

H031631

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT**

**DVD COPY CONTROL ASSOCIATION, INC., a Delaware
corporation,**

Plaintiff and Appellant,

v.

KALEIDESCAPE, INC., a Delaware corporation,

Defendant and Appellee.

APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF SANTA CLARA
HON. LESLIE C. NICHOLS, JUDGE
CASE No. 1:04 CV 031829

APPELLANT'S OPENING BRIEF

**AKIN GUMP STRAUSS HAUER &
FELD LLP**

EDWARD P. LAZARUS (SBN 212658)
L. RACHEL HELYAR (SBN 193080)
MICHAEL C. SMALL (SBN 222768)
2029 CENTURY PARK EAST, SUITE 2400
LOS ANGELES, CALIFORNIA 90067-3012
TELEPHONE: 310-229-1000
FACSIMILE: 310-229-1001

WHITE & CASE LLP

WILLIAM SLOAN COATS (SBN 94864)
HEIDI L. KEEFE (SBN 178960)
MARK R. WEINSTEIN (SBN 193043)
MARK F. LAMBERT (SBN 197410)
3000 EL CAMINO REAL
5 PALO ALTO SQUARE, 9TH FLOOR
PALO ALTO, CALIFORNIA 94306
TELEPHONE: 650-213-0300
FACSIMILE: 650-213-8158

ATTORNEYS FOR APPELLANT
DVD COPY CONTROL ASSOCIATION, INC.

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CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

[Cal. Rules of Court, rule 8.208]

Appellant knows of no entity or person that must be listed under subsections (1) or (2) of Rule 8.208. (Cal. Rules of Court, rule 8.208 (d)(3).)

APPELLANT'S OPENING BRIEF

INTRODUCTION

The trial court ruling in this case, if left undisturbed, threatens to destroy the uniform licensing scheme underlying one of the most successful entertainment innovations of all time – the DVD.

To protect against unlawful copying, the content contained on DVDs is protected by a patented encryption/decryption technology known as the Content Scramble System (CSS). Every company that seeks to manufacture a device authorized to play back DVD content must license CSS from the DVD Copy Control Association (the DVDCCA), a non-profit licensing entity made up of representatives from the entertainment, consumer electronics, and information technology industries. The standardized license agreement, which reflects a delicate balance among industries with significantly divergent interests, requires licensees like defendant-appellee Kaleidescape to follow certain “Technical Specifications” that are delivered upon completion of the license agreement and payment of an administrative fee.

The main question in this case is whether a document entitled “CSS General Specifications,” which was delivered to Kaleidescape after it entered into the license agreement (the Agreement) and paid its fee, is a component of the Technical Specifications with which Kaleidescape must comply. The General Specifications contain crucial protections against unauthorized copying of DVD content, including, as relevant here, the requirement that when a machine plays back DVD content for viewing, the physical DVD itself must be present in the device.

The court ruled that the General Specifications are *not* a subset of the Technical Specifications. But this interpretation, which is subject to de

novo review, is clearly wrong. Overwhelming evidence, including the language of the license agreement and a wealth of undisputed extrinsic evidence, shows that the parties mutually understood the General Specifications to be a subset of the Technical Specifications.

Kaleidescape's own witnesses testified that this was their understanding, and during the course of this litigation – at the summary judgment stage and right up to the moment of trial – Kaleidescape affirmatively took the position that the General Specifications were Technical Specifications. The trial court could reach a contrary reading of the Agreement only by erroneously deeming dispositive extrinsic evidence to be irrelevant. In so doing, the court reached the absurd result of reading out of the license agreement provisions that are essential to the agreement's central purpose – to prevent the unauthorized copying of copyrighted DVD content.

The court also ruled in the alternative that, regardless of whether Kaleidescape had to comply with the General Specifications, the DVDCCA was not entitled to the injunctive remedies it sought. The court ruled out specific performance on the grounds the General Specifications were purportedly too uncertain. The court also refused to enforce a contract provision stipulating to irreparable harm in the case of breach by a licensee and then ruled out injunctive relief against Kaleidescape out of concern the company might suffer if compelled to follow the Agreement's requirements. With respect to all its remedies-related rulings, the court misapprehended the governing law and disregarded the unequivocal intent of the parties that, to preserve uniformity among companies licensing CSS, injunctive remedies should be available for breaches of the Agreement.

For more than a decade, consumers and businesses alike have shared the enormous benefits that come from widely distributing content through a secure digital medium. The CSS licensing regime – by which all licensees have access to the essential encryption/decryption technology on the exact

same terms – has played no small role in this success. With no sound justification, the trial court has dramatically upset this carefully-wrought system. Its ruling should be reversed.

STATEMENT OF THE CASE

A. The Formation and Purpose of the DVDCCA.

Today, hundreds of millions of people throughout the world take for granted the DVD technology that allows them to watch movies and television programs at their convenience. But this stunningly successful technological breakthrough – virtually unimaginable a generation ago – did not develop spontaneously. It is the product of a delicate set of compromises achieved through painstaking negotiation among the companies that produce the content for DVDs and the consumer electronics and information technology companies that make the devices consumers use to play back the DVDs and enjoy their content. (4RT294:17-304:7.)¹

All three industries recognized a common interest – shared with consumers – to achieve a single format (the DVD) for delivering digital content to the public. (2RT92:6-13; 4RT295:24-296:4.) To obtain this uniformity, however, the content providers needed strong assurance that the content delivery system would render it very difficult for the typical consumer to make unauthorized copies of their copyrighted materials. (2RT92:14-22; 4RT299:26-27.) The consumer electronics and information technology companies, for their part, needed a content protection system that would not add unduly to the price of their products. (2RT92:15-22; 4RT299:27-300:4.)

¹ References to the Reporter’s Transcript are cited as “[volume]RT[page:line]” and references to the Appellant’s Appendix are cited as “[volume]AA[page].”

