



WAKE FOREST
JOURNAL OF BUSINESS AND
INTELLECTUAL PROPERTY LAW

VOLUME 11

2010 - 2011

NUMBER 1

**COMMENT: DVD COPY PROTECTION RULES VIOLATE
THE SHERMAN ACT**

Matthew W. Turetzky¹

The majority of DVDs sold in the United States are protected by the Content Scramble System (CSS). Any firm wishing to use it, either to encrypt their content or to decrypt encrypted content, must first obtain a license from the DVD Copy Control Association (DVD-CCA). Because of CSS's prevalence, the DVD-CCA has an extraordinary amount of market power.

Copyright based challenges to the DVD-CCA's practices have been largely unsuccessful despite CSS's well known ineffectiveness at stopping individuals with little technical sophistication from ripping CSS-encrypted DVDs. Indeed, programs that can circumvent CSS, like DeCSS, are widely available on the internet. With its impotence shrouded in the color of law, CSS remains the prevailing form of encryption of DVD content.

These practices should be challenged under the Sherman Act, the cornerstone of federal antitrust law. Such challenges, like the recent one made in RealNetworks, Inc. v. DVD Copy Control Association, have been unsuccessful. Given the prevalence of DVDs, it is surprising that the association's CSS license agreement has escaped a full-scale rule of reason review. This is especially concerning in light of the agreement's effect on the market for devices like video servers, digital video recorders, and backup programs like RealDVD. This comment concludes that the DVD-CCA's implementation of CSS, the prevailing method of DVD copy protection in the United States, is an anticompetitive restraint of trade in violation of section 1 of the Sherman Act.

¹ J.D. Candidate, Duke University School of Law, 2011; *Editor-in-Chief*, Duke Law & Technology Review; B.S., University of Florida, 2008. I am profoundly grateful to Professor Barak Richman and Shelly R. Turetzky for their comments, wisdom, and guidance throughout this entire process. I would also like to thank Dirk Lasater for his extraordinary assistance with this comment. Any mistakes or omissions are mine alone.

I. INTRODUCTION.....	104
A. <i>DVDs and the Digital Revolution.....</i>	105
B. <i>The RealDVD/Facet Dispute.....</i>	110
II. CONTEXTUALIZING THE ANTITRUST ISSUES	113
A. <i>The DVD-CCA.....</i>	113
B. <i>The CSS License Agreement.....</i>	114
C. <i>The Digital Millennium Copyright Act</i>	117
III. APPLYING ANTITRUST ANALYSIS TO THE DVD-CCA	120
A. <i>Identifying the Specific Restraint: The Studios' Collective Refusal to License</i>	122
B. <i>What are the CSS-License Agreement's likely anticompetitive effects?.....</i>	123
C. <i>Are There Offsetting Procompetitive Justifications?</i>	128
D. <i>Do The Parties Have Sufficient Market Power To Control Access To Instrumentalities Critical For Competition?</i>	141
IV. CONCLUSION.....	143

I. INTRODUCTION

Imagine a world where technology allows you to access all of your movies, music, and games on any device in your home. In this utopian fantasy, you could take your music and movies anywhere with a cell phone signal. Forgot to upload your newest playlist? No problem. Want to view an old movie you have not seen in decades? Just log on. Have a song stuck in your head? Hit play.

This, of course, is not a fantasy. Technology has caught up with utopia. Unfortunately, copyright law has not.² Many scholars have condemned the Digital Millennium Copyright Act (DMCA) as being responsible for this disparity.³ Emerging in the commentary is the role of antitrust law in policing excesses spawned by the DMCA.⁴

² This is due to the erosion of the doctrinal contours of copyright law. A more thorough analysis of the subject is beyond the scope of this comment. For an insightful discussion of copyright law's recent setbacks, see JAMES BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* (2008), available at <http://thepublicdomain.org/thepublicdomain1.pdf>.

³ The chief criticism of the DMCA is that it has not been subject to the traditional limitations of copyright law. *E.g.*, Timothy K. Armstrong, *Fair Circumvention*, 74 *BROOK. L. REV.* 1, 2–3 (2008) (contending that judges should develop a fair circumvention doctrine to respond to the DMCA's hostility towards fair use); Dan L. Burk, *Anticircumvention Misuse*, 50 *UCLA L. REV.* 1095, 1132 (2003) (criticizing the DMCA for giving copyright owners rights that would

This comment attempts to further define that role. Rather than broadly focusing on the DMCA's impact on innovation, I have taken aim at a very narrow issue: the effect of Hollywood's licensing practices of its DVD encryption technology on the market for video servers and other devices that require the copying of Digital Versatile Discs (DVD). Based on the recent *RealNetworks* decision, it appears that content owners are shrouding their cartel-like anticompetitive conduct beneath the veil of what would otherwise be legitimate copy protection technology.⁵ In order to pierce the veil, this comment applies a complete rule of reason analysis to the DVD-CCA's influence on the market for video servers,⁶ personal video recorders,⁷ and software like RealDVD.

A. DVDs and the Digital Revolution

In the market for digital video, DVDs today represent the standard medium of distribution to consumers.⁸ The discs allow consumers to instantly jump to any scene in a movie while retaining near perfect digital quality. This format allows users to take advantage of new high-definition TVs⁹ and digital surround sound systems while making the rewind and fast-forward buttons a thing of the past.¹⁰

ordinarily be limited by the doctrine of copyright misuse); Aaron K. Perzanowski, *Rethinking Anticircumvention's Interoperability Policy*, 42 U.C. DAVIS L. REV. 1549, 1552 (2009) (arguing that the "anticircumvention provisions of the DMCA unnecessarily inhibit interoperability."); Jerome H. Reichman et al., *A Reverse Notice and Takedown Regime to Enable Public Interest Uses of Technically Protected Copyrighted Works*, 22 BERKELEY TECH. L.J. 981, 1022–24 (2007) (discussing how § 1201 frustrates public interest uses of copyrighted material).

⁴ See, e.g., Dan L. Burk, *Legal and Technical Standards in Digital Rights Management Technology*, 74 FORDHAM L. REV. 537, 562 (2005) ("[T]he practical outcome [of the *Reimerdes* DVD copying case] was that DVD movie playback remained tied to approved systems—effectively controlling a market for consumer electronics that was well beyond the intellectual property interest in copyrighted movies.").

⁵ See Opinion Re: Motions to Dismiss Plaintiffs'/Counter-Defendants.' Antitrust Counterclaims at 2–3, *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (No. 3:08-CV-04548), ECF No. 484 [hereinafter Antitrust Order] (dismissing RealNetworks' antitrust counterclaims on procedural grounds).

⁶ E.g., APPLETV, <http://www.apple.com/appletv> (last visited Mar. 22, 2010).

⁷ E.g., TIVO, <http://www.tivo.com> (last visited Mar. 22, 2010).

⁸ See *RealNetworks*, 641 F. Supp. 2d at 919.

⁹ DVDs do not allow a consumer to *completely* take advantage of an HDTV because DVDs are not encoded in 1080p format. The new Blu-Ray format, however, does allow consumers to watch movies in high definition. For a discussion on the advantages of Blu-Ray versus DVDs, see *Blu-ray: CNET's Quick Guide*, CNET,

The problem with DVDs is that unlike their Compact Disc (CD) cousins, they cannot be copied, archived, or converted into other formats without violating federal copyright law.¹¹ As a result, no American firm¹² has manufactured a true¹³ DVD replication device that can take encrypted DVD content and move it to another device (like an iPod) or another DVD for backup.¹⁴ This is because DVDs are encrypted; and notwithstanding the exceptions,¹⁵ the DMCA prohibits *the very act* of circumventing CSS, which is the predominant form of DVD encryption. The very act of circumventing was made illegal by the DMCA to respond to the ease with which digital media can be duplicated.¹⁶ While analog VHS tapes had to be physically

http://reviews.cnet.com/4520-13817_7-6462511-2.html (last visited Mar. 22, 2010).

¹⁰ See Jim Kirk, *New Discs Expected to Replace VCRs – 9 Firms Unveil Standard Format*, CHI. SUN-TIMES, Dec. 10, 1995, at 60.

¹¹ *Compare* Universal City Studios, Inc. v. Reimerdes, 111 F. Supp. 2d 294, 324 (S.D.N.Y. 2000) (ripping DVDs violates no fair use defense under the DMCA in DVD copy case), *aff'd sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001), *with* RIAA v. Diamond Multimedia Sys., Inc., 180 F. 3d 1072, 1079 (9th Cir. 1999) (ripping CDs into MP3 format for use on a portable MP3 player is fair use).

¹² There are plenty of foreign companies that offer software over the internet that are otherwise illegal under the DMCA. For example, AnyDVD and CloneDVD 2 are manufactured by SlySoft, Ltd. of Ireland. See *SlySoft AnyDVD HD*, <http://www.slysoft.com/en/anydvdhd.html> (last visited Mar. 22, 2010). DVDSHrink is manufactured by an unknown manufacturer. See DVD SHRINK, <http://www.dvdshrink.org/> (last visited Mar. 22, 2010). DVD Ripper Pro is manufactured by an unknown manufacturer based out of Qingdao, China. See IFUNIA DVD RIPPER PRO FOR MAC, <http://ifuniadvdripper.com/> (last visited Mar. 22, 2010).

¹³ *But see Kaleidescape – Legal Update*, KALEIDESCAPE.COM, <http://www.kaleidescape.com/news/pr/legal-update.php> (last visited Mar. 27, 2010). Even in light of an adverse ruling in a state appellate court, Kaleidescape still maintains that its product is “100% licensed and legal.” *Id.* I believe that Kaleidescape has erred. When the trial court examines the CSS license agreement on remand, it will likely reach the same conclusion that was reached in *RealNetworks*, 641 F. Supp. 2d at 913.

¹⁴ *But cf.* Rick Broda, *Battle of the Premium DVD Rippers*, CNET (Jan. 22, 2010, 5:00 AM), http://reviews.cnet.com/8301-19512_7-10438934-233.html (reviewing WinX DVD Ripper Platinum and Wondershare DVD Ripper Platinum; both products are capable of ripping a *non-CSS-encoded* DVD into MPEG-4 format, which allows the end user to “space shift” her movies onto an iPod or an iPhone). Because most commercially sold DVDs are encoded with CSS, the DVD rippers evaluated by Broda are useless for most consumer applications. See *id.*

¹⁵ 17 U.S.C. §§ 1201(c)–(j) (2006) (exceptions to the circumvention and trafficking bans).

¹⁶ H.R. REP. NO. 105-551, pt. 2, at 25 (1998) (“In contrast to the analog experience, digital technology enables pirates to reproduce and distribute perfect copies of works—at virtually no cost at all to the pirate. As technology advances, so must our laws.”).

copied from one tape to the next—a process which is considered time-consuming and laborious by today’s standards—digital media can be duplicated in a matter of minutes by simply copying and pasting the file on a computer. Additionally, widespread broadband internet access has made it possible to take these otherwise colossal files and transmit them over vast distances in short periods of time.¹⁷

It should be no surprise then that content piracy continues to be the scapegoat for a decade of abysmal movie sales in Hollywood.¹⁸ Sony laid off several hundred employees last year because “DVD sales, which gave the movie industry an unprecedented boost over the past decade, are suffering double-digit declines.”¹⁹ In an e-mail to employees, CEO Michael Lynton and Co-Chairman Amy Pascal blamed “the growth of online piracy . . . the social media effect on the performance of films . . . [and] the way people have changed how they watch television and acquire DVDs.”²⁰

This e-mail is surprising, because Sony and other industry giants had gone to great lengths to prepare for widespread piracy long before the layoffs. In the mid-1990s, content producers established the DVD-CCA to create a uniform encryption system that would be licensed to hardware manufacturers and movie studios for the purpose of making it very difficult—and after the DMCA was passed, illegal—to copy DVD content.²¹ The encryption system they settled on was CSS.²²

But CSS was not the only technological protection measure employed by content providers.²³ Some content providers have used RipGuard or ARccOS.²⁴ The advantage of these systems is that they are not exclusive; they can be used in addition to CSS.²⁵ RipGuard

¹⁷ Brian Stelter & Brad Stone, *Digital Pirates Winning Battle with Studios*, N.Y. TIMES, Feb. 5, 2009, at A1, available at <http://www.nytimes.com/2009/02/05/business/media/05piracy.html>.

¹⁸ See *id.*

¹⁹ Julia Boorstin, *Sony to Layoff 450 Workers as DVD Sales Fall*, CNBC (Feb. 1, 2010, 7:30 PM), <http://www.cnbc.com/id/35189365>.

²⁰ *Id.*

²¹ See *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 918–19 (N.D. Cal. 2009).

²² *Id.* at 919.

²³ *Id.* at 927–29.

²⁴ *Id.* at 927–28.

