as an effective method.⁴⁰ The court, however, applied the broad definition of “effectively controls” under Section 1201(a)(3)(A), which merely requires some process of access-control authorized by the copyright owner of the underlying material.⁴¹

In deciding that the CSS is an effective method of access control, Judge Patel relied on the precedent in Reimerdes, which emphasized that the copyright holder had authorized the access control system.⁴² Additionally, Judge Patel found that 321 Studios’ interpretation of the same DMCA section supported the holding that the effectiveness of an access control method should not turn on what is technically possible, but on whether it is effective with regard to the “average consumer.”⁴³ The court found a violation of 1201(a)(2)(A), holding that Real’s software purposefully discarded elements of the CSS technology in the process of retaining the content on the hard drives of personal computers.

Applying the holding in 321 Studios, that CSS constitutes both effective access and copy-control technology, Judge Patel found that RealDVD also violated 1201(b)(1)(A), which prohibits the trafficking of products that circumvent *copy-protection* methods.⁴⁴ Real argued that the CSS requirements are satisfied when the DVD is inserted the first time, and that subsequent use of the content, drawing from the hard drive, is not required (as the disc itself is no longer required). The

³⁹ Pl.’s (Studios’) Mot. Prelim. Inj. 9:15-19, Mar. 19, 2009, <http://www.eff.org/files/finode/RealDVD/Studio%20PI%20motion.pdf>.

⁴⁰ RealNetworks, 641 F.Supp. 2d at 932.

⁴¹ RealNetworks, 641 F.Supp. 2d at 932 (citing to 17 U.S.C. § 1201(a)(3)(A)).

⁴² RealNetworks, 641 F.Supp. 2d at 932.

⁴³ RealNetworks, 641 F.Supp. 2d at 932 (citing to 321 Studios, 307 F. Supp.2d at 1095)

⁴⁴ RealNetworks, 641 F.Supp. 2d at 935.

court found this to be an impermissible use of the technology, and that it “is circumvention by its statutory definition in the DMCA’s copy-control provision.”⁴⁵

This broad interpretation of circumvention seems to foreclose the possibility that any software can legally store DVD content in a medium other than the physical disc. Judge Patel also distinguished between minimal and temporary copying, such as caching, and the total and permanent storage method made possible by RealDVD, finding the later to be a violation. Finally, Real’s licensing of the CCS was immaterial to the court, given the primary purpose of the software: copying, through circumvention, for long-term storage.⁴⁶

Separate from their claim under the DVD CCA license, the studios also alleged violation of the DMCA, section 1201(b), through RealDVD’s circumvention of two additional copy protection technologies: ARccOS and RipGuard.⁴⁷ These systems are based on completely different content protection technology. They are specifically targeted at thwarting the *process* of DVD ripping. The technology includes fake menus, buttons or bad sectors on the discs that confuse and slow the ripping process, but not legitimate playback.⁴⁸

The RealDVD court rejected both of Real’s arguments against the effectiveness of these technologies: (1) that they only delay significantly the process ripping, and do not thwart it completely, and (2) that they only protect against some copying and not *all* copying. The court found that the availability of methods of circumvention to Real does not justify circumvention under 1201(b).⁴⁹ Real argued that these techniques were, in theory, similar to the way that DVD players avoid the hidden errors. However, the court distinguished between the way that DVD players avoid these errors, through temporary copying in the form of “buffering,” and the way that RealDVD circumvents ARccOS and RipGuard to allow an entire movie to be permanently

⁴⁵ RealNetworks, 641 F.Supp. 2d at 936.

⁴⁶ RealNetworks, 641 F.Supp. 2d at 936.

⁴⁷ PL’s (Studios’) Mot. Prelim. Inj. 15:13-14, Mar. 19, 2009, <http://www.eff.org/files/filenode/RealDVD/Studio%20PI%20motion.pdf>.

⁴⁸ RealNetworks, 641 F.Supp. 2d at 928.

