

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WILLIAM H. ALSUP

APPLE, INC., A CALIFORNIA)	
CORPORATION,)	
)	
PLAINTIFF,)	
)	
VS.)	NO. C 08-0325 WHA
)	
PSYSTAR CORPORATION,)	
)	SAN FRANCISCO, CALIFORNIA
DEFENDANT.)	MONDAY
)	DECEMBER 14, 2009
)	
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AND RELATED COUNTERCLAIMS.)	
)	
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TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF

CAMARA & SIBLEY, LLP
2339 UNIVERSITY BOULEVARD
HOUSTON, TEXAS 77005
BY: K.A.D. CAMARA, ESQUIRE
NOAH D. RADBIL

FOR DEFENDANT

TOWNSEND AND TOWNSEND AND CREW, LLP
TWO EMBARCADERO CENTER, EIGHTH FLOOR
SAN FRANCISCO, CALIFORNIA 94111
BY: JAMES G. GILLILAND, JR., ESQUIRE
MEHRNAZ BOROUHAND SMITH, ESQUIRE

(FURTHER APPEARANCE ON FOLLOWING PAGE)

REPORTED BY: JOAN MARIE COLUMBINI, CSR #5435, RPR
OFFICIAL COURT REPORTER, U.S. DISTRICT COURT

APPEARANCES (CONTINUED)

FOR DEFENDANT:

APPLE

1 INFINITE LOOP, MS 301-4GC
CUPERTINO, CALIFORNIA 95014

BY: **BRUCE SEWELL, ESQUIRE**

PROCEEDINGS; MONDAY, DECEMBER 14, 2009

1
2
3 **THE COURT:** WELCOME, EVERYONE. WELCOME BACK. PLEASE
4 HAVE A SEAT.

5 **THE CLERK:** CALLING CIVIL ACTION C08-3251, APPLE
6 VERSUS PSYSTAR.

7 COUNSEL, CAN YOU PLEASE STATE YOUR APPEARANCES FOR
8 THE RECORD?

9 **MR. GILLILAND:** GOOD AFTERNOON, YOUR HONOR. JIM
10 GILLILAND AND MEHRNAZ BOROUMAND SMITH FOR APPLE. ALSO WITH US
11 IS THE NEW GENERAL COUNSEL OF APPLE, BRUCE SEWELL.

12 **MR. SEWELL:** GOOD AFTERNOON, YOUR HONOR.

13 **THE COURT:** WELCOME. AND?

14 **MR. CAMARA:** GOOD AFTERNOON, YOUR HONOR. KIWI CAMARA
15 FOR THE DEFENDANT PSYSTAR CORPORATION. I'M JOINED BY MY
16 COLLEAGUE NOAH RADBIL, WHO HAS JUST PASSED THE BAR.

17 **THE COURT:** CONGRATULATIONS. HAVE YOU BEEN SWORN IN?

18 **MR. RADBIL:** NO, NOT YET.

19 **THE COURT:** I'D BE HAPPY TO DO THAT.

20 **MR. CAMARA:** IT'S THE TEXAS BAR.

21 **THE COURT:** THAT'S ALL RIGHT. YOU'RE WELCOME TO BE
22 HERE PRO HAC VICE. THANK YOU. HAVE A SEAT EVERYONE.

23 WE ARE HERE FOR THE MOTION ON INJUNCTION. LET'S HEAR
24 FROM APPLE FIRST.

25 **MR. GILLILAND:** YOUR HONOR, THIS IS APPLE'S MOTION

1 FOR THE ENTRY OF A PERMANENT INJUNCTION AFTER THE COURT HAS
2 GRANTED SUMMARY JUDGMENT OF COPYRIGHT INFRINGEMENT AND VIOLATION
3 OF THE DIGITAL MILLENNIUM COPYRIGHT ACT.

4 PSYSTAR ESSENTIALLY CONCEDES THAT APPLE IS ENTITLED
5 TO A PERMANENT INJUNCTION HERE. THEY HAVE NOT OFFERED ANY
6 EVIDENCE OR ARGUMENT THAT THERE SHOULD NOT BE AN INJUNCTION.
7 THE ONLY ISSUE THAT APPEARS TO BE IN FRONT OF THE COURT IS THE
8 BREADTH OF THAT INJUNCTION.

9 SPECIFICALLY, PSYSTAR ASKS THE COURT TO CARVE OUT ITS
10 NEWEST PROJECT, WHICH IT HAS NAMED REBEL EFI, FROM THE
11 INJUNCTION THAT WOULD FOLLOW FROM THE VIOLATIONS THAT HAVE BEEN
12 FOUND. BUT INJUNCTION SHOULD NOT BE RESTRICTED TO ANY
13 PARTICULAR PRODUCT OR ANY PARTICULAR PRODUCT NAME.