²⁵ *Id.* at 927. Although ARccOS and RipGuard have restricted the media server market much in the same way CSS has, they have done it without using concerted industry action. As a practical matter, there are plenty of public policy arguments that can be made against utilizing encryption mechanisms on DVDs without reaching the concerted action issue. However, these arguments sound mostly in copyright, not antitrust law. I have chosen to save these issues for another day because the focus of this comment is narrowly tailored to the anticompetitive harms

protection targets CSS ripping procedures themselves, “making it impractical for all but the most determined” to copy CSS-encrypted content.²⁶ It is used by Disney “to protect nearly all of its DVD titles distributed throughout the United States.”²⁷ ARccOS, on the other hand, is a “passive control technology” that uses a different encryption code for each disc.²⁸ The studios have spent millions of dollars to deploy both of these technologies in their DVDs.²⁹

The significance of these measures was highlighted by the District Court in *RealNetworks*:

Of the top 300 DVD titles commercially released in 2005-2007, thirty were protected by RipGuard, and an additional twenty five by ARccOS. . . . The Studios have paid tens of millions of dollars over the last four years to protect their content using these systems.³⁰

The proliferation of encryption mechanisms combined with a broad reading of the DMCA in DVD copying cases has made it difficult for even the most successful innovators to innovate. Apple’s dilemma in its design of Apple TV illustrates this point. Apple TV did not include a DVD player, perhaps because Apple realized that including one might cannibalize its sales of digital content on iTunes.³¹ Phillip Schiller, an Apple senior vice president, has nevertheless maintained that Apple TV is a “new DVD player for the Internet age.”³² But the truth is that Apple TV was never designed as an all-in-one replacement for traditional set-top boxes.³³ Without the ability to playback DVDs, consumers never saw a need for Apple TV;

caused by the DVD-CCA’s CSS license agreement and the DVD-CCA.

²⁶ *RipGuard: Protecting DVD Content Owners from Consumer Piracy*, http://www.rovicorp.com/products/content_producers/protect/ripguard.htm (last visited Mar. 25, 2010).

²⁷ *RealNetworks*, 641 F. Supp. 2d at 928.

²⁸ ARccOS, http://www.arccos.com/opencms/opencms/sites/am/Digital_Services/ArccOS.html (last visited Mar. 25, 2010). This is more sophisticated than CSS, which relies on a single algorithm. *Id.*

²⁹ *RealNetworks*, 641 F. Supp. 2d at 928.

³⁰ *Id.*

³¹ See Apple TV Technical Specifications, <http://www.apple.com/appletv/~specs.html> (last visited Mar. 25, 2010). Notably absent amongst the features listed is a DVD drive. See *id.*

³² Press Release, Apple, Inc., Apple TV Now Shipping (Mar. 21, 2007), <http://www.apple.com/pr/library/2007/03/21/appletv.html>.

³³ Ranjit Mathoda, *Apple TV and the Future of the DVD Player*, SEEKING ALPHA (June 28, 2007), <http://seekingalpha.com/article/39630-apple-tv-and-the-future-of-the-dvd-player>.

the device—despite its innovative potential—struggled to gain traction in the market.³⁴

TiVo has faced similar issues. Rather than relying on a centralized media hub like iTunes for the vast majority of its content, TiVo relies on a consumer's cable provider.³⁵ The problem here is that most cable providers have their own DVRs, and have purposefully designed their systems to be incompatible with the device. When TiVo is compatible, thus justifying its purchase, TiVo users can use their internet connection to download rented movies from Netflix.³⁶ These digital downloads, like the ones distributed over iTunes, have no doubt cannibalized the market for DVDs.³⁷

The problems with these innovations are obvious. Technology has surpassed the business practices of content providers in Hollywood. This was realized by Rob Glaser, former CEO of RealNetworks, who “fell in love with a DVD-copying device from Kaleidescape while [his wife] was pregnant and confined to a bed several years ago.”³⁸ Glaser assumed that if Kaleidescape could build a device that copied DVDs while maintaining membership with the DVD-CCA then RealNetworks could too.³⁹ The inspiration for RealDVD and its hardware cousin Facet was born.

³⁴ *First Year Apple TV Sales Fall Below Expectations*, APPLE INSIDER (Dec. 7, 2007, 4:00 PM), http://www.appleinsider.com/articles/07/12/10/first_year_apple_tv_sales_fall_below_expectations.html.

³⁵ Cable providers have fought vigorously to make TiVo technology incompatible with digital cable. Nate Anderson, *TiVo: Cable is Strangling our Business with SDV*, ARS TECHNICA (Feb. 21, 2010), <http://arstechnica.com/tech-policy/news/2010/02/tivo-cable-is-strangling-our-business.ars>. These practices raise anticompetitive concerns of their own. Although outside the scope of this comment, the overuse of licensing and the erosion of the *Sony* rule—that copying for personal use is presumptively fair—has encouraged cable and satellite providers to shut TiVo and other innovators out of the market. If you are among the millions of consumers who pay more than one hundred dollars per month for a sophisticated HD-DVR cable package and wonder why the cable box itself is so slow and suffers from such laggard performance, you now know why.

³⁶ TiVo Premiere Brochure, http://www.tivo.com/assets/pdfs/products/TiVoPremiere_brochure.pdf (last visited Mar. 25, 2010).

³⁷ Cf. Carlo Longino, *Film Studios can 'Cannibalize' Their DVD Sales, or Lose them Completely*, TECHDIRT (May 27, 2009), <http://www.techdirt.com/articles/20090526/0908025013.shtml> (studios have considered pulling their movies from Netflix in light of declining sales).

³⁸ Greg Sandoval, *RealNetworks: A Tale of Opportunities Missed*, CNET (Mar. 15, 2010, 4:00 AM), http://news.cnet.com/8301-31001_3-20000390-261.html.

³⁹ *Id.*

Glaser “viewed RealDVD as a way to enter the digital video market.”⁴⁰ In addition to traditional DVD playback, RealDVD could retrieve information about the film, provide links to related websites, and store “an image of the copy-protected DVD to a computer hard drive” for archival and playback without the in-drive presence of a DVD.⁴¹

RealNetworks also developed Facet. Facet was a hardware platform that relied on the RealDVD software for playback, organization, and storage of DVD content by means of “an intuitive user interface.”⁴² Unlike AppleTV or TiVo, which have the capacity to cannibalize DVD sales, RealDVD and Facet could add value to DVD’s by allowing consumers to make new uses of the discs themselves.⁴³

Glaser’s belief that the legal hurdles were insignificant was confirmed by a state trial court in *Kaleidescape*.⁴⁴ RealNetworks responded to the *Kaleidescape* decision by moving forward with the production of RealDVD. From this point on, every *facet* of the story fell apart.⁴⁵

B. The RealDVD/Facet Dispute

Under the DMCA,⁴⁶ manufacturers may not make devices that assist consumers in circumventing CSS encryption because the DMCA

⁴⁰ RealNetworks, Inc. v. DVD Copy Control Ass’n, 641 F. Supp. 2d 913, 924 (N.D. Cal. 2009).

⁴¹ *Id.*

⁴² *Id.* at 925–26.

⁴³ See Julie Jacobson, *Copy Protection Group Sues Kaleidescape*, CEPRO (Jan. 1, 2005), http://www.cepro.com/article/copy_protection_group_sues_kaleidescape/D1 (explaining how the demand for DVDs goes up as Kaleidescape’s market share expands).

⁴⁴ See Reporters Transcript of Proceedings, DVD Copy Control Ass’n v. Kaleidescape, Inc., No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007), available at <http://www.kaleidescape.com/files/legal/DVDCCA-vs-Kaleidescape-Statement-of-Decision.pdf> (court’s oral statement of decision), *rev’d*, 97 Cal. Rptr. 3d 856 (Cal. Ct. App. 2009).

⁴⁵ See Greg Sandoval, *RealNetworks: A Tale of Opportunities Missed*, CNET (Mar. 15, 2010, 4:00 AM), http://news.cnet.com/8301-31001_3-20000390-261.html.

⁴⁶ Many believe that the United States was obligated to pass the DMCA after signing the World Intellectual Property Organization Copyright Treaty (“WIPO Treaty”). Burk, *supra* note 4, at 558. But Burk contends that 1998 U.S. copyright law was largely compliant with these requirements and that “lobbying by content industries resulted in the enactment of . . . [the DMCA] containing anti-circumvention provisions that far exceed anything contemplated by the treaty.” *Id.*

makes trafficking in such devices, regardless of their use, illegal.⁴⁷ In other words, while consumers possess the fair use right to backup their DVDs to other hard drives or devices,⁴⁸ they do not possess the right to *circumvent* the encryption protecting them in order to make fair use backup copies of copyrighted works.⁴⁹ The result of this paradigm is that consumers paradoxically need to obtain permission to circumvent CSS from the DVD Copy Control Association in order to convert their DVDs into a format that can be used on a laptop or iPod.⁵⁰

This interpretation of the DMCA, that manufacturers cannot sell devices that backup lawfully purchased DVDs for space-shifting purposes, was not shared by RealNetworks.⁵¹ Despite their optimism, RealNetworks realized that this fair use argument has not gained much traction in the courts.⁵² Accordingly, RealNetworks pursued licensing negotiations with Paramount and Fox directly. The negotiations did not go well, and at one point a Paramount representative flatly told RealNetworks that they would “require blood money to break the

⁴⁷ 17 U.S.C. § 1201(a)(2) (2006) (anti-trafficking provision).

⁴⁸ Cf. *RIAA v. Diamond Multimedia Sys. Inc.*, 180 F.3d 1072, 1079 (9th Cir. 1999) (ripping CDs into MP3 format for use on a portable MP3 player is fair use).

⁴⁹ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 440 (2d Cir. 2001) (holding that a computer programmer violates the anti-trafficking provision of the DMCA when he designs and posts software (DeCSS) on the internet that allows users to circumvent CSS to access copyrighted works on DVDs). For a superb and concise discussion of *Corley*, see ROGER E. SCHECTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS* § 7.7, at 144–46 (2003).

⁵⁰ This result is absurd because consumers cannot call the DVD-CCA even if they wanted to. The DVD-CCA, according to its chief litigator is “not a regular company” because “[y]ou can’t call them up and ask questions.” Julie Jacobson, *Industry Insider: DVD CCA is an Innovation-Stifling Cartel*, CE PRO (Jan. 1, 2005), http://www.cepro.com/article/industry_insider_dvd_cca_is_an_innovation_stifling_cartel/.

⁵¹ RealNetworks was convinced that they could raise a *Sony* styled “substantial non-infringing” fair use argument despite post-DMCA DVD copying cases that have held the contrary. Compare Reporter’s Transcript of Proceedings at 78–85, *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (No. 3:08-CV-04548), ECF No. 44 [hereinafter TRO Hearing], and *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (fair use defense covers devices with substantial non-infringing uses), with *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 324 n.170 (S.D.N.Y. 2000) (the DMCA does not incorporate *Sony*), *aff’d sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001).

⁵² Indeed, it has gained an especially deaf ear in Judge Patel’s courtroom in the Northern District of California. Before adjudicating the RealDVD dispute, Judge Patel gained notoriety as the jurist who shut down Napster. *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 913–14 (N.D. Cal. 2000) (rejecting Napster’s *Sony* argument because users “can keep the music they download”), *aff’d in part, rev’d in part*, 239 F.3d 1004 (9th Cir. 2001).

[DVD-CCA] cartel.”⁵³ Rather than capitulating, RealNetworks proceeded with the development of RealDVD.

On September 30, 2008, the date RealDVD was scheduled to be released, RealNetworks filed a complaint in the United States District Court for the Northern District of California seeking a declaratory judgment that “the CSS License Agreement permits the manufacture, distribution, and sale of the RealDVD product” and that RealNetworks did “not violate the DMCA.”⁵⁴ The DVD-CCA and the movie studios responded by filing counterclaims alleging breach of the CSS license agreement and DMCA violations. On October 9, 2008, citing RealDVD’s noncompliance with the DMCA and Real’s probable breach of the CSS license agreement, the District Court entered a temporary restraining order against RealNetworks to prevent the continued distribution of RealDVD and its hardware cousin Facet.⁵⁵ Both parties litigated the matter vigorously over the next several months.⁵⁶ On May 13, 2009, RealNetworks filed antitrust counterclaims against the DVD-CCA and the studios.⁵⁷

In the final chapter of the litigation, RealNetworks received a beat down; everything that could have gone wrong for them did. The breach of contract and DMCA claims went to final judgment on August 11, 2009 in favor of the DVD-CCA.⁵⁸ Adding insult to injury, the *Kaleidescape* ruling was reversed a day later.⁵⁹ On January 8, 2010, the District Court granted the studios’ motion to dismiss the antitrust counterclaims.⁶⁰ On March 3, 2010, Real settled with the six major Hollywood studios and the DVD-CCA for \$4.5 million, agreed to withdraw its appeal, and stopped selling its RealDVD software and affiliated products.⁶¹

⁵³ Transcript of Proceedings at 36, *RealNetworks*, 641 F. Supp. 2d 913 (No. C 08-04548 MHP) [hereinafter Antitrust Transcript].

