No. 10-15113

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PSYSTAR CORPORATION,

Defendant-Appellant,

v.

APPLE INC.,

Plaintiff-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

REPLY BRIEF FOR APPELLANT PSYSTAR CORPORATION

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This reply brief addresses Apple's response on copyright misuse as well as those unanticipated arguments that Apple made in response to the sealing-order and scope-of-the-injunction issues.

COPYRIGHT MISUSE

Copyright gives authors the right to control the copying, creation of derivative works from, and distribution of their works. As Apple correctly points out, copyright allows authors to refuse to allow others to do some or all of these things — to veto copying, the creation of derivative works, and distribution of their creative output.

But copyright does not give copyright owners the right to control how their works are used. Copyright does not allow the author of a book to require that it be read only at the beach or that the information there contained be used only to support Republican causes. Copyright governs copying, not use.

This case is about Apple's attempt to control, through copyright, how purchasers of copies of OS X

use their copies of OS X. Apple is free to — and does — do this by contract. The question is whether Apple's attempt to do this by copyright too, and thereby gain access to the threat of statutory damages, constitutes copyright misuse.

Copyright misuse is the use of copyright to protect exclusive rights not granted by the Copyright Act. See Altara Corp. v. Clear Logic, Inc., 424 F.3d 1079, 1090 (9th Cir. 2005) (citing Alcatel USA, Inc. v. DGI Technologies, Inc., 166 F.3d 772, 792 (5th Cir. 1999)); R. Br. at 27. The exclusive right to control how a copyrighted work is used is not a right granted by the copyright act. Therefore, using copyright to control how users use a copy of a copyrighted work is copyright misuse.

The Fifth Circuit so held in *Alcatel*. For all Apple's attempts to distinguish that case, R. Br. at 35–37 — the only case about use of a copyright in an operating system to control the user's choice of hardware, and thus the only case squarely on

point — Apple must admit that the Fifth Circuit held that it was misuse to use a copyright to prevent a competitor from offering compatible, cheaper hardware for use with a copyrighted operating system. Alcatel, 166 F.3d at 792-93.

This Court should not create a circuit split with the Fifth Circuit. No case requires it to do so. Practice Management, cited in Psystar's opening brief, holds that it is misuse to license diagnostic codes on condition that they be used exclusively. See Practice Management Info. Corp. v. American Medical Ass'n, 121 F.3d 516, 521 (9th Cir. 1997). Apple says that this case is different because Apple did not forbid the use of other operating systems. R. Br. at 34-35.

In fact, this case is worse. Whereas in Practice Management, the copyright owner's restriction related to the copyright work — use my codes only — here, the restriction relates to a wholly different subject — use my operating system only in conjunction with my hardware. If the right

to make use of a copyrighted work exclusive is not granted by the Copyright Act then, a fortiori, the right to make use of an adjunct to the copyrighted work — here, the physical computer hardware — exclusive is not granted by the Copyright Act.

Apple says that its restriction fosters competition and does not limit creativity. R. at 33–34. Not so. If Psystar is allowed to sell its competing hardware for use with OS X, then customers can choose between Apple's integrated product, OS X on a Macintosh, and Psystar's cheaper, unintegrated product, OS X on an Open Computer. And further creativity and competition can be expected as other companies, like Dell and Lenovo, compete to offer the best hardware platform for different users.

Apple also says that, as for patent misuse, a requirement that a copyrighted product be used only in conjunction with a different product should be misuse only when the copyright owner has market power in the market for the copyrighted product.

R. Br. at 28–31. But that was a change wrought by statute for patent misuse, see 35 U.S.C. § 271(d)(5); if anything, the statute suggests that the unamended law, which applies in the copyright context, does not require a showing of market power. And, as Apple admits, no court has yet engrafted the market-power requirement onto the law of copyright misuse.

In any event, Apple says, this Court decided the issue in Triad. First, the discussion of copyright misuse in Triad occupies a single paragraph. See Triad Systems Corp. v. Southeastern Express Co., 64 F.3d 1330, 1337 (9th Cir. 1995). And Triad, like the other service-software cases that Apple cites (Data General, MAI, In re Independent Service Oragnizations Antitrust Litig.), is distinguishable on the ground that the software in Triad was never sold separately from the hardware.

What Triad was doing was licensing its operating and diagnostic software for, essentially,

its own use in maintaining its clients' hardware. What Triad did not do was sell copies of its operating and diagnostic software, then require that these copies be used only in connection with Triad machines.

What distinguishes these two cases is that the first involves a decision not to sell copies of software. Apple sold copies of OS X; Triad did not. The second involves an attempt to control what purchasers of copies of software do with their copies, in particular, what hardware they use the software on. Apple tries to do this; Triad did not.

What Triad did is not copyright misuse because Triad merely exercised its copyright right not to sell copies of its software. What Apple did is copyright misuse because Apple sought to use copyright to protect a right that is not a copyright right: the putative right to control how users use Apple's copyrighted work after Apple has sold them a copy. Declining to sell copies is a

copyright right. Controlling their subsequent use is not.

* * *

Finally, it is worth taking a step back to look at a strange feature of Apple's position. Apple admits that if it required OS X to be the only operating system that a user used on his Macintosh, then that would be copyright misuse. R. Br. at 34–35. But Apple denies that, if, instead of creating an exclusive operating system, it required that its operating system be used exclusively on Macintoshes, that would be copyright misuse.

It cannot be that misuse exists where a copyright owner tries to use copyright to make his copyrighted work exclusive, but not when he tries to use copyright to make an adjunct, uncopyrighted work exclusive. Both restrictions seek to protect a right not granted by the Copyright Act. As the Fifth Circuit recognized in Alcatel, both are misuse.

SCOPE OF THE INJUNCTION

Apple contends that Psystar waived its objections to the scope of the district court's injunction when it declined to take up the district court's invitation to file a postjudgment motion seeking a declaration that Rebel EFI does not violate the district court's injunction. But the whole point of Psystar's argument is that Psystar cannot be forced to litigate that issue in the district court when the first-filed case encompassing Rebel EFI is the case pending in the Southern District of Florida. Apple's discussion of the injunction issue misses this point entirely. R. Br. at 43–54.

Psystar stated its objection to an injunction that encompassed matters being litigated in the Florida case in its response to Apple's motion for a permanent injunction. E.O.R. at 105. The district court evidently disagreed with this response when it granted Apple's motion for a permanent injunction. Again, nothing more was

required to preserve error. See Floyd v. Laws, 929 F.2d 1390, 1400 (9th Cir. 1991) ("any question which has been presented to a federal district court for a ruling and which has not thereafter been waived or withdrawn is preserved for review").

SEALING ORDERS

Apple contends that Psystar waived its objections to the district court's sealing order. R. Br. at 20, 59. This is incorrect. Psystar filed a response to Apple's motion to seal in which it argued that the "trade secrets" that Apple sought to protect had already appeared in publications that Apple's own witnesses described as authoritative. E.O.R. at 552; O. Br. at 42. The district court evidently disagreed with this response when it signed Apple's proposed order. Nothing more was required to preserve error. Floyd, 929 F.2d at 1400.

Respectfully submitted,

/s/ K.A.D. Camara

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening brief is monospaced, has 10.5 or fewer characters per inch and contains 1,568 words.

/s/ K.A.D. Camara

CERTIFICATE OF SERVICE

I hereby certify that, on Monday, July 26, 2010, I served a copy of this brief and of the record excerpts on opposing counsel by ECF as follows:

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