14 WHAT THIS COURT HAS FOUND IS THAT THERE WAS UNLAWFUL
15 CONDUCT, AND THE SCOPE OF THE INJUNCTION SHOULD BE COMMENSURATE
16 WITH THE SCOPE OF THE UNLAWFUL CONDUCT.

17 SPECIFICALLY, HERE YOU'VE RULED THAT THERE HAS BEEN
18 COPYRIGHT INFRINGEMENT AND THERE HAS BEEN VIOLATION OF THE
19 DIGITAL MILLENNIUM COPYRIGHT ACT; THEREFORE, ALL THAT APPLE HAS
20 ASKED FOR IS AN INJUNCTION, THE LANGUAGE OF WHICH IS COEXTENSIVE
21 WITH THE SCOPE OF THE VIOLATIONS.

22 AS YOUR HONOR KNOWS FROM THE RECORD IN THE CASE,
23 PSYSTAR HAS INFRINGED APPLE'S RIGHTS REPEATEDLY. IT HAS SOLD
24 MODIFIED VERSIONS OF MAC OS X VERSION 10.5.2, 10.5.3, 10.5.4,
25 .5 AND NOW 10.6.

1 THE COURT SHOULD NOT BE RESTRICTED IN THE LANGUAGE
2 THAT IT USES FOR AN INJUNCTION ABOUT DESCRIBING ANY SPECIFIC
3 PRODUCT OR SPECIFIC TITLE. THAT WOULD SIMPLY INVITE
4 GAMESMANSHIP IN THE FUTURE, INVITE THE RELABELING OF PRODUCTS,
5 THE REFORMATTING OF PRODUCTS. ALL WE'RE ASKING THE COURT TO DO
6 IS TO ISSUE AN INJUNCTION WHICH SAYS: DO NOT INFRINGE APPLE'S
7 COPYRIGHTS OF MAC OS X; DO NOT CIRCUMVENT THE TECHNOLOGICAL
8 PROTECTION MEASURE IN MAC OS X; DO NOT DISTRIBUTE PRODUCTS THAT
9 EITHER CONTAIN OR GENERATE THE KEY THAT'S CONTAINED IN MAC OS X.

10 THE COURTS ROUTINELY GRANT INJUNCTIONS OF THIS
11 NATURE. AS YOUR HONOR SAID IN WARNER BROTHERS VERSUS BROWN,
12 QUOTE:

13 "IT HAS BEEN GENERALLY ACCEPTED THAT UPON A
14 FINDING OF INFRINGEMENT, AN INJUNCTION MAY ISSUE
15 AS TO EXISTING AND FUTURE WORKS."

16 EXACTLY THE SAME RULING WAS MADE IN THE DISNEY VERSUS
17 POWELL DECISIONS BY THE D.C. CIRCUIT. THERE THE COURT FOUND
18 THERE HAD BEEN INFRINGEMENT ON T-SHIRTS OF THE COPYRIGHT FOR
19 MICKEY MOUSE AND THE COPYRIGHT FOR MINNIE MOUSE, BUT THE
20 INJUNCTION THAT WAS ENTERED WAS AN INJUNCTION AGAINST COPYRIGHT
21 INFRINGEMENT OF ANY DISNEY CHARACTER ON ANY PRODUCT.

22 IN A&M RECORDS VERSUS NAPSTER, JUDGE PATEL ISSUED AN
23 INJUNCTION AGAINST COPYRIGHT INFRINGEMENT OF ANY OF THE
24 PLAINTIFF'S COPYRIGHTED SONGS, EVEN THOUGH, IN THE COURSE OF ANY
25 ONE LAWSUIT, THEY COULD ONLY PROVE INFRINGEMENT OF A FEW OF

1 THEM.

2 SIMILARLY, IN REAL NETWORKS, SIMILARLY JUDGE SPERO IN
3 SILICON IMAGE SOMETHING VERSUS ANALOGIX, AN INJUNCTION ROUTINELY
4 INCLUDES THE FUTURE CONDUCT.

5 SO, THAT'S ALL WE ARE ASKING THE COURT TO DO HERE.

6 PSYSTAR'S ARGUMENT IS THAT YOUR HONOR CARVED OUT FROM
7 THIS CASE ANYTHING OTHER THAN MAC OS X LEOPARD WHEN APPLE ASKED
8 THE COURT TO STAY THE FLORIDA ACTION AND TO REOPEN DISCOVERY
9 HERE.