⁵⁴ Complaint for Declaratory Relief at 9, *RealNetworks*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (No. C 08-04548 MHP), ECF No. 1.

⁵⁵ TRO Hearing, *supra* note 51 at 103.

⁵⁶ Lance Whitney, *RealNetworks Suffers Net Loss as Sales Drop*, CNET (May 8, 2009), http://news.cnet.com/8301-1023_3-10236388-93.html (indicating Real spent \$6 million in 2008 on legal fees defending RealDVD).

⁵⁷ Plaintiffs and Counterclaim Defendants RealNetworks, Inc. and RealNetworks Home Entertainment, Inc.’s Answer and Counterclaims to the Counterclaims of the DVD Copy Control Association, *RealNetworks*, 641 F. Supp. 2d 913 (No. C 08-04548), ECF No. 323 [hereinafter Antitrust Counterclaims].

⁵⁸ *RealNetworks*, 641 F. Supp. 2d at 954.

⁵⁹ *DVD Copy Control Ass’n v. Kaleidescape, Inc.*, 97 Cal. Rptr. 3d 856 (Ct. App. 4th 2009), *rev’g*, No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007).

⁶⁰ Antitrust Order, *supra* note 5, at 2-3.

⁶¹ Press Release, RealNetworks, Inc., RealNetworks Settles RealDVD Dispute

II. CONTEXTUALIZING THE ANTITRUST ISSUES

RealNetworks claimed that the CSS license agreement was the mechanism by which the studios effectuated their concerted refusal to deal. In order to evaluate that claim fairly, inquiry into the DVD-CCA and the CSS license agreement must be made.

A. *The DVD-CCA*

Matsushita and Toshiba, the original developers of CSS, granted the DVD-CCA a “royalty-free license in CSS technology and the DVD-CCA became the sole licensor and administrator of CSS technology under the CSS License Agreement.”⁶² As the sole licensor of CSS, the DVD-CCA requires that every licensee comply “with the uniform set of rules set forth in the CSS license” whose purpose is to prevent copying of CSS-protected content.⁶³ Licensees must also pay a \$15,000 fee to the DVD-CCA.⁶⁴

Approximately 300 companies in various industries have licensed CSS from the DVD-CCA.⁶⁵ Licensees include content producers, creators of software and hardware decoders, and manufacturers of DVD players.⁶⁶ “CSS has been implemented in millions of DVD players and computers worldwide and is used to protect the content on hundreds of millions of DVDs.”⁶⁷

The DVD-CCA is governed by a twelve member Board of Directors: five from the major motion picture studios, three from the consumer electronics industry, three from the computer manufacturing industry, and one at-large director.⁶⁸ Strangely, the DVD-CCA does not openly publicize the members of the board on their website.⁶⁹ However, in one correspondence between Kaleidescape⁷⁰ and the

with Hollywood (Mar. 3, 2010), *available at*
<http://realnetworks.com/pressroom/releases/2010/corp-realdvd.aspx>.

⁶² *RealNetworks*, 641 F. Supp. 2d at 920–21.

⁶³ *Id.* at 921.

⁶⁴ *Id.* (“To become a CSS licensee, an interested party must . . . pay the requisite fee.”); Jacobson, *supra* note 50 (CSS licenses cost \$15,000).

⁶⁵ *RealNetworks*, 641 F. Supp. 2d at 921; *see also* Notice Pursuant to the National Cooperative Research and Production Act of 1993; DVD Copy Control Association (“DVD CCA”), 66 Fed. Reg. 40,727–29 (Aug. 3, 2001).

⁶⁶ *RealNetworks*, 641 F. Supp. 2d at 921.

⁶⁷ *Id.*

⁶⁸ *Id.* at 918.

⁶⁹ *See* DVD CCA WELCOMES YOU!, <http://www.dvdcca.org/> (last visited Mar. 26, 2010).

⁷⁰ Kaleidescape is a product similar to RealNetworks’ Facet. *See* John Y. Kim, *The Great Kaleidescape: New Hope in the Digital Rights Debate*, 27 TEMP. J. SCI.

DVD-CCA, six of the board members are identified.⁷¹ One glance at their names makes the multi-industry cartel-like appearance of the DVD-CCA too hard to ignore: Chris Cookson, of Warner Brothers; Benn Carr, of Disney; Jeff Lawrence, of Intel; Gabe Begeg-Dov, of Hewlett-Packard; David Harshman, of Toshiba; and Andy Parsons, of Pioneer.⁷² These are some of the largest players in the content and electronics industries.⁷³ Moreover, it is impossible to reach the DVD-CCA's board members by simply picking up the phone and calling them because there is no "them" to talk to.⁷⁴

B. *The CSS License Agreement*

The dispute in *RealNetworks* focused on the interpretation of the CSS license agreement. The CSS license agreement prohibited Real from "making available the means for . . . *unauthorized* copying of copyrighted content intended to be protected using CSS."⁷⁵ Real argued that it could win at trial regardless of the construction given to the word "unauthorized."⁷⁶

One interpretation of the agreement, informed by the *Kaleidescape* case, is that the word unauthorized must mean that some forms of copying must be authorized.⁷⁷ Otherwise, the term unauthorized, as

TECH. & ENVTL. L. 339, 339, 352 (2009) (describing the features of Kaleidescape and noting that Kaleidescape "gives consumers greater control of their DVDs while upholding that piracy protection measures implemented by the DVD CCA."). RealNetworks based their lawsuit on a favorable ruling in *DVD Copy Control Ass'n v. Kaleidescape* which was subsequently reversed on appeal. Antitrust Counterclaims, *supra* note 57, at 8. See generally *DVD Copy Control Ass'n v. Kaleidescape, Inc.*, 97 Cal. Rptr. 3d 856 (2009), *rev'g*, No. 1-04-CV031829 (Cal. Super. Ct. Mar. 29, 2007).

⁷¹ Letter from Michael Malcolm, CEO, Kaleidescape, Inc., to Members of the Content Protection Advisory Council, DVD Copy Control Association (June 15, 2007), <http://www.kaleidescape.com/files/legal/Kaleidescape-DVDCCA-Letter-20070615.pdf>.

⁷² *Id.*

⁷³ See generally *id.* (arguing the potential influence DVD-CCA members have on the market and to the viability of Kaleidescape as a business).

⁷⁴ Jacobson, *supra* note 43.

⁷⁵ *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913, 921 (N.D. Cal. 2009) (internal quotations omitted) (emphasis added).

⁷⁶ See *id.* at 946 ("According to Real, the Agreement does not ban all copying of DVDs, but rather, only requires copy protection to the extent that the technical specifications mandate certain functions be preserved in compliant DVD products.").

⁷⁷ Antitrust Counterclaims, *supra* note 57, at 20 ("If the Studios and the DVD CCA are wrong in their interpretation of the CSS License, then their attempt to use the License to impose post-hoc terms that were not included in the License amounts to an illegal group boycott.").

used in the CSS license agreement, is meaningless (*i.e.*, the agreement's drafters could have omitted the word unauthorized and achieved the same result). Because the inclusion of the word unauthorized implies that certain forms of copying were authorized, the studios must have still been able to license their copyrighted content stored on DVD to Real, including the right to reproduce that content. The only way that the studios could not make such a license is if the DVD-CCA could paradoxically sue the movie studios for licensing its own content simply because that content is stored on DVD. To protect the interests of the DVD-CCA, Real could, under this interpretation, create a product like Facet that locks up content with enhanced security measures to prevent infringement, and then raise a *Sony*-styled "substantial non-infringing" fair use argument in subsequent infringement suit by non-consenting studios.⁷⁸ The court rejected these arguments.⁷⁹

The other possible interpretation, advanced by the DVD-CCA, is that the CSS license agreement does not allow *any* copying of CSS protected content whatsoever.⁸⁰ Under this construction, the CSS license agreement does not permit individual studios from licensing their CSS-protected DVD content to a manufacturer like Real even though the studios have the exclusive right to license such content under the copyright laws.⁸¹ This is because—the DVD-CCA would argue—such a license would effectively destroy the protection that the DVD-CCA afforded to other content producers.⁸² In other words, the

⁷⁸ TRO Hearing, *supra* note 51, at 78–85. See generally *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984) (fair use defense covers devices with substantial non-infringing uses), *superseded by statute*, Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (2006), *as recognized in RealNetworks*, 641 F. Supp. 2d at 941.

⁷⁹ *RealNetworks Inc.*, 641 F. Supp. 2d at 941–43.

⁸⁰ Antitrust Counterclaims, *supra* note 57, at 19.

⁸¹ Antitrust Transcript, *supra* note 53, at 27–28, 30. The studios also argued that the CSS license agreement does not prohibit the licensing of digital content directly (in other words, digital content not on DVD). *Id.* at 16–17. This argument makes sense only in the complicated haze of copyright law, in which "courts do not rely on a description of the work, but rather look to the fixed format of the work itself . . . for determining the scope of protection." Dan L. Burk & Mark A. Lemley, *Fence Posts or Sign Posts? Rethinking Patent Claim Construction*, 157 U. PA. L. REV. 1743, 1774 (2008) (emphasis added). But in reality, *digital video* is the fixed format, not DVD. See generally Antitrust Transcript, *supra* note 53, at 31. And though copyright law does not say much about reality, antitrust law does. My argument is a simple one: that, under the guise of their DMCA-endorsed *faux* distinction between DVDs and digital download, the studios are forcing innovators like RealNetworks to sign the CSS license agreement *just to negotiate* licensing terms with member studios.

⁸² For example, if Paramount sold RealNetworks a license to let its customers

only way the movie studios can protect their content is by surrendering their ability to license CSS protected content to the DVD-CCA, which could not license individual studio content without consent from all of the member studios; or, in metaphorical terms, the studios locked up their movies and then threw away the key. In sum, the DVD-CCA read the agreement to mean that under no circumstances was copying of CSS-protected content permitted. And this reading was adopted by the District Court in *RealNetworks*.⁸³

The problem with this reading of the CSS license agreement is that the DVD-CCA's amendment process functionally stops Real from negotiating with the DVD-CCA directly. This is a classic section 1 antitrust concern known as a horizontal refusal to deal, or a horizontal group boycott.

This horizontal refusal was effectuated in many ways. First, “[p]rospective licensees are not permitted to negotiate any aspect of the CSS License or Procedural Specifications.”⁸⁴ Thus, Real had to agree to the CSS license's terms first, and then try to amend them later. Next, once it obtained the CSS license—which of course bound Real to the unamended terms—Real would then have to convince all three hundred DVD-CCA members (movie studios, consumer electronics firms, and members of the computer industry) to agree to permit copying of CSS-protected content.⁸⁵ This is far from likely. Recognizing that the agreement retards innovation in the market for video servers, personal video recorders, and software like RealDVD, consumer electronics manufacturers have invested their limited resources elsewhere. If they now agree to an amendment that permits copying, they will (upon agreement) be lagging in a market where innovation and first-mover advantage is critical.⁸⁶ Movie studios also have no interest in amending the agreement because of their belief that revenues from the digital download market would consequently decline. This is the classic motive and effect of a horizontal refusal to deal.

make backup copies of *Iron Man* using RealDVD, then RealDVD could also copy content produced by other studios who have refused to negotiate with RealNetworks. In this case, nothing is stopping nonparties to this hypothetical agreement to pursue a cause of action for copyright infringement. Assume for instance that Paramount sold Real a license to let consumers make backup copies of *its* content. Also, assume that Real refused to pay for a license on similar terms with the *other* studios. On these facts, there is no reason why the *other* studios—who were not parties to the license—could not pursue a copyright infringement action against RealNetworks.

⁸³ *RealNetworks*, 641 F. Supp. 2d at 923.

⁸⁴ *Id.* at 922.

⁸⁵ Antitrust Transcript, *supra* note 53, at 28–29.

⁸⁶ Jacobson, *supra* note 50.

Realizing that it was locked into a virtually unamendable agreement, Real met with Fox and Paramount in the hopes of obtaining an exclusive license that would allow RealDVD to copy Fox and Paramount DVDs onto consumer hard drives.⁸⁷ Discussions broke down, and Paramount—along with the remaining six major movie studios—refused to license their DVD content to Real.⁸⁸ Relying on the CSS license agreement, the movie studios claim that they were contractually bound not to sell such a license.⁸⁹

This interpretation of the CSS license agreement—that the agreement itself prevents movie studios from licensing their DVD content—presents a colorable concerted refusal to deal claim under section 1 of the Sherman Act.