⁴⁹ RealNetworks, 641 F.Supp. 2d at 938 (The court rejected Real’s expansive interpretation of Lexmark and attempt to apply standards for 1201(a) to (b) (citing *Lexmark Int’l. inc. v. Static Control Components, Inc.*, 387 F.3d 522, 547 (6th Cir. 2004)).

copied. Given that the primary purpose was circumvention for the purpose of saving the data, the court found a likelihood of success on the 1201(b)(1)(A) claim.⁵⁰

FAILURE OF THE FAIR USE DEFENSE

Real initially argued that RealDVD was analogous to the time-shifting VTRs found to be permissible by the US Supreme Court in Sony Corp. of America v. Universal City Studios.⁵¹ There, the court permitted a fair use defense for the time-shifting of content through the use of video cassette recorders. The RealDVD court, however, found the Sony case inapplicable because it was decided prior to the passage of the DMCA, which specifically and explicitly addresses digital content protection and prohibition of trafficking in circumvention technologies.⁵²

According to the RealDVD court, fair use is a potential exemption for consumers under the DMCA, but not for companies seeking to sell products that enable that fair use.⁵³ Trafficking in technologies that circumvent access-control or copy-control protections is indefensible. The court however *did* find that a fair use exception exists for direct circumvention of copy-protection technology under 1201(b).⁵⁴ Real argued that the holding in US v. Elcom, allowing users to backup ebooks, provided grounds for a fair use defense for RealDVD.⁵⁵ The court agreed that *users* are permitted to make copies of DVDs under certain fair use circumstances, but this does not extend to companies that provide circumvention technology. Users *are* also limited by the 1201(a) violations regarding access-control technology. Judge Patel found that “[t]he prohibition

⁵⁰ RealNetworks, 641 F.Supp. 2d at 939-940.

⁵¹ Pl.’s (Real’s) Opp. Mot. Prelim. Inj. (Revised) 20:16-22, Mar. 23, 2009
http://www.eff.org/files/filenode/RealDVD/Real%20Opp%20to%20PI_0.pdf (citing Sony Corp. of Am. V. Universal City Studios, 464 U.S. 417 (1984)).

⁵² RealNetworks, 641 F.Supp. 2d at 941.

⁵³ RealNetworks, 641 F.Supp. 2d at 942-43.

⁵⁴ RealNetworks, 641 F.Supp. 2d at 942.

⁵⁵ Pl.’s (Real’s) Opp. Mot. Prelim. Inj. (Revised) 20:23-21:5, Mar. 23, 2009,
http://www.eff.org/files/filenode/RealDVD/Real%20Opp%20to%20PI_0.pdf (citing US v. Elcom Ltd., 203 F. Supp. 2d 1111, 1135 (N.D. Cal. 2002)).

on individual circumvention conduct only applies with respect to access protection technologies.”⁵⁶

The RealDVD court concluded that, “Whatever application the fair use doctrine may have for individual consumers making backup copies of their own DVDs, it does not portend to save Real from liability under the DMCA in this action.”⁵⁷ Therefore, no fair use defense exculpated Real.

CONCLUSION

Perhaps the most troubling aspect of the RealDVD court’s decision is the lack of options it ultimately leaves the consumer. The court is largely unconcerned that its decision effectively forecloses most consumers’ chance to exercise their fair use rights over DVDs. The RealDVD court simply turned the issue over to Congress, echoing a statement by the Reimerdes court that “The fact that Congress elected to leave technologically unsophisticated persons who wish to make fair use of encrypted copyrighted works without the technical means of doing so is a matter for Congress.”⁵⁸

However, the above is in tension with the RealDVD court’s finding of a limited fair use exception for consumers. Their ability to backup DVD content for protective purposes, or exploit fair use rights all but evaporates if no commercial technology enabling the exercise of those rights is permissible. The distinction between legal right and actual ability serves little functional difference if consumers cannot realistically take advantage of the legal right.

⁵⁶ RealNetworks, 641 F.Supp. 2d at 942.

⁵⁷ RealNetworks, 641 F.Supp. 2d at 944.

⁵⁸ RealNetworks, 641 F.Supp. 2d at 943 (quoting Reimerdes, 111 F. Supp.2d 294 at 324).