10 WE ASKED THE COURT TO EXERCISE ITS DISCRETION TO DO
11 THAT, AND YOUR HONOR ELECTED TO NOT, DEFERRING TO JUDGE HOEVELER
12 IN FLORIDA AS TO WHETHER OR NOT TO TRANSFER THE CASE, AND
13 DECIDING TO KEEP THIS CASE ON TRACK SO WE COULD HAVE THE SUMMARY
14 JUDGMENT ARGUMENT WHEN WE DID AND WE COULD HAVE THIS HEARING
15 NOW.

16 THAT RULING WAS WITHOUT PREJUDICE TO ANY FUTURE
17 MOTIONS. THE MOTION TO TRANSFER THE FLORIDA CASE HAS BEEN
18 FILED. THE REPLY BRIEF WILL BE DUE A WEEK FROM TODAY. WHETHER
19 OR NOT IT IS TRANSFERRED HERE IS NOT THE ISSUE. THE ISSUE HERE
20 IS WE'RE SEEKING AN INJUNCTION THAT IS COMMENSURATE WITH THE
21 SCOPE OF THE VIOLATION THAT YOU ALREADY FOUND.

22 PSYSTAR HAS BEEN TRAFFICKING IN TECHNOLOGY THAT
23 CIRCUMVENTS THE TECHNOLOGICAL PROTECTION MEASURE IN MAC OS X.
24 WE ARE ASKING FOR AN INJUNCTION THAT STOPS THAT. IT DOESN'T
25 MATTER WHAT THEY CALL THE PRODUCT THAT DOES IT. YOU DON'T HAVE

1 TO RESOLVE AT THIS POINT WHETHER ANY PARTICULAR PRODUCT WOULD
2 CIRCUMVENT THE TECHNOLOGICAL PROTECTION MEASURE OR NOT. THAT'S
3 FOR THE PARTIES TO WORK OUT LATER. WE'RE SIMPLY ASKING FOR AN
4 INJUNCTION THAT FITS THE SCOPE OF THE VIOLATIONS THAT YOU FOUND.

5 DO YOU HAVE ANY QUESTIONS FOR ME, YOUR HONOR?

6 **THE COURT:** LET ME HEAR FROM THE OTHER SIDE. I MIGHT
7 HAVE A QUESTION.

8 **MR. GILLILAND:** THANK YOU, YOUR HONOR.

9 **THE COURT:** ALL RIGHT.

10 **MR. CAMARA:** MAY IT PLEASE THE COURT. YOUR HONOR,
11 MR. GILLILAND'S MOST IMPORTANT POINT IS THE LAST POINT, WHICH IS
12 THAT, IN GIVING THEM THE INJUNCTION THEY ASK FOR, YOU WOULD NOT
13 NOW BE DECIDING WHETHER REBEL EFI OR ANY PARTICULAR PSYSTAR
14 PRODUCT CONSTITUTES A VIOLATION OF THAT INJUNCTION OR
15 CONSTITUTES COPYRIGHT INFRINGEMENT. AND THAT'S RIGHT.

16 THE EFFECT OF GIVING THEM THE INJUNCTION IS THAT WE
17 WOULD BE LITIGATING IN THIS COURT WHETHER OR NOT REBEL EFI,
18 WHICH IS THE SUBJECT OF LITIGATION IN FLORIDA ALREADY, IS A
19 VIOLATION OF THE COPYRIGHT ACT OR NOT.

20 NOW, WE BELIEVE THAT REBEL EFI AND SNOW LEOPARD
21 INVOLVED DIFFERENT FACTUAL AND LEGAL QUESTIONS. AND IN THE
22 FLORIDA COURT, THEY ARGUE IN SUPPORT OF THEIR MOTION TO TRANSFER
23 THAT THEY DO NOT INVOLVE DIFFERENT FACTUAL QUESTIONS, AND IN
24 SUPPORT OF THAT ARGUMENT THEY INTRODUCED THE TESTIMONY OF
25 MR. VIDRINE, WHO THIS COURT STRUCK FROM THIS CASE.

1 SO, IN ORDER TO SATISFY THE PREDICATE OF THEIR
2 ARGUMENT, WHICH IS THAT THESE TWO THINGS ARE ACTUALLY THE SAME,
3 THEY NEED TO RELY UPON EVIDENCE THAT, ON OUR MOTION TO ENFORCE
4 THE DISCOVERY RULES, THIS COURT RULED WAS EXCLUDED.

5 SIMILARLY, WHEN THEY TRIED TO ADD EVIDENCE OF SNOW
6 LEOPARD, BRING BACK MR. VIDRINE, AND INCLUDE FURTHER EVIDENCE OF
7 SNOW LEOPARD, AND INCLUDE EVIDENCE OF PSYSTAR'S NEW PRODUCTS,
8 THIS COURT RULED THAT IT WOULD NOT REOPEN DISCOVERY IN THIS
9 CASE, AND, THEREFORE, THAT THE CASE FILED IN FLORIDA WAS THE
10 FIRST FILED CASE GOVERNING THOSE ISSUES.