C. *The Digital Millennium Copyright Act*

Dealing with the DVD-CCA is a nightmare for innovators. It is no surprise then that RealNetworks tried to avoid negotiating with them entirely. Instead, they thought, why not simply reverse engineer CSS and design software like RealDVD or hardware like Facet without obtaining a CSS license?⁹⁰ The answer is that the DMCA makes this activity illegal,⁹¹ even though the DMCA does not grant a new copyright per se.⁹² Instead, it merely creates new bases of liability.⁹³ Since no new property rights are created, organizations like the DVD-CCA can run afoul of the Sherman Act when they use encryption mechanisms to block the licensing of copyrighted content by tying the

⁸⁷ Antitrust Order, *supra* note 5, at 2–3.

⁸⁸ Antitrust Counterclaims, *supra* note 57, at 12.

⁸⁹ *Id.*

⁹⁰ The intersection of antitrust law and copyright law is an obvious by-product of the DMCA. Had the DMCA not been in force when *RealNetworks* was decided (i.e., copyright law prior to 1998), then there would be no antitrust issue: one could simply reverse engineer the CSS encryption and distribute products that make decryption possible. The only limitation would be copyright infringement, which is subject to traditional defenses like fair use, as opposed to the DMCA's regime of anticircumvention *violations*, which is not.

⁹¹ See *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294, 317 (S.D.N.Y. 2000), *aff'd sub nom. Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); see also 17 U.S.C. §§ 1201(a)(2),(b) (2006).

⁹² *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1192 (Fed. Cir. 2004) (“The essence of the DMCA’s anticircumvention provisions is that §§ 1201(a),(b) establish causes of action for *liability*. They do not establish a new *property right*. The DMCA’s text indicates that *circumvention is not infringement* . . . This distinction between property and liability is critical.”) (emphasis added).

⁹³ *Id.* at 1192–93 (“Whereas copyrights, like patents, are property, liability protection from unauthorized circumvention merely creates a new cause of action under which a defendant may be liable.”).

content to a horizontal agreement, which requires the licensee to refrain from entering the market for personal video servers and similar devices.

That is not to say that Hollywood's copyright concerns are entirely illegitimate. The owner of a federally protected copyright has "the exclusive right" to reproduce the copyrighted work, to prepare derivative works, to distribute copies, to perform the work, and to display the work.⁹⁴ The copyright owner may also license or sell these rights to a third-party.⁹⁵ Possession of a copyright satisfies the functional definition of monopoly because a copyright owner is able to decide how and at what price to extract value from the copyrighted content.⁹⁶

In addition to infringement under the 1976 Copyright Act, plaintiffs in DVD copying cases often raise the anti-trafficking provisions of the DMCA as an additional cause of action.⁹⁷ The anti-trafficking provisions target "not those who break into another's domain, but instead those who facilitate the process."⁹⁸ There are two types of anti-trafficking provisions: the access-control provision⁹⁹ and the copy-control provision.¹⁰⁰ The District Court found that RealNetworks violated both of these provisions by developing and distributing RealDVD.¹⁰¹

One problem with the DMCA is that it is not subject to traditional defenses to copyright infringement like fair use. Fair use is the "guarantee of breathing space" at the heart of copyright.¹⁰² Although anti-trafficking violations are not necessarily copyright infringement cases, most defendants in DMCA actions will nevertheless raise fair use as a defense.¹⁰³ Before the DMCA, fair use—as codified in

⁹⁴ 17 U.S.C. § 106 (2006).

⁹⁵ ROGER E. SCHECHTER & JOHN R. THOMAS, *INTELLECTUAL PROPERTY: THE LAW OF COPYRIGHTS, PATENTS AND TRADEMARKS*, § 6.4, at 104 (2003).

⁹⁶ BLACK'S LAW DICTIONARY 1028 (8th ed. 2004) (defining monopoly as "[t]he market condition existing when only one economic entity . . . provides a particular service.").

⁹⁷ *E.g.*, *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009); *Universal City Studios, Inc. v. Reimerdes*, 111 F. Supp. 2d 294 (S.D.N.Y. 2000) *aff'd sub nom.* *Universal City Studios, Inc. v. Corley*, 273 F.3d 429 (2d Cir. 2001); *see generally* 17 U.S.C. §§ 1201(a)(2),(b) (2006).

⁹⁸ 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 12A.03[D][1] (2007).

⁹⁹ 17 U.S.C. § 1201(a)(2) (2006).

¹⁰⁰ *Id.* § 1201(b)(1).

¹⁰¹ *RealNetworks*, 641 F. Supp. 2d at 932–36.

¹⁰² *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).

¹⁰³ *E.g.*, *RealNetworks*, 641 F. Supp. 2d at 940–44; *Universal City Studios, Inc.*

section 107 of the Copyright Act¹⁰⁴—was understood by the Supreme Court to include “substantial noninfringing uses.”¹⁰⁵ This included using a VCR to record TV shows that you otherwise would not be at home to watch.¹⁰⁶

Applying the fair use doctrine to the DMCA has been problematic, because it is an affirmative defense to copyright *infringement*, not circumvention or trafficking.¹⁰⁷ Like most DMCA cases, *RealNetworks* was not an infringement suit. Therefore, fair use’s application to DMCA cases remains suspect at best.¹⁰⁸

With fair use out of the picture, current copyright law has pitted the legitimate expectations of consumers (to have access to new and innovative technology that naturally results from a competitive marketplace) against this notion that copyright law permits content owners to restrain the development of that technology in the name of protecting their copyrighted works.¹⁰⁹

Fair use’s absence, however, presents a false choice with respect to liability under the Sherman Act. Simply put, nothing in the DMCA provides content owners with the right to control the *use* of their content to restrain trade in the market for other technologies in violation of section 1 of the Sherman Act.

v. Reimerdes, 111 F. Supp. 2d 294, 321–24 (S.D.N.Y. 2000), *aff’d sub nom.* Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

¹⁰⁴ 17 U.S.C. § 107. Although fair use is codified in § 107, legislative history makes it clear that statutory recognition of fair use was meant to simply “restate the present *judicial* doctrine of fair use, not to change, narrow, or enlarge it in any way.” WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW*, 413 (2d ed. 1995) (quoting H.R. REP. NO. 94-1476 (1976)).

¹⁰⁵ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 442 (1984).

¹⁰⁶ *Id.*

¹⁰⁷ PATRY, *supra* note 105, at 413 (“Fair use is an affirmative defense. As such, it is relevant only after there has been a *prima facie* showing of infringement, i.e., copying and substantial similarity.”) (citations omitted); *see* 17 U.S.C. §§ 107, 1201(c)(1).

¹⁰⁸ For the same reason, the applicability of the doctrine of copyright misuse also remains suspect. Burk, *supra* note 3, at 1132. I have not considered copyright misuse in this comment because misuse is traditionally invoked as an affirmative defense to copyright infringement. *See* Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901, 902–03 (2004). Despite its similarities with section 1 Sherman Act claims, copyright misuse is not an affirmative cause of action that if proven entitles the claimant to relief.

¹⁰⁹ *See* Amy Harmon, *Studios Using Digital Armor to Fight Piracy*, N.Y. TIMES, Jan. 5, 2003, at SL1, *available at* <http://www.nytimes.com/2003/01/05/business/05CONT.html?pagewanted=1> (explaining that the right to make personal copies is “something consumers have taken for granted in the past.”).

III. APPLYING ANTITRUST ANALYSIS TO THE DVD-CCA

Section 1 of the Sherman Act bans “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”¹¹⁰ However, section 1 “cannot mean what it says”¹¹¹ because “[e]very agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence.”¹¹²

There are, however, “certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.”¹¹³ Courts considering the use of this *per se* rule must determine “whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.”¹¹⁴ “The ‘concerted’ refusal to deal, or agreement of two or more persons not to deal with a third, has traditionally been characterized as *per se* illegal under the antitrust laws.”¹¹⁵ The *concerted* aspect of the refusal explains its “pernicious effect on competition,”¹¹⁶ not the refusal itself.¹¹⁷

Not all concerted refusals, however, will receive *per se* scrutiny.¹¹⁸ Hovenkamp notes that “[t]he *per se* rule is reserved for so-called *naked* boycotts—that is, concerted refusals of competitors to deal with another competitor, customer or supplier when no case can be made that the refusal is ancillary to any legitimate joint activity.”¹¹⁹ When

¹¹⁰ 15 U.S.C. § 1.

¹¹¹ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 687 (1978).

¹¹² *Bd. of Trade of Chi. v. United States*, 246 U.S. 231, 238 (1918).

¹¹³ *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958) (describing the types of agreements traditionally condemned as *per se* illegal).

¹¹⁴ *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19–20 (1979).

¹¹⁵ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* §5.4a, at 220 (3d ed. 2005); *see also* *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966); *Radiant Burners Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457 (1941); *E. States Retail Lumber Dealers Ass’n v. United States*, 234 U.S. 600 (1914).

¹¹⁶ *N. Pac. Ry. Co.*, 356 U.S. at 5.

¹¹⁷ *See E. States*, 234 U.S. at 611–12 (explaining while a single firm may voluntarily refuse to deal with another, competitors who agree to a refusal may not).

¹¹⁸ *E.g.*, *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).

¹¹⁹ HOVENKAMP, *supra* note 115, § 5.4a, at 221.

the “competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,” the court should employ the rule of reason.¹²⁰ Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”¹²¹

The DVD-CCA’s practices are not of the type for which “no case can be made” that the total ban on copying of CSS-protected content is ancillary to “legitimate joint activity.”¹²² Certainly the CSS license agreement is a mechanism by which content owners can protect their copyrights.¹²³ Moreover, the agreement fosters competition in the market for DVD players and other compliant devices. Because the agreement can foster competition in that market, it is not entirely anticompetitive. Analysis must therefore proceed under the rule-of-reason.

The framework for analyzing a practice under the rule-of-reason was best articulated by Justice Breyer, who wrote separately in *California Dental Association v. Federal Trade Commission*.¹²⁴ *California Dental* involved dentists who were members of an association (the CDA) that required its members to abide by a code of ethics.¹²⁵ The code provided that dentists could not make false or misleading advertisements.¹²⁶ This included the advertising of “fees for specific types of services without fully and specifically disclosing all variables and other relevant factors.”¹²⁷

Disapproving of the practice, the FTC filed an enforcement action against the CDA. The agency alleged that the “CDA had unreasonably restricted two types of advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services.”¹²⁸

The Court held that the Court of Appeals erred in applying a so-called “quick-look analysis.”¹²⁹ The Court believed that because the

¹²⁰ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

¹²¹ *Cont’l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

¹²² HOVENKAMP, *supra* note 115, § 5.4a, at 221.

¹²³ Albeit, much like a nuclear bomb can be used as a fly swatter.

¹²⁴ 526 U.S. 756 (1999).

¹²⁵ *Id.* at 759–60.

¹²⁶ *Id.* at 760.

¹²⁷ *Id.* at 760 n.1.

¹²⁸ *Id.* at 762.

¹²⁹ *Id.* at 769. Quick-look is less categorical than the per se rule, but less thorough than the rule of reason.

anticompetitive effects were “far from intuitively obvious . . . a more thorough enquiry into the consequences of those restraints [should have been] performed.”¹³⁰

Justice Breyer, concurring in judgment, found this distinction to be ridiculous. Recognizing that antitrust analysis was more of a continuum rather than one constricted by bright line categorical rules, Justice Breyer wrote that

I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?¹³¹

This mode of analysis is eminently sound. For that reason, it should be no surprise that this organizational structure is in accord with the views of noted antitrust scholar Phillip Areeda.¹³² The following analysis of the DVD-CCA and the CSS license agreement is correspondingly broken down to that structure.

A. Identifying the Specific Restraint: The Studios' Collective Refusal to License

The specific restraint at issue is the studios' collective refusal to grant a license to RealNetworks to “make and sell a device that copies their DVD content onto a hard drive.”¹³³ Justice Breyer was very

¹³⁰ *Id.* at 759.

¹³¹ *Id.* at 782 (Breyer, J., dissenting).

¹³² *See id.* at 784 (citing 7 P. AREEDA, ANTITRUST LAW ¶ 1503a, at 372–77 (1986)); *id.* at 786–87 (citing 7 P. AREEDA, ANTITRUST LAW ¶ 1504, at 377–83 (1986)); *id.* at 788 (citing 7 P. AREEDA, ANTITRUST LAW ¶ 1503, at 376–77 (1986)).

¹³³ RealNetworks, Inc. & RealNetworks Home Entertainment, Inc.'s Opposition to Studios' Motion to Dismiss Antitrust Claims at 1, 4–5 RealNetworks, Inc. v. DVD Copy Control Ass'n, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (No. 3:08-CV-04548-MHP), ECF No. 476 [hereinafter Opposition to Dismissal]. The argument that there was no explicit agreement is of no import and requires little discussion in light of numerous Supreme Court decisions, like *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), which hold that an illegal conspiracy can be inferred “without direct proof of an agreement.” Barak D. Richman, *The Antitrust of Reputation Mechanisms: Institutional Economics and Concerted Refusals to Deal*, 95 VA. L. REV. 325, 343 (2009).

careful in his *California Dental* opinion to distinguish between the agreement, which the defendants blame for their anticompetitive behavior, and the behavior itself.¹³⁴ This distinction is important, because if the restraint was simply the CSS license agreement itself, then it would be difficult for courts to evaluate the “substantive economic effect” of the DVD-CCA’s conduct.¹³⁵

Nevertheless, I refer to the restraint as “the studios’ collective refusal” and the “CSS license agreement” interchangeably. This is because the CSS license agreement memorializes the studios concerted refusal to license.