11 SO WE WOULD SUBMIT TO THE COURT THAT IF THEY RECEIVE
12 THE KIND OF INJUNCTION THEY'RE ASKING FOR, THEY'RE BETTER OFF
13 THAN IF THE COURT HAD GRANTED THEIR EARLIER MOTIONS. IF THE
14 COURT HAD GRANTED THEIR EARLIER MOTIONS, THEN WE WOULD HAVE
15 LITIGATED IN THIS CASE WITH DISCOVERY, SUMMARY JUDGMENT,
16 BRIEFING, AND SO FORTH, WHETHER OR NOT REBEL EFI INFRINGES THE
17 COPYRIGHT IN SNOW LEOPARD AND WHETHER OR NOT REBEL EFI IS A
18 PRODUCT THAT FACILITATES CIRCUMVENTION VIOLATION OF THE DMCA.

19 BECAUSE THE COURT DECLINED TO OPEN UP THIS CASE, THAT
20 SUBJECT IS BEING LITIGATED NOW IN FLORIDA.

21 IF THEY RECEIVE THE KIND OF INJUNCTION THEY WANT,
22 THAT QUESTION WILL BE LITIGATED IN THIS CASE, BUT IT WILL NOT BE
23 LITIGATED IN THE ORDERLY COURSE OF CIVIL LITIGATION. INSTEAD IT
24 WILL BE LITIGATED IN THE COURSE OF A CONTEMPT PROCEEDING.

25 AND JUST AS THEY SAY, THIS COURT CANNOT NOW DECIDE

1 WHETHER OR NOT REBEL EFI WOULD BE IN VIOLATION OF THE KIND OF
2 INJUNCTION THEY ARE SEEKING, AND THE COURT CAN'T DO THAT BECAUSE
3 THE EVIDENCE NECESSARY TO KNOW WHAT TECHNOLOGICAL PROTECTION
4 MEASURES REBEL EFI IS SUPPOSEDLY CIRCUMVENTING AND THE LEGAL
5 QUESTION ABOUT WHETHER END USERS HAVE A DEFENSE UNDER 117, SINCE
6 EVEN ON APPLE'S VIEW, THEY WOULD BE USING OS X ON THEIR OWN
7 COMPUTERS FOR AN INTERNAL USE, WHICH WAS THE BASIS, I BELIEVE,
8 FOR THE COURT'S RULING THAT PSYSTAR IS NOT ENTITLED TO A 117
9 DEFENSE.

10 SO THERE ARE DIFFERENT FACTUAL AND LEGAL QUESTIONS,
11 AND THE EVIDENCE NECESSARY TO ESTABLISH THOSE DIFFERENT FACTS IS
12 EVIDENCE THAT THE COURT HAS EXCLUDED FROM THE CASE UP TO THIS
13 POINT. THAT'S THE TESTIMONY OF MR. VIDRINE.

14 SO IT WOULD BE A WHOLE NEW LITIGATION, BUT IT WOULD
15 BE A LITIGATION IN THE CONTEXT OF A CONTEMPT PROCEEDING, INSTEAD
16 OF AN ORDERLY NORMAL CIVIL LITIGATION WITH SUMMARY JUDGMENT AND
17 WHATNOT.

18 AGAIN, THE REASON FOR THAT IS BECAUSE THEY MOVED TO
19 ADD THOSE PRODUCTS TO THE CASE, AND THE COURT DENIED THEIR
20 MOTION.

21 SO WE SUBMIT -- AND I WOULD ALSO POINT OUT THAT WHILE
22 IT IS TRUE THAT OUR BRIEFING CONTESTS ONLY THE SCOPE OF REBEL
23 EFI, THAT'S BECAUSE THAT'S THE ONLY THING THAT REMAINS RELEVANT.
24 PSYSTAR HAS ALREADY STOPPED SELLING COMPUTER HARDWARE OUT OF
25 RESPECT FOR THIS COURT'S DECISION. WE BELIEVE THAT DECISION WAS

1 IN ERROR AND INTEND TO APPEAL IT TO THE NINTH CIRCUIT. BUT THE
2 ONLY THING THAT'S CURRENTLY AT ISSUE IS THIS REBEL EFI PRODUCT.
3 AND, AGAIN, REBEL EFI IS ALREADY AT ISSUE IN THE FLORIDA ACTION.

4 THE CASE WE CITED, AMC, FROM THE NINTH CIRCUIT, AND
5 THE CASES CITED THEREIN, INCLUDING ESPECIALLY THE VIRGINIA
6 SOCIETY FOR HUMAN LIFE CASE FROM THE FOURTH CIRCUIT, MAKE CLEAR
7 THAT THIS IS THE KIND OF THING THAT THE FEDERAL COURTS ARE
8 EXPECTED TO DO.