B. What are the CSS-License Agreement’s likely anticompetitive effects?

The second part of the analysis asks whether the restraint has “the potential for genuine adverse effects on competition.”¹³⁶ There are two main anticompetitive effects of the studios’ refusal to deal: (1) the damage to the market for video servers, aftermarket DVRs, and software like RealDVD, and (2) the agreement’s potential to prevent individual studios from licensing their copyrighted CSS-protected DVD content.

i. Damage to the Market for Video Servers, Aftermarket DVRs, and Software like RealDVD

The studios’ refusal to license their CSS-protected DVD content has retarded innovation in the consumer electronics market. Without a license from the studios’ or the DVD-CCA, RealNetworks cannot legally build a device that can compete with a DVR like TiVo or a standalone media server like Apple TV. Unlike both of these

¹³⁴ *Cal. Dental*, 526 U.S. at 782 (Breyer, J., dissenting) (“The most important question is the first: What are the specific restraints at issue? Those restraints do *not* include merely the agreement to which the California Dental Association’s . . . ethical rule literally refers, namely, a promise to refrain from advertising that is ‘false or misleading in any material respect.’ Instead, the Commission found a set of restraints *arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice*, through advisory opinions, guidelines, enforcement policies, and review of membership applications.”) (second emphasis added) (internal citations omitted).

¹³⁵ See Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1771 (1994) (explaining that the degree of scrutiny should vary with the type of restraint at issue).

¹³⁶ *Cal. Dental*, 526 U.S. at 784 (Breyer, J., dissenting) (internal citations omitted).

products, Facet has the advantage of not being linked to a downstream subscription (from either a cable provider or iTunes, respectively). If released, it would pave the way for the next generation of media servers that could truly claim the title “God’s Machine.”¹³⁷

The studios argued that the CSS license agreement, not their concerted conduct, was the basis of their refusal. This argument should have carried little weight because the studios framed the CSS license agreement.¹³⁸ In fact, the trial transcripts make clear that “the motion picture studios got together as a group to determine the terms of the CSS license.”¹³⁹

Nevertheless, the studios might point out that all of the relevant players in the consumer electronics industry (including RealNetworks) are members of the DVD-CCA. This argument has two prongs to it. First, as a horizontal agreement with vertical¹⁴⁰ overtones, the studios would contend that the CSS license agreement should be provided more deference than what antitrust law provides for ordinary horizontal arrangements. Second, to the extent that the agreement restrains trade, the companies who are restrained have voluntarily agreed to the restraint. Both of these arguments must be rejected.

¹³⁷ This was the FCC Chairman’s description of TiVo. See *TiVo Sales Remain Tepid Despite Fanatic Fans*, FORBES.COM (Sept. 11, 2003, 6:00 AM), <http://www.forbes.com/2003/09/11/0911tivopinnacor.html>. However, technology today allows for so much more. For example, it is entirely possible to build a device that would have two terabytes of storage space (that is equal to 2,000 gigabytes, or about 750 hours of HD programming), with 802.11n wireless networking (so it could access Netflix and other online services in addition to movies, music, and videos stored on your other computers quickly), a DVD-burner (like Facet), a TV tuner (like TiVo), a built-in VPN protocol (so you can access all of your media anywhere in the world from your phone or laptop), an AM/FM tuner, and a port for connecting Sirius/XM radios. What’s the point of any of this technology though, if you cannot use it to archive, organize, and view your DVD movie collection? See Longino, *supra* note 37 (studios have considered pulling their movies from Netflix in light of declining sales). As long as consumers agree with this sentiment, electronics firms will invest their research dollars elsewhere. Accordingly, innovation and consumers will suffer.

¹³⁸ [Proposed] Second Amended Complaint for Declaratory Relief & Violation of Sherman Act & State Law at 13–14 *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913 (N.D. Cal. 2009) (No. 3:08-CV-04548), ECF No. 325-1 [hereinafter Second Amended Complaint]; Opposition to Dismissal, *supra* note 133, at 6.

¹³⁹ Second Amended Complaint, *supra* note 138, at 13.

¹⁴⁰ Unlike horizontal competition, which “takes place between firms at the same stage,” vertical competition refers to “competition between firms at successive stages.” Robert L. Steiner, *Vertical Competition, Horizontal Competition, and Market Power*, 53 ANTITRUST BULL. 251, 251 (2008).

The vertical aspect argument is fundamentally flawed. In pointing to antitrust law's recent tradition of not scrutinizing vertical agreements under the per se rule,¹⁴¹ the argument fails to account for circumstances—like this one—wherein the vertical players have an economic interest in restraining innovation in the relevant market. In the case of DVDs, consumer electronics manufacturers have invested their limited resources towards endeavors other than DVD archivers or video servers. If the consumer electronics firms now agree to a proposed amendment that permits copying, they will (upon agreement) be among the second movers; lagging in a market where being first to market is key.¹⁴²

The second part of the argument—that RealNetworks has agreed to the restraint—is a sheer misstatement of the facts. Agreement implies mutual assent to the terms. As mentioned *supra*, however, the CSS license agreement is offered on a take-it or leave-it basis.¹⁴³ As the District Court pointed out,

[p]rospective licensees are not permitted to negotiate any aspect of the CSS License or Procedural Specifications. Nor does DVD CCA offer prospective licensees any legal advice about the License Agreement or the Procedural Specifications at any time—whether the advice concerns specific terms, membership categories, or more general questions about compliance.¹⁴⁴

In other words, not only was RealNetworks required to accept the terms as they were offered, or in the alternative, refuse the license and have no ability to develop innovative devices that utilize DVD content, but it was also forced to accept these terms without an understanding of the DVD-CCA's interpretation of them. Regardless of whether such a contract of adhesion is enforceable as a matter of state contract law, it certainly should not provide a basis for estopping a federal antitrust claim under the Sherman Act.

The consequence of this type of activity is clear. Before an innovator develops new devices or technologies that utilize DVD content, they must first accept the take-it-or-leave-it CSS license agreement. By digitally restricting all forms of copying, including

¹⁴¹ See, e.g., *Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 885 (2007) (vertical minimum resale price fixing no longer subject to per se treatment and instead receives rule of reason review).

¹⁴² Jacobson, *supra* note 43.

¹⁴³ See *supra* note 70 and accompanying text.

¹⁴⁴ *RealNetworks*, 641 F. Supp. 2d at 922.

those permitted by copyright law, the CSS license agreement provides a virtual guarantee that innovation will be restricted, if not eliminated, in the market for video servers and other related devices.

ii. The Agreement Eliminates the Ability of Movie Studios to License their Copyrighted CSS-Protected DVD Content

The second anticompetitive effect of the restraint is that it prohibits the studios from licensing their copyrighted CSS-protected DVD content. The point here is exposed by the Court of Appeals for the Second Circuit: “while owners of copyrights may individually refuse to deal with a party seeking a license, such owners may not collectively refuse to deal to prevent competition.”¹⁴⁵ This is exactly what the movie studios did in *RealNetworks*.¹⁴⁶

Arguing that such an agreement was necessary without more is no defense. Rather, the DVD-CCA must provide a basis for a court to conclude that the restraint—the refusal to license RealNetworks the ability to manufacture RealDVD and Facet—was “no greater than was [reasonably] necessary” to achieve the studios goal of protecting their copyrights.¹⁴⁷

The studios’ refusal to license, as memorialized in the CSS license agreement, appears to fail this test on two grounds. First, the studios made no attempt to consider whether the development of RealDVD and Facet actually posed a threat to the copyrighted works owned by the studios. Although copyright law does not require such a consideration, antitrust law does. Second, the studios’ decision to construct and bind the entire industry to a virtually unamendable CSS license agreement made an individual consideration of RealDVD and Facet impossible.¹⁴⁸ Although the antitrust laws impose no duty for a

¹⁴⁵ *PrimeTime 24 Joint Venture v. Nat’l Broad. Co.*, 219 F.3d 92, 99 (2d. Cir. 2000) (citing *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.* 441 U.S. 1, 19 (1979)).

¹⁴⁶ Antitrust Counterclaims, *supra* note 57, at 11–12.

¹⁴⁷ Clarence E. Eldridge, *A New Interpretation of the Sherman Act*, 13 MICH. L. REV. 1, 10 (1914) (“[T]he restraint imposed must be no greater than was necessary to a full consummation of the indispensable main, lawful purpose.”); *see also* Gabriel A. Feldman, *The Misuse of the Less Restrictive Alternative Inquiry in Rule of Reason Analysis*, 58 AM. U. L. REV. 561, 567 (2009) (“Taft explained that a restraint was reasonably necessary if it was ‘reasonably adapted and limited to the necessary protection of a party in carrying out [the underlying agreement.]’” (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 281 (1898), *modified and aff’d sub nom. Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899))).

¹⁴⁸ *See* Second Amended Complaint, *supra* note 138, at 13.

firm to deal with its rivals, they certainly provide no refuge for the competitor who—rather than competing on the merits—bands together with his rivals for the sole purpose of eliminating competition.

Had the studios conducted even a perfunctory investigation, they would have discovered that RealDVD and Facet posed little objective threat to the value of the studios' copyrighted DVDs. In fact, RealNetworks went to great lengths to design a product that protected the ripped DVD content in an encryption format that was far superior to the debilitated CSS—a quintillion¹⁴⁹ times more secure to be exact.¹⁵⁰ When Facet rips a DVD to its hard drive, it locks the AES encrypted version of the video content onto its hard drive so only Facet can play the saved copy.¹⁵¹ Of particular irony, RealDVD does not even allow a user to transfer playable DVD content onto a device like an iPod or to a backup DVD disc.¹⁵² On these facts, it is hard to understand how RealDVD or Facet even posed a threat to the studios' copyrights.¹⁵³ Refusing to grant a license to RealNetworks under these circumstances is not “[reasonably] necessary”¹⁵⁴ to protect the studios' copyrights.

Even if an agreement was necessary in order to protect their copyrights, it is not clear why the agreement had to bind its members to unanimous approval of potential amendments. The argument that it was necessary to promulgate CSS as a secure standard makes little sense once CSS has been hacked.¹⁵⁵ It makes even less sense when alternative security mechanisms like ARccOS and RipGuard are available and do not damage DVD's compatibility as a format.¹⁵⁶ This

¹⁴⁹ One quintillion is equal to 10^{18} . *Quintillion Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/quintillion+> (last visited Sept. 3, 2010).

¹⁵⁰ See Second Amended Complaint, *supra* note 138, at 18. This is the same “encryption system used by the U.S. Government for classified information.” *Id.*

¹⁵¹ *Id.* at 18–19.

¹⁵² *Id.* at 18. In other words, RealDVD does not even create the utopia that I described at the beginning of this comment: a world where everyone can access all of their content regardless of where they are or when they want it. This makes the studios' anticompetitive bent all the more obvious.

¹⁵³ It is not clear why RealNetworks developed software and hardware that lacked many desirable features. It is probable that Glaser and his team anticipated the *RealNetworks* litigation. Perhaps they wanted to design a product that would survive the perfect test case. Regardless of their motives, the bottom line is that RealDVD and Facet did not pose a threat to the studios; if anything, RealDVD and Facet's success could have been a wake-up call to the them. Only then would the studios have realized that their paranoia of DVD copying was hurting their bottom line.

¹⁵⁴ Eldridge, *supra* note 147; Feldman, *supra* note 147.

¹⁵⁵ See *infra* note 180 and accompanying text.

¹⁵⁶ See *supra* text accompanying notes 23–29.

argument fails for those reasons.

C. Are there offsetting procompetitive justifications?

In light of the aforementioned anticompetitive effects of the studios' refusal to deal, the studios must proffer some offsetting procompetitive justifications to justify their refusal. In simple terms, the procompetitive justifications must outweigh the anticompetitive effects of the restraint.