9 WHEN CASES ARE PROCEEDING IN DIFFERENT FORA, IT WOULD
10 BE INAPPROPRIATE FOR THE FIRST COURT SEIZED OF THE DISPUTE TO
11 HAVE AN INJUNCTION THAT FREEZES THE LAW, EFFECTIVELY, AND THAT
12 PREVENTS THE CIRCUIT COURTS FROM COMING TO DIFFERENT CONCLUSIONS
13 ABOUT UNLAWFUL QUESTIONS, DISPUTED QUESTIONS, CLOSE QUESTIONS OF
14 LAW, LIKE THE QUESTIONS OF LAW IN THIS CASE.

15 AND, AGAIN, WE WOULD POINT OUT, WE UNDERSTAND THE
16 COURT HAS REACHED ITS DECISION, BUT WE BELIEVE THERE ARE STRONG
17 GROUNDS FOR APPEAL, AT LEAST ON THE COPYRIGHT MISUSE QUESTION.

18 IF THE NINTH CIRCUIT WERE TO AFFIRM, IT WOULD CREATE
19 A CIRCUIT SPLIT WITH THE FIFTH CIRCUIT, MOST CLEARLY IN THE
20 ALCATEL DECISION, AND WE WOULD SUBMIT WITH THE FEDERAL CIRCUIT
21 IN CHAMBERLAIN, WITH THE SIXTH CIRCUIT IN LEXMARK, AND
22 CRITICALLY WITH THE 11TH CIRCUIT WITH MIAMI CASES PENDING IN
23 TELCOM.

24 WE THINK THIS IS EXACTLY THE SORT OF SITUATION THAT
25 THE FOURTH CIRCUIT HAD IN MIND IN VIRGINIA SOCIETY FOR HUMAN

1 LIFE WHEN IT SAID THAT AN OVERBROAD DISTRICT COURT INJUNCTION
2 MIGHT HAVE THE EFFECT OF FREEZING THE LAW PREMATURELY, INSTEAD
3 OF ALLOWING CIRCUIT SPLITS TO DEVELOP, INSTEAD OF ALLOWING, AS
4 THIS COURT SUGGESTED, A FRESH SET OF EYES TO TAKE A LOOK AT THE
5 ISSUES.

6 NOW, IF WE TAKE A STEP BACK, INJUNCTIONS ARE, OF
7 COURSE, WITHIN THIS COURT'S EQUITABLE DISCRETION. AND AN
8 APPROPRIATE FACTOR TO CONSIDER IS THE RELATIVE HARM TO THE TWO
9 PARTIES OF GRANTING OR DENYING AN INJUNCTION.

10 PSYSTAR'S SALES, AS APPLE HAS REPEATEDLY BROUGHT TO
11 THE ATTENTION OF THIS COURT, ARE TRIVIAL RELATIVE TO APPLE'S
12 BUSINESS.

13 SO EVEN IF AN INJUNCTION CARVES OUT REBEL EFI FOR THE
14 TWO YEARS NECESSARY FOR THE APPEAL TO PERCOLATE THROUGH THE
15 NINTH CIRCUIT, OR FOR JUDGE HOEVELER TO REACH A DECISION ABOUT
16 COLLATERAL ESTOPPEL IF HE BELIEVES THE CASES ARE THE SAME, OR ON
17 THE MERITS IF HE BELIEVES THE CASES ARE DIFFERENT, THAT WOULD BE
18 TWO YEARS OF DE MINIMIS HARM TO APPLE. WHEREAS, IF THIS COURT
19 GRANTS APPLE THE KIND OF INJUNCTION APPLE IS SEEKING, AND THEN
20 LATER HOLDS THAT PSYSTAR SALES OF REBEL EFI ARE IN CONTEMPT OF
21 THIS COURT'S INJUNCTION, THAT WOULD END PSYSTAR'S BUSINESS.
22 THAT IS ALL THAT'S LEFT OF PSYSTAR AFTER ITS COMPLIANCE WITH THE
23 SUBJECT MATTER OF THIS COURT'S SUMMARY JUDGMENT ORDER.

24 SO WE THINK THE BALANCE OF HARMS HERE TIP STRONGLY IN
25 FAVOR OF THIS COURT USING ITS DISCRETION IN CRAFTING AN

1 INJUNCTION TO DISPLAY, YOU KNOW, FOR LACK OF A BETTER WORD, A
2 BIT OF JUDICIAL MODESTY AND SAY THAT THE FLORIDA CASE, WHICH IS
3 ALREADY GOING FORWARD PURSUANT TO THIS COURT'S ORDER AND
4 PURSUANT TO APPLE'S BEHAVIOR TO DISCOVERY IN THIS CASE, SHOULD
5 BE ALLOWED TO PROCEED AND JUDGE HOEVELER SHOULD BE ALLOWED TO
6 COME TO A DECISION ABOUT WHETHER HE BELIEVES THE LEGAL ISSUES IN
7 THIS CASE ARE THE SAME AS THE LEGAL ISSUES IN THE FLORIDA CASE,
8 IN WHICH EVENT THERE IS NO PREJUDICE TO APPLE BECAUSE HE WILL
9 APPLY THE DOCTRINE OF COLLATERAL ESTOPPEL, OR TO COME TO THE
10 CONCLUSION THAT, IN FACT, THE LEGAL ISSUES ARE DIFFERENT, SO
11 THAT JUDGE HOEVELER COMES TO THE VIEW THAT REBEL EFI IS, IN
12 FACT, LEGAL.

13 WE SUBMIT THAT IS CLEARLY WITHIN THIS COURT'S
14 DISCRETION TO DO, AND IT WOULD BE A WISE EXERCISE OF THAT
15 DISCRETION.

16 IN THE ALTERNATIVE, IF THE COURT IS INTERESTED IN
17 GRANTING THE KIND OF BROAD INJUNCTION THAT APPLE SUGGESTS, WE
18 SUBMIT THAT INSTEAD OF THE CARVE-OUT, THE COURT COULD GRANT A
19 LIMITED STAY OF ENFORCEMENT OF THAT INJUNCTION, LIMITING ITS
20 ENFORCEMENT AS TO REBEL EFI UNTIL THE FLORIDA -- UNTIL JUDGE
21 HOEVELER HAS COME TO A DECISION OR UNTIL THE NINTH CIRCUIT
22 AFFIRMS OR REVERSES THE SUMMARY JUDGMENT IN THIS CASE.

23 I WOULD BE HAPPY TO ANSWER ANY QUESTIONS IF YOUR
24 HONOR HAS ANY.

25 **THE COURT:** NOPE. NO QUESTIONS. THANK YOU.

1 **MR. CAMARA:** THANK YOU, YOUR HONOR.

2 **MR. GILLILAND:** YOUR HONOR, IT SEEMS TO ME THAT
3 PSYSTAR IS TWO STEPS AHEAD OF ITSELF AT THIS POINT. IF THE
4 COURT ISSUES THE INJUNCTION THAT WE BELIEVE IS APPROPRIATE, THEN
5 IT WILL BE UP TO PSYSTAR AND ITS COUNSEL TO DETERMINE WHETHER
6 THERE ARE ANY PARTICULAR PRODUCTS THAT IT CAN OR CANNOT CONTINUE
7 TO SELL IN THE FUTURE.

8 MR. CAMARA SEEMS TO BE ACKNOWLEDGING THAT THE COMPANY
9 IS GOING TO SELL REBEL EFI AND THAT THAT WILL BE CONTUMACIOUS
10 CONDUCT, BUT WE DON'T NEED TO ADDRESS THAT QUESTION YET.

11 ONCE THE COURT ISSUES THE INJUNCTION THEN PSYSTAR
12 WILL HAVE WITHIN ITS OWN MEANS THE DECISION ABOUT WHETHER TO
13 SELL THAT PRODUCT OR NOT SELL THAT PRODUCT, OR ANY OTHER
14 PRODUCT. IT'S NOT FOR THE COURTS TO TRY TO GUESS WHAT THEY ARE
15 GOING TO DO IN THE FUTURE.

16 ALL WE ARE ASKING YOU TO DO IS ISSUE AN INJUNCTION
17 WHICH STOPS THE CONDUCT YOU ALREADY FOUND UNLAWFUL, WHICH IS
18 INDUCING INFRINGEMENT, CREATING DERIVATIVE WORKS, AND
19 TRAFFICKING IN CIRCUMVENTION TECHNOLOGY. IF THE INJUNCTION SAYS
20 THAT CONSISTENT WITH THE COURT'S FINDINGS, THEN PSYSTAR WOULD
21 HAVE TO DECIDE WHAT TO DO NEXT WITH ITS BUSINESS.

22 THE AMC CASE CITED BY DEFENDANT IS COMPLETELY
23 INAPPOSITE HERE. THERE THE FIFTH CIRCUIT HAD ALREADY DECIDED
24 THAT CERTAIN CONDUCT WAS NOT INAPPROPRIATE. IT WAS AN ADA CASE
25 ABOUT WHEELCHAIR ACCESS, AND THE FIFTH CIRCUIT ALREADY RULED

1 AMC'S THEATERS WERE IN COMPLIANCE. THEN A DISTRICT COURT IN THE
2 NINTH CIRCUIT RULED TO THE CONTRARY AND ISSUED A NATIONWIDE
3 INJUNCTION. IN THAT CIRCUMSTANCE, THE NINTH CIRCUIT SAID THAT
4 TRANSGRESSES THE JURISDICTION OF THE FIFTH CIRCUIT.