There are four offsetting procompetitive justifications that the DVD-CCA could raise in the CSS license agreement's defense: (1) the protection of copyrighted works, (2) the DVD-CCA is a standard setting organization, (3) the DVD-CCA is a joint venture among competitors, and (4) that RealNetworks was free to license content from the studios directly. These justifications are examined *seriatim*.

i. The Protection of Copyrighted Works

The first justification, the protection of copyrighted works, is by far the strongest and yet the most misunderstood. Its premise is that copyright law gives the studios the exclusive right to make copies of their works and distribute those copies. The studios, therefore, should be allowed to take any necessary steps to ensure that their works are not being copied. To support this argument, the studios would point to the DMCA, which provides content owners with a cause of action against those who circumvent an encryption mechanism (like CSS) that protects a copyrighted work (like a DVD).¹⁵⁷

However impenetrable the bulwark of copyright may be, one is hard pressed to find the specific section of Title 17 that "confer[s] a privilege to violate the antitrust laws."¹⁵⁸ The argument that copyrighted works should be treated differently in the antitrust context is a "ruinous competition" argument that, as the following analysis will show, has consistently been rejected by the Court as invalid.¹⁵⁹

¹⁵⁷ See 17 U.S.C. § 1201(a)(1)(A) (2006).

¹⁵⁸ *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004) (quoting *CSU, L.L.C. v. Xerox Corp.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000)); see also *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 (1979) (explaining that copyright owners cannot refuse to license content merely to prevent competition).

¹⁵⁹ See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 159 (1948) (rejecting the ruinous competition argument).

The seminal decision on this issue was handed down more than half-a-century ago in *United States v. Paramount Pictures*.¹⁶⁰ In *Paramount*, the five major motion picture studios,¹⁶¹ and others, were engaged in a series of practices that violated sections 1 and 2 of the Sherman Act.¹⁶² One of these condemned practices was block-booking, which is the “licensing, or offering for license, one feature [film] or group of feature [films] on condition that the exhibitor will also license another feature or group of features released by the distributors during a given period.”¹⁶³ As in *RealNetworks*, the defendants in *Paramount Pictures* argued that their practices should be treated differently because their horizontal agreement dealt with copyrighted works. Affirming the district court’s decision to enjoin this practice, the Court held that

[t]he copyright law, like the patent statutes, makes reward to the owner a secondary consideration. In *Fox Film Corp. v. Doyal*, 286 U.S. 123 (1932), Chief Justice Hughes spoke as follows respecting the copyright monopoly granted by Congress: “The sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors.” It is said that reward to the author or artist serves to induce release to the public of the products of his creative genius. But the reward does not serve its public purpose if it is not related to the quality of the copyright. Where a high quality film greatly desired is licensed only if an inferior one is taken, the latter borrows quality from the former and strengthens its monopoly by drawing on the other. The practice tends to equalize rather than differentiate the reward for the individual copyrights. Even where all the films included in the package are of equal quality, the requirements that all be taken if one is desired increases the market for some. Each stands not on its own footing but in whole or in part on the appeal which another film may have. As the District Court said, *the result is to add to the monopoly of the copyright in*

¹⁶⁰ *Id.*

¹⁶¹ In 1948, this included Paramount Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corp., Columbia Pictures Corp., and Universal Corp. *Id.* at 140.

¹⁶² *Id.* at 141–61 (unlawful practices included price fixing, clearances, pooling agreements, master agreements, block-booking, and discrimination).

¹⁶³ *Id.* at 156.

*violation of the principle of the patent cases involving tying clauses.*¹⁶⁴

The Court went on to mention in a footnote that the Copyright Act “includes no such privilege” to add to the monopoly of copyright by tying the license of one feature to another.¹⁶⁵ It is irrelevant that “enforcement of the restriction as to block-booking will be very disadvantageous to [the studios] and will greatly impair [their] ability to operate profitably.”¹⁶⁶ This argument, known as the “ruinous competition argument,” is rejected by the Court because “the policy of the antitrust laws is not qualified or conditioned by the convenience of those whose conduct is regulated.”¹⁶⁷

This principle applies just as strongly even when the goods in question are not protected by intellectual property law. In *Fashion Originators*, a guild refused to sell their garments to department stores that sold garments from competing manufacturers, which in the guild’s view, were pirating the guild’s designs.¹⁶⁸ The attire designed by the guild was “neither copyrighted nor patented,” and in fact, “existing legislation affords [the guild] no protection against copyists.”¹⁶⁹ The guild argued that the combination did not violate the Sherman Act because they did not fix or regulate prices, parcel out or limit production, nor did the practice cause a deterioration in quality.¹⁷⁰

Nevertheless, the Court struck down the guild’s acts under the Sherman and Clayton Acts because the guild “exercised sufficient control and power in the women’s garments and textile businesses ‘to exclude from the industry those manufacturers and distributors who do not conform to the rules and regulations of [the guild], and thus tend to create in themselves a monopoly in the said industries.’”¹⁷¹ In other words, the guild had market power.

¹⁶⁴ *Id.* at 158 (emphasis added). The one obvious way to distinguish *Paramount Pictures* from *RealNetworks* is that the antitrust harm in *RealNetworks* is not based on tying; it is based on a group refusal. This difference is meaningless: both tying and group refusals are restraints of trade in violation of section 1 of the Sherman Act. The leveraging concern remains the same regardless of what you label the cause of action. See *United States v. Microsoft Corp.*, 253 F.3d 34, 84 (D.C. Cir. 2001).

¹⁶⁵ *Paramount Pictures*, 334 U.S. at n.12. See also *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1201 (Fed. Cir. 2004).

¹⁶⁶ *Paramount Pictures*, 334 U.S. at 159.

¹⁶⁷ *Id.*

¹⁶⁸ *Fashion Originators’ Guild of Am., Inc. v. FTC*, 312 U.S. 457, 461 (1941).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 466.

¹⁷¹ *Id.* at 466–67.

The guild also argued that “their boycott and restraint of interstate trade” was not prohibited by the Sherman and Clayton Acts because the restraint was “reasonable and necessary to protect the manufacturer, laborer, retailer and consumer against the devastating evils growing from the pirating of original designs and had in fact benefitted all four.”¹⁷² Like in *Paramount Pictures*, the Court again rejected this ruinous competition argument because “the aim of [the guild’s] combination was the intentional destruction of one type of manufacture and sale which competed with guild members.”¹⁷³ The Court went on to note that “[t]he purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman and Clayton Acts.”¹⁷⁴

Fashion Originators cannot be distinguished from *Paramount Pictures* on the ground that the guild did not have any statutory or common law intellectual property right in its garment designs. “Indeed, even if such rights existed the defendants would not have been permitted to pursue them by means of a boycott but would have had to assert them in a court that could determine both the validity of the claimed rights and the factual issue of infringement.”¹⁷⁵ The relevance of this point is clear: concerted refusals are not a valid method for enforcing intellectual property rights.

From these cases, some principles emerge. *Paramount Pictures* teaches that fierce competition does not justify leveraging the copyrights over successful movies to the licensing of less popular ones.¹⁷⁶ *Fashion Originators* takes the proposition one step further to say that Sherman Act liability cannot be avoided by shrouding anticompetitive conduct in an adverse actor’s alleged “piracy.”¹⁷⁷

The studios’ argument in *RealNetworks*, that the DMCA vests the studios with a special exemption from the antitrust laws, is the same

¹⁷² *Id.* at 467.

¹⁷³ *Id.* See also Richman, *supra* note 133, at 343 (“[E]fforts to self-police legal contracts, even if necessitated by court failures, and perhaps even if such self-policing has procompetitive justifications, would have difficulty escaping antitrust liability under a strict application of the current caselaw.”).

¹⁷⁴ *Fashion Originators*, 312 U.S. at 467–68.

¹⁷⁵ PHILLIP E. AREEDA & HERBERT HOVENKAMP, *FUNDAMENTALS OF ANTITRUST LAW* § 22.02a, at 22–12 (3d ed. 2010).

¹⁷⁶ *United States v. Paramount Pictures*, 334 U.S. 131, 158 n.12 (1948). *Accord Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1193 (Fed. Cir. 2004).

¹⁷⁷ *Fashion Originators*, 312 U.S. at 467; see AREEDA & HOVENKAMP, *supra* note 175.

ruinous competition argument that was rejected by the Court over sixty years ago in *Paramount Pictures*. Simply clothing the devil in a digital dress is not enough to avoid the argument's circularity. Congress, not the studios, defines the outer boundaries of intellectual property rights.¹⁷⁸ This is true even when those not conforming to the anticompetitive restraint can be objectively described as pirates, like in *Fashion Originators*.¹⁷⁹

From a pragmatic standpoint, arguing that a horizontal refusal to license DVD content—or CSS itself—is the only reasonable way for the studios to prevent unauthorized copying of their copyrighted content ignores the reality of CSS's ineffectiveness. Copies of CSS decryption software (like DeCSS) are widely available on the internet.¹⁸⁰ But more importantly, arguing that a digital fence is necessary to protect content is much different than arguing that all of the competitors in an industry needed to collude to develop the product, lock, and key to that fence; and that access to what lied beyond the fence would be limited only to those who accepted a take-it-or-leave-it license agreement. Copyright law provides the remedies for copyright infringement. All other actions taken by private individuals must be subject to the scrutiny of the Sherman Act. This is the lesson of *Fashion Originators*: Content producers seeking to protect their intellectual property rights must obtain their remedy from the courts, not themselves.¹⁸¹

Perhaps the DVD-CCA will point to a literal reading of the DMCA. They will contend that any circumvention of CSS on CSS-protected DVDs is now per se illegal under the DMCA unless the DVD-CCA provided Real with explicit authorization to circumvent CSS. However, this argument has already been made and disposed of by the Federal Circuit in *Skylink*.¹⁸² The *Skylink* court held that “[t]he essence of the DMCA’s anticircumvention provisions is that §§ 1201(a)-(b) establish causes of action for *liability*. They do not

¹⁷⁸ See *Fashion Originators*, 312 U.S. at 468 (guild cannot refuse to deal with certain retailers even if the conduct of the “pirates” was tortious or unlawful).

¹⁷⁹ *Id.* at 461.

¹⁸⁰ Faultline, *RealNetworks Claims CSS License Lets it Copy DVDs*. *Sues Studios*, THE REGISTER (May 21, 2009, 8:10 GMT), http://www.theregister.co.uk/2009/05/21/realnetworks_sues_hollywood_in_dmca_dispute/ (“CSS algorithms have been known for at least a decade, and are not hard to crack at all.”).

¹⁸¹ See *Fashion Originators*, 312 U.S. at 468.

¹⁸² *Chamberlain Grp., Inc. v. Skylink Techs., Inc.*, 381 F.3d 1178, 1195 (Fed. Cir. 2004).

establish a new *property right*. The DMCA's text indicates that *circumvention is not infringement . . .*"¹⁸³

The *Skylink* court rejected a literal interpretation of the DMCA.¹⁸⁴ It held that such an interpretation "is only plausible if the anticircumvention provisions established a new property right capable of conflicting with the copyright owner's other legal responsibilities—which as we have already explained, they do not."¹⁸⁵ The court went on to hold that the DMCA did not change "the legal landscape governing the reasonable expectations of consumers or competitors . . . the ways that courts analyze industry practices . . . [nor did it] render the pre-DMCA history of the . . . industry irrelevant."¹⁸⁶ Rather, the "[s]tatutory structure and legislative history both make it clear that § 1201 applies only to circumventions *reasonably related* to protected rights."¹⁸⁷ The court concluded that intellectual property rights of content owners to exclude others from copyrighted content *must be balanced with the policies and limitations imposed by the Sherman Act*.¹⁸⁸

Thus, there is nothing peculiar about copyright or the DMCA that *requires* a uniform encryption mechanism to be tied to an agreement that prohibits the licensing of encrypted content.

ii. The DVD-CCA as a Standard Setting Organization and CSS as the Standard

If *RealNetworks* went to trial on the merits, the studios would have argued that CSS and its accompanying license agreement promotes rather than restrains competition. Because of the "potential for procompetitive benefits [inherent in standard setting associations] . . . most lower courts [have] appl[ie]d rule-of-reason analysis to product standard-setting by private associations."¹⁸⁹ As a corollary to the argument that the DVD-CCA is a standard setting organization, the studios have argued that the CSS license agreement is "enormously output-enhancing and pro-competitive."¹⁹⁰

¹⁸³ *Id.* at 1192 (emphasis added).

¹⁸⁴ *Id.* at 1202.

¹⁸⁵ *Id.* at 1193.

¹⁸⁶ *Id.* at 1194 (alteration in original).

¹⁸⁷ *Id.* at 1195 (emphasis added).

¹⁸⁸ *Id.* at 1201–03 (emphasis added).

¹⁸⁹ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *see also* Richman, *supra* note 133, at 348.

¹⁹⁰ *E.g.*, Motion Picture Studio Parties' Notice of Motion and Motion to Dismiss Real's Antitrust Claims; Memorandum of Points and Authorities at 17, *RealNetworks, Inc. v. DVD Copy Control Ass'n*, 641 F. Supp. 2d 913 (N.D. Cal.

Certainly the agreement is output-enhancing for the studios insofar as it provides an additional layer of protection against the public goods problem inherent in every type of intellectual property.¹⁹¹ But this is irrelevant for the purpose of determining the practice's validity under antitrust law. The factfinder must weigh the restraint imposed on the market against the procompetitive benefits derived from the standard.¹⁹² In other words, does the agreement foster more competition in the market for copyrighted movies than it restrains in the market for personal video servers and digital video archivers?