5 HERE WE DON'T HAVE ANY SUCH CONCERN. THIS COURT IS
6 THE ONLY ONE THAT'S EVER ADDRESSED ON THE MERITS PSYSTAR'S
7 CONDUCT. THIS COURT HAS FOUND IT IS UNLAWFUL. CONSEQUENTLY,
8 THE INJUNCTION SHOULD STOP IT.

9 **THE COURT:** WHERE DOES IT STAND IN FLORIDA? WHAT
10 EXACTLY ARE THE ISSUES THAT ARE TENDERED FOR THE JUDGE THERE?

11 **MR. GILLILAND:** A COUPLE OF THINGS, YOUR HONOR.

12 FIRST OF ALL, APPLE HAS FILED ITS MOTION TO TRANSFER
13 TO THIS COURT. PSYSTAR HAS OPPOSED. OUR REPLY BRIEF IS DUE ON
14 MONDAY. JUDGE HOVELER HAS NOT YET SET A HEARING FOR ORAL
15 ARGUMENT.

16 IN PSYSTAR'S PAPERS IN FLORIDA, THEY HAVE SAID THAT
17 THE ISSUES REGARDING SNOW LEOPARD AND THE SALE OF COMPUTERS ARE
18 MOOT, BECAUSE THEY'RE NOT GOING TO SELL SNOW LEOPARD OR
19 COMPUTERS THAT RUN SNOW LEOPARD ANY LONGER.

20 SO PSYSTAR HAS SAID THAT THE ONLY ISSUES THAT REMAIN
21 IN FLORIDA ARE ITS ANTITRUST CLAIM AGAINST APPLE, WHICH WE
22 SUBMIT IS A REPACKAGING OF THE CLAIM THAT THIS COURT ALREADY
23 DISMISSED, AND THE LAWFULNESS OF REBEL EFI.

24 AGAIN, I SAY WE DON'T HAVE TO RESOLVE THE QUESTION OF
25 WHETHER THAT IS A LEGAL OR ILLEGAL PRODUCT YET UNTIL AFTER THE

1 INJUNCTION IS ENTERED.

2 **THE COURT:** IN A PATENT CASE, WHICH THIS IS NOT A
3 PATENT CASE, I KNOW THAT, BUT IN A PATENT CASE, IF THERE'S AN
4 INJUNCTION, A DEFENDANT HAS USUALLY THE RIGHT TO -- MAYBE NOT
5 THE RIGHT, BUT, CERTAINLY, IT'S DONE ALL THE TIME -- TO BRING A
6 MOTION FOR, ESSENTIALLY, DECLARATORY RELIEF THAT A DESIGN-AROUND
7 DOES NOT INFRINGE. SO WHY WOULDN'T THE DEFENDANT HERE BE
8 ENTITLED TO BRING A MOTION TO DEMONSTRATE THAT REBEL EFI DOES
9 NOT INFRINGE?

10 **MR. GILLILAND:** I THINK THAT'S AN EXCELLENT ANALOGY,
11 YOUR HONOR.

12 FIRST, IN A PATENT CASE, THE INJUNCTION WOULD SAY
13 STOP THE INFRINGEMENT OF THIS PATENT, THESE CLAIMS. IT WOULD
14 THEN BE UP TO THE SELLER TO DECIDE WHETHER ITS PRODUCT DOES OR
15 DOES NOT INFRINGE. AND IF THEY HAVE A WORRY ABOUT A PARTICULAR
16 DESIGN-AROUND, THEY WOULD HAVE THE OPPORTUNITY TO COME IN AND
17 ASK THE COURT, WHO ISSUED THE INJUNCTION --

18 **THE COURT:** YES. THAT WOULD APPLY HERE AS WELL,
19 WOULDN'T IT?

20 **MR. GILLILAND:** ABSOLUTELY.

21 **THE COURT:** SO THEY DON'T HAVE TO WAIT UNTIL THEY'RE
22 ACCUSED OF CONTEMPT; THEY COULD -- FOR SELLING -- ARE THEY
23 ALREADY SELLING THE PRODUCT?

24 **MR. GILLILAND:** YES, SIR.