Whether CSS is a procompetitive standard depends on (1) preliminary inquiry of whether the DVD-CCA actually promulgates a *standard*, (2) whether strong network effects currently exist for the standard, and (3) if internal procedures existed within the DVD-CCA for Real to take advantage of to preserve the output enhancing features of the standard.

The term "standard" must be defined before determining whether the DVD-CCA promulgates one. Professor Lemley defines standards as "any set of technical specifications that either provides or is intended to provide a common design for a product or process."¹⁹³ Even under Lemley's broad definition, it does not appear that the DVD-CCA is a true standard setting organization. Any argument to the contrary is undercut by the DVD-CCA's, who in its Answer asserted that "nothing requires a Studio to distribute its content on *CSS-protected* DVDs."¹⁹⁴ On the other hand, the DVD format itself is a standard because all major industry players have to distribute their content on DVD because it is *the standard* means of distribution of movies.¹⁹⁵

2009) (No. C 08-4548 MHP), ECF No. 454 [hereinafter Studios' Motion to Dismiss].

¹⁹¹ See Mark A. Lemley, *Intellectual Property Rights and Standard-Setting Organizations*, 90 CALIF. L. REV. 1889, 1892 (2002) ("Intellectual creations are public goods that are much easier and cheaper to copy than they are to produce in the first place. Absent some form of exclusive right over inventions, no one (or not enough people) will bother to innovate. IP rights are thus a 'solution' to the public-goods problem because they privatize the public good, giving potential inventors an incentive to engage in research and development.").

¹⁹² See *Allied Tube*, 486 U.S. at 501.

¹⁹³ Lemley, *supra* note 191, at 1896.

¹⁹⁴ Studios' Motion to Dismiss, *supra* note 190, at 16 (emphasis added).

¹⁹⁵ See Kirk, *supra* note 10. Some may suggest that my argument ignores the growing popularity of internet based distribution of digital video. While internet-based digital video's popularity is exploding, it is not in the same market as DVDs. DVDs allow a user to take a movie with him in the car, to a friend's house, or on another device. Digital download doesn't offer this type of tangibility. Some forms

The second step in the analysis of CSS's status as a standard turns on the existence of strong network effects for a single encryption format.¹⁹⁶ When a product has strong network effects, the value for the product increases as more people use it.¹⁹⁷ For example, the telephone, fax machine, Facebook, Google Chat, and the QWERTY keyboard all have strong network effects. In the late 1990s, this factor would swing strongly in the DVD-CCA's favor because CSS was *the mechanism* for protecting DVDs. It was assumed that a standard encryption mechanism, like the DVD format itself, would need to be agreed upon by the entire industry. In other words, it was thought that the lock and key must *both* be designed by the same locksmith.

However, CSS was eventually cracked. Once broken, developers and content producers scrambled to develop secondary encryption mechanisms without abandoning the DVD format. What they came up with was ARccOS and RipGuard.¹⁹⁸ Both of these encryption mechanisms, unlike CSS, do not require a horizontal agreement to take effect. Or, to extend the locksmith metaphor, the lock and key were now being manufactured by different locksmiths. Thus, prevalence of CSS amongst studio-produced DVDs ten years ago is not enough to trigger a finding of strong network effects today.

In fact, rather than adding value, the recent sales figures indicate that CSS probably reduces the value for studio produced DVDs.¹⁹⁹ Realizing that DVDs have limited uses and cannot be copied, archived, or converted into other formats, consumers have turned to rental services like Netflix in increasing numbers.²⁰⁰ The absence of strong network effects and the existence of alternative methods of protecting DVD content indicates that rigid adherence to the CSS license agreement is hardly the least restrictive method to protect studio content from copyright infringement.²⁰¹

The third and final prong of the standard-setting analysis examines whether RealNetworks failed to take advantage of internal DVD-CCA procedures. The DVD-CCA argues that Real has failed to propose an

(i.e., iTunes) only allow the files to be viewed on certain computers. Other forms (i.e., Netflix) require an internet connection in order to access content. DVDs have no such limitations.

¹⁹⁶ See Lemley, *supra* note 191 at 1900 ("Absent network effects, economists generally presume that consumers fare best when many companies compete to offer different sorts of products. To the extent that standardization on a single product reduces consumer choice, it may be undesirable.") (citations omitted).

¹⁹⁷ BOYLE, *supra* note 2, at 69.

¹⁹⁸ See *supra* text accompanying note 26.

¹⁹⁹ See Boorstin, *supra* note 19.

²⁰⁰ See *Face Value: Movies to go*, ECONOMIST, July 9, 2005, at 57.

²⁰¹ Feldman, *supra* note 147. See generally Eldridge, *supra* note 147.

amendment to the CSS license agreement despite having “ample opportunity” to do so.²⁰² Although somewhat incriminating, this fact has less argumentative force when placed in the context of the DVD-CCA’s behavior of “stacking the private standard-setting body with decision-makers sharing their economic interest in restraining competition.”²⁰³ The shared interest of DVD-CCA members in restraining competition in the market for personal video servers, video archivers, and software like RealDVD, has been demonstrated both in this comment and elsewhere.²⁰⁴ In these situations, the Court has held that

[t]he antitrust validity of [a standard-setting process] is not established, without more, by [an association’s] literal compliance with the rules of the Association, for the hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.²⁰⁵

The DVD-CCA, whose members all share an interest in the restraint, does not appear to have these safeguards.²⁰⁶

In sum, the CSS license agreement is not a standard setting agreement. It is a contract of adhesion. As such, it is offered to studios and consumer electronics manufacturers on a take-it-or-leave-it basis.²⁰⁷ The apparent goal of the agreement is two-fold: (1) to establish a variety of legal consequences for non-studio actors that circumvent CSS, regardless of whether they belong to the DVD-CCA or not, and (2) to have a regime in place to make it extremely costly for one of the member studios to defect from the DVD-CCA cartel. This restraint is not ancillary to the maintenance of a standardized encryption mechanism. And the existence of ARccOS and RipGuard in the marketplace renders the need for a uniform encryption mechanism suspect at best.²⁰⁸ Therefore, the argument that the CSS

²⁰² Studios’ Motion to Dismiss, *supra* note 190, at 6.

²⁰³ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 511 (1988).

²⁰⁴ See *supra* notes 81–82 and accompanying text. Consumer electronics manufacturers who abide by the agreement have invested resources in markets other than the market for video servers, personal video recorders, and software like RealDVD. If they agree to the proposed license, they will be behind in a market where being the first mover is critical. See Jacobson, *supra* note 45, at 9.

²⁰⁵ *Allied Tube*, 486 U.S. at 509.

²⁰⁶ See Jacobson, *supra* note 43, at 9.

²⁰⁷ *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 922 (N.D. Cal. 2009).

²⁰⁸ See *supra* text accompanying notes 23–29.

license agreement is the instrument of the DVD-CCA's function as a legitimate standard setting organization should not be given much weight.

iii. The DVD-CCA as a Joint Venture Among Competitors

Modern jurisprudence defines joint ventures as arrangements “in which persons who would otherwise be competitors *pool their capital and share the risks of loss as well as the opportunities for profit*. In such joint ventures, the partnership is regarded as a single firm competing with other sellers in the market.”²⁰⁹ Based on this definition, it does not appear that the DVD-CCA is a joint venture among competitors.

Rather than pooling capital and sharing the risks of loss in addition to the opportunities for profit, the DVD-CCA appears to be a for-profit organization of horizontal and vertical competitors who have contractually bound each other to produce only attenuated DVD products. The DVD-CCA is not financed by the studios. Instead, it is run by LMI, a limited liability company based out of Morgan Hill, California, which manages the DVD-CCA and several other significant copyright protection bodies.²¹⁰ Multiplying the \$15,000 license fee by the 300 members of the association indicates that LMI has taken in about \$5 million through the administration of the DVD-CCA.²¹¹

The DVD-CCA might nevertheless succeed at convincing a court that it is a joint venture among competitors. Such success, however, would not end the matter because even efficiency creating joint ventures have historically come under scrutiny. In 1889, a number of railroad companies organized the Terminal Railroad Association of St. Louis to combine and operate the various independent terminal companies in St. Louis as a unitary system.²¹² The combination was necessary in order to efficiently cope with the unique topography of St. Louis.²¹³ The Association made no secret of its desire to “obtain

²⁰⁹ *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 356 (1982); *see also* *Texaco, Inc. v. Dagher*, 547 U.S. 1, 6 (2006) (explaining that price fixing in a joint venture between two competitors who retain their brand names is no different than a single firm setting its own price) (emphasis added).

²¹⁰ *Jacobson*, *supra* note 50.

²¹¹ *Id.*

²¹² *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 391 (1912).

²¹³ Namely, the separation of St. Louis and East St. Louis by the Mississippi River.

the control of every feasible means of railroad access to St. Louis.”²¹⁴ The government sued the Association under the Sherman Act in 1890.²¹⁵ Twenty-one years later, the case reached the Supreme Court.²¹⁶ The question before the Court was whether “the unification of substantially every terminal facility by which the traffic of St. Louis is served resulted in a combination which is in restraint of trade within the meaning and purpose of the anti-trust act?”²¹⁷

The Court answered in the affirmative even though the companies used the Association’s bridges and terminals because it was cheaper than building their own.²¹⁸ The Court noted that whether the combination was an efficiency enhancing joint venture or “an unreasonable restraint, forbidden by” the Sherman Act would “depend upon the *intent* to be inferred from the extent of the control” over the bridges and terminals that all competitors are under “compulsion to use.”²¹⁹ As a practical matter, the Court recognized that even if constructing individual bridges was not financially prohibitive “the city would be cut to pieces with the many lines of railroad intersecting it in every direction” if every railroad built its own terminals and bridges.²²⁰

More recent rules concur with the Court’s one-hundred year old precedent. The Antitrust Guidelines for Collaboration Among Competitors, while not binding, signals that the CSS license agreement is of the type that should be subjected to heavy scrutiny by the DOJ and FTC.²²¹ Under the guidelines, an agreement that is not “reasonably necessary to achieve” the procompetitive objective of agreeing to a single form of encryption is *per se* illegal.²²² “An agreement may be ‘reasonably necessary’ without being essential. However, if the participants could achieve an equivalent or comparable efficiency-enhancing integration through practical, significantly less restrictive means, then the Agencies conclude that the agreement is not reasonably necessary.”²²³

²¹⁴ *Terminal R.R.*, 224 U.S. at 393.

²¹⁵ *Id.* at 390–91.

²¹⁶ *Id.* at 383.

²¹⁷ *Id.* at 394.

²¹⁸ *Id.* at 397.

²¹⁹ *Id.* at 394–95.

²²⁰ *Id.* at 403.

²²¹ See generally FED. TRADE COMM’N & DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS (2000), available at <http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf>.

²²² *Id.* at 8 (emphasis added).

²²³ *Id.* at 9.

Of course, the CSS license agreement is not a naked restraint of trade. There are plenty of procompetitive justifications for having an organization that grants licenses to decrypt CSS. When *properly organized*, the organization could provide the necessary balance between the desires of consumer electronics manufacturers to innovate and the wishes of content owners to protect their copyrighted works. But the present organization of the DVD-CCA, with its take-it-or-leave-it CSS license agreement, leaves no room for procompetitive considerations.

The Court faced this issue in *Terminal Railroad*, and concluded that “the combination which has occurred would not be an illegal restraint under the terms of the statute [sic] if *it were what is claimed for it*, a proper terminal association acting as the impartial agent of every line which is under compulsion to use its instrumentalities.”²²⁴

Perhaps the same can be said of the DVD-CCA. If it was what it claimed to be, an organization that has “enabled the owners of movie content to provide consumers *access* to high quality DVD movies for home viewing,” then it would probably be negotiating specific licenses with companies like RealNetworks to enable new and exciting uses of DVD products. It could also require RealNetworks to take measured steps to prevent unauthorized duplication of home movies (or, at the very least, open its eyes to the fact that RealNetworks was taking such steps *sua sponte*). Such action would likely survive Sherman Act scrutiny.

But the DVD-CCA *is not what it claims to be*. It is, like the standard setting organization in *Allied Tube*, systematically “stack[ed] . . . with decisionmakers sharing their economic interest in restraining competition.”²²⁵ Under the reasoning of *Terminal Railroad*, a court could order the DVD-CCA to negotiate a new CSS license agreement in good faith, or restructure the organization to provide an amendment process that allows for legitimate bargaining by both sides.

In sum, the situation in *RealNetworks* was quite similar to *Terminal Railroad*. The DVD-CCA was not a *legitimate* joint venture. There was no shared investment. There was no shared risk of loss. It was, and still is, a mere shell association that promulgates a non-negotiable standard for the use of DVDs. True joint ventures involve risks borne mutually by all its members. The DVD-CCA, on the other hand, eliminates risk for its members by restraining competition in markets that pose a threat to the sales of traditional DVD players. On

²²⁴ *Terminal R.R.*, 224 U.S. at 410.

²²⁵ *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 511 (1988).

these facts, the District Court in *RealNetworks* should have done something similar to what the Court did in *Terminal Railroad*, and order the association to reorganize in a form that resembles what it was supposed to be: “an impartial agent of every line which is under compulsion to use its instrumentalities.”²²⁶

iv. Real was Free to License Content from the Studios

The studios’ final hypothetical procompetitive justification, that Real was free to license content from the movie studios, is akin to an estoppel argument. They would contend that neither the studios nor the DVD-CCA ever prevented Real from licensing content from the studios. They would further argue that Real was free to license digital content at all times. This is a strawman argument.

The dispositive concern here is not whether the studios refused to license content in *another medium*, it is whether the studios collectively refused to license *CSS-protected DVD content* to RealNetworks. The studios’ argument is no different than contending that there is no refusal to deal in *Terminal Railroad* because other, smaller, non-member railroads, were free to build their own bridge to cross the Mississippi.²²⁷ The operative question in *Terminal Railroad*, as it is here, is not whether or not the plaintiffs were free to go another route, it is whether the most logical and reasonable route is being cut off by a concerted effort among competitors whose object is to restrain trade, charge higher prices, and stifle innovation.²²⁸ This is by all appearances the object of the DVD-CCA.

The studios would respond by pointing to *Broadcast Music, Inc. v. Columbia Broadcasting System*.²²⁹ In *BMI*, the Court held that blanket licenses of copyrighted music should be judged under the rule of reason, because the monitoring and enforcement of music copyrights would be impossible for individual artists to effectively carry out on their own.²³⁰ However, *BMI* is fundamentally different from *RealNetworks* because the musicians in *BMI* were still able to license

²²⁶ *Terminal R.R.*, 224 U.S. at 405.

²²⁷ *See id.* (stating that the “topographical condition peculiar to” St. Louis renders a unified system of bridges and rail terminals a restraint on commerce despite the fact that competitors would “remain the right and power to construct their own terminals.”).

²²⁸ *See id.* at 405–09 (examining the different practices of the association for anticompetitive effects and procompetitive justifications).

²²⁹ 441 U.S. 1 (1979).

²³⁰ *Id.* at 24.

their music on an individual basis.²³¹ Conversely, in *RealNetworks*, the movie studios could not individually license DVD content to Real without violating the CSS license agreement.²³²

BMI would have been a completely different case if the blanket license agreements excluded the ability of musicians to contract licenses for their content on an individual basis. That completely different case is, in essence, *RealNetworks*. Ironically, this means that *BMI* is an argument against, rather than support for the studios' position.

*D. Do the parties have sufficient market power to control access to instrumentalities critical for competition?*²³³

It appears that the studios and the DVD-CCA possess significant market power because they control access to intellectual property critical for competition.²³⁴ The facts spelled out in *RealNetworks* make this point eminently clear: The studios met as a group to discuss the terms of the CSS license agreement.²³⁵ They all agreed that the license would prohibit copies of CSS protected content unless the studios unanimously agreed at a later date to modify the agreement.²³⁶ The association that would act as licensor—the DVD-CCA—would be composed of the largest and most prominent firms in the content, consumer electronics, and computer industries because of the network effects associated with the DVD format itself.²³⁷ Consequently, CSS

²³¹ *Id.* at 24–25.

²³² Compare *id.* at 11, with Antitrust Transcript, *supra* note 53, at 41. Despite these differences, the studios still argued the strawman; that content was never denied to Real, because they were free to license content on other mediums. Antitrust Transcript, *supra* note 53, at 16.

²³³ Richman refers to the arguments made in this section as the “*Associated Press* doctrine.” Richman, *supra* note 133, at 351 (“The *Associated Press* doctrine . . . permits [trade associations] to exclude members only if exclusion is pursuant to a procompetitive justification that is essential to promote the purpose of the venture.”). The claim is similar to an “essential facilities” argument. See *infra* note 240.

²³⁴ See *RealNetworks, Inc. v. DVD Copy Control Ass’n*, 641 F. Supp. 2d 913, 921 (N.D. Cal. 2009); see also Notice Pursuant to the National Cooperative Research and Production Act of 1993; DVD Copy Control Association (“DVD CCA”), 66 Fed. Reg. 40,727 (Aug. 3, 2001) (listing the members of the DVD-CCA). Some courts have described this argument as an “essential facilities” doctrine. See *Town of Massena v. Niagara Mohawk Power Corp.*, No. 79-CV-163, 1980 WL 1889, at *28 n.41 (N.D.N.Y. Sep. 8, 1980) (citing numerous cases supporting the argument) (citations omitted).

²³⁵ Second Amended Complaint, *supra* note 138, at 5–6 (internal citations omitted).

²³⁶ *Id.* (internal citations omitted).

²³⁷ See *supra* text accompanying notes 182–201; *RealNetworks*, 641 F. Supp. 2d

has been implemented on millions of DVDs,²³⁸ and remains the prevalent form of encryption.²³⁹

Moreover, market power can be established by looking to the control that the association wields over the instrumentalities of the marketplace. To borrow language from the Court's opinion in *Terminal Railroad*, consumer electronics manufacturers were instantly "under compulsion" to create devices that can playback DVD movies once the movie studios agreed on DVD as the standard format for the distribution of digital media.²⁴⁰ At precisely the moment when the movie studios agreed to encode their DVD movies with CSS, consumer electronics manufacturers who wished to compete in the DVD products market were under further compulsion to decrypt CSS. If decryption of CSS is illegal under the DMCA, then the manufacturers are also under compulsion to obtain a CSS license agreement from the appropriate licensing association: the DVD-CCA. If that license agreement prohibits manufacturers from creating software or hardware that can copy a DVD for lawful and reasonable purposes, then the market for video servers, personal video recorders, and software like RealDVD is necessarily restrained.

Although separated by 100 years of technology, *Terminal Railroad* and *RealNetworks* present the same economic problem. Both antitrust-plaintiffs are "compelled" to use the instrumentalities of a stronger defendant that is restraining competition. In *Terminal Railroad* it was a railway bridge. In *RealNetworks*, it is the CSS license agreement. Compulsion is essentially market power; and as explicated above, the DVD-CCA has it in spades.

In sum, the CSS license agreement is no defense to Sherman Act liability. The requirement that no product have the capability to copy CSS-protected DVDs is not ancillary to the lawful purpose of establishing a collectively agreed upon encryption mechanism by the major movie studios to protect copyrighted content. The agreement is

at 921; *see also* Notice Pursuant to the National Cooperative Research and Production Act of 1993, 66 Fed. Reg. 40,727.

²³⁸ *RealNetworks*, 641 F. Supp. 2d at 921.

²³⁹ *See id.*

²⁴⁰ *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 394–95 (1912). This "under compulsion" argument can be analogized to an essential facilities claim. However, I avoid using the phrase "essential facilities" to describe the issue for four reasons: (1) because the Court has never recognized the essential facilities doctrine, (2) it is not used in the Court's *Terminal Railroad* opinion, (3) the use of the phrase is unnecessary to advance my argument, and (4) the "essential facilities" doctrine applies to section 2, not section 1 of the Sherman Act. HOVENKAMP, *supra* note 115, §7.7, at 309–10.

a restraint in the market for video servers (like Facet) and archival software (like RealDVD). The result of this restraint is that consumer electronics firms will not innovate in this field. Until a court stops these practices, consumers will be unable to legally archive their DVD movie collections, put their movies on their iPods, or make backup copies of their DVDs.

IV. CONCLUSION

Copyright is supposed to be a solution to the public goods problem inherent in works of original authorship. In copyright's absence, piracy would be widespread, innovation would be limited, and creative works like music, movies, and books would never hit the stores. It is simply cheaper to duplicate a DVD than it is to produce a one-hundred million dollar blockbuster like *Iron Man*.

But more intellectual property rights do not necessarily mean more innovation.²⁴¹ The practices of the DVD-CCA reveal this to be the case. The DMCA gave the movie studios broad powers to stop piracy, punish infringers, and protect their creative works. Despite these dramatic changes in American copyright law, the movie studios have suffered more in the last decade than in all of history.

In *RealNetworks*, the District Court conveniently avoided analyzing the DVD-CCA's practices and its take-it-or-leave-it CSS license agreement by basing its dismissal of RealNetworks' antitrust counterclaims on procedural doctrines like *Noerr-Pennington* and the requirement that an antitrust plaintiff state an antitrust injury.²⁴² This dismissal implicitly accepts as true some notion that the antitrust laws can conflict with the DMCA even in cases involving highly creative works like DVDs, as opposed to garage door openers in *Skylink*. The dismissal also suggests that when they conflict, the DMCA's prohibitions must prevail. This assumption is baseless, because "[i]ntellectual property rights do not confer a privilege to violate the antitrust laws."²⁴³ Intellectual property rights and the prohibitions of the Sherman Act have always been coexistent.

²⁴¹ See BOYLE, *supra* note 2, at 48–49 (arguing that too much intellectual property protection will stifle innovation just as severely as not protecting intellectual property at all).

²⁴² Antitrust Order, *supra* note 5, at 7.

²⁴³ *In re Indep. Serv. Orgs. Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000).

While it is clear that the court avoided discussing antitrust law with any substance, it is not clear why.²⁴⁴ Certainly the DVD-CCA would not pose much of a problem to anybody, except maybe pirates,²⁴⁵ “if it were what is claimed for it.”²⁴⁶ For this reason, courts have broad discretion to fashion specific remedies to Sherman Act violations.²⁴⁷ In order to bring the DVD-CCA’s practices into conformance with the Sherman Act, a court should—in a hypothetical case—strike the modification clause of the CSS license agreement that requires unanimous approval from the DVD-CCA. The court in this hypothetical should also subordinate the CSS license agreement to any future licenses of CSS-protected DVD content by copyright owners. In other words, the CSS-license agreement should not be a weapon by which the DVD-CCA can limit the exclusive rights vested to copyright

²⁴⁴ To the extent that the District Court addressed the procedural aspects of the antitrust issues in *RealNetworks*, it’s analysis was not without error:

First, the court assumed that the relevant license was for movie content generally, not for a license over the material support for that content (in this case, CSS-protected DVD content). *See* Antitrust Order, *supra* note 5, at 9 (“There is no allegation that Real is not at full liberty to negotiate individual agreements with motion picture studios to license their content in the form of non-CSS encrypted digital copies.”). This is false. Antitrust law requires the court to narrowly define the relevant market, which in this case would be DVD content, not digital video generally.

Second, the District Court invoked the *Noerr-Pennington* doctrine as a basis of immunity of the DVD-CCA’s group conduct prior to litigation. *Id.* at 7. This argument has two flaws: (1) *Noerr-Pennington* has nothing to do with this case because this case is not about petitioning the government. Petitioning a court for redress should not immunize antitrust violations in every case or else the Sherman Act would be swallowed up by the *Noerr-Pennington* doctrine. (2) Even if the doctrine applied because of some concern about the enforceability of studios’ copyright, then that argument would necessarily fail for being based on a false assumption: that someone’s copyright was being infringed, which was not alleged.

Third, the District Court assumes that Real has to allege that the Studios entered into an explicit agreement. *Id.* at 10–11. The Supreme Court has made it clear, however, that an agreement can be inferred when a rational actor would not have committed an act absent agreement. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954) (“[C]onscious parallelism’ has not yet read conspiracy out of the Sherman Act entirely.”); *see also* Richman, *supra* note 133, at 343.

²⁴⁵ I am referring to pirates of the digital, not seafaring variety.

²⁴⁶ *Terminal R.R.*, 224 U.S. at 410.

²⁴⁷ *E.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 598 n.23 (1985) (approving of district court injunction requiring the parties to offer joint lift tickets); *Associated Press v. United States*, 326 U.S. 1, 21 (1945) (approving of a vague injunction which prohibited the defendants from “observing [the old bylaws], or agreeing to observe any new or amended By-Law having a like purpose or effect.”); *United States v. Terminal R.R. Ass’n*, 224 U.S. 383, 411–13 (1912).

owners absent an actual—and in antitrust terms, legitimate—license from the copyright owner to the DVD-CCA.

Policing the use of copyrighted works through technological protection measures is a serious threat to innovation. I recognize and am willing to concede that sifting through competing claims of DMCA liability and Sherman Act antitrust violations involves an intellectually burdensome journey into uncharted jurisprudential waters. However, if the courts and Congress continue to ignore the Sherman Act's role as a limit on complicated copyright laws like the DMCA, then the very purpose of American intellectual property law—incentivizing innovation and creation—will be obstructed by newer and more restrictive license agreements that will make the CSS agreement look edentulous by comparison.