25 **THE COURT:** ALL RIGHT. WELL, MAYBE THAT'S THE

1 DIFFERENCE. BUT IN THE NORMAL SCENARIO, BEFORE THE COMPANY
2 STARTS SELLING IT, IF THEY WANT TO BE CAUTIOUS, THEY GO TO THE
3 JUDGE AND SAY, WOULD THIS WORK, AND THEY EXPLAIN WHY THEY THINK
4 IT WOULD WORK.

5 **MR. GILLILAND:** THE SAME PROCESS COULD BE FOLLOWED
6 HERE ONCE THE COURT ISSUES ITS INJUNCTION. PSYSTAR -- ASSUMING
7 THAT IT WERE OF THE SCOPE THAT APPLE IS REQUESTING, PSYSTAR
8 COULD TEMPORARILY STOP SELLING THAT PRODUCT AND COME IN AND ASK
9 THE COURT FOR A RULING AS TO WHETHER OR NOT IT WOULD CONSTITUTE
10 CONTEMPT.

11 IN THE RECORDS CURRENTLY BEFORE YOU, APPLE HAS
12 SUBMITTED THE DECLARATION OF DR. KELLY. HE DID GET REBEL EFI,
13 AND HE DID LOOK AT IT. HE HAS PUT INTO HIS DECLARATION THAT IT
14 DOES, IN FACT, GENERATE APPLE'S DECRYPTION KEY. WE BELIEVE
15 PSYSTAR WILL HAVE A DIFFICULT TIME CONVINCING ANY COURT IT
16 SHOULD BE ALLOWED TO SELL THIS PRODUCT.

17 BUT, AGAIN, WE'RE TWO STEPS AHEAD OF OURSELVES,
18 BECAUSE IT PRESUMES THEY ARE GOING TO CONTINUE TO SELL IT AND
19 THAT THEN THERE'S A CONTEMPT PROCEEDING.

20 **THE COURT:** IS THERE A MOTION TO DISMISS THE FLORIDA
21 CASE?

22 **MR. GILLILAND:** IT'S A MOTION TO DISMISS OR TRANSFER.

23 **THE COURT:** ARE THE MERITS TENDERED ON THAT?

24 **MR. GILLILAND:** NO, YOUR HONOR, IT'S PURELY ON
25 PROCEDURAL GROUNDS AT THE MOMENT.

1 **THE COURT:** PROCEDURAL TO SEND IT ALL OUT HERE?

2 **MR. GILLILAND:** CORRECT.

3 **THE COURT:** ALL RIGHT.

4 MR. CAMARA, DID YOU WANT TO HAVE THE LAST WORD?

5 **MR. GILLILAND:** THANK YOU, YOUR HONOR.

6 **MR. CAMARA:** BRIEFLY, YOUR HONOR.

7 **THE COURT:** GO AHEAD.

8 **MR. CAMARA:** I'D LIKE TO MAKE TWO POINTS.

9 FIRST, IT ISN'T A WORK-AROUND WHICH WE'RE PROPOSING,
10 REBEL EFI. WE HAVE BEEN DEVELOPING IT AND BEGAN SELLING IT, I
11 BELIEVE, BEFORE THIS COURT RULED ON SUMMARY JUDGMENT. IT
12 LITERALLY IS JUST A SEPARATE PRODUCT LINE AT PSYSTAR, AND THE
13 QUESTION, OF COURSE, IS WHETHER THIS INJUNCTION SHOULD BE
14 CRAFTED SO BROADLY.

15 **THE COURT:** HOW DO I KNOW THAT? HOW DO I KNOW -- THE
16 PAPERWORK IS PRETTY THIN ON WHAT REBEL EFI IS.

17 **MR. CAMARA:** THAT'S EXACTLY OUR POINT, YOUR HONOR.
18 WHETHER REBEL EFI'S INFRINGEMENT IS BEING LITIGATED IN FLORIDA,
19 THAT'S THE FIRST FILED CASE ABOUT REBEL EFI. IT'S THE FIRST
20 FILED CASE BECAUSE THIS COURT DECLINED TO ALLOW THEM TO BRING
21 SNOW LEOPARD AND REBEL EFI INTO THIS CASE.

22 **THE COURT:** IT WAS JUST SNOW LEOPARD.

23 **MR. CAMARA:** I BELIEVE IT WAS ALL NEW PRODUCTS THEY
24 WANTED DISCOVERY ON. BUT EVEN IF IT WAS SNOW LEOPARD, THIS
25 COURT DECLINED TO ALLOW THEM TO BRING IN DMCA AND COPYRIGHT

1 CLAIMS ABOUT SNOW LEOPARD, WHICH IS THE ONLY THING THAT REBEL
2 EFI IS BEING USED TO ALLOW END USERS TO USE.

3 SO THE FIRST FILED CASE ABOUT THAT ISSUE IS IN
4 FLORIDA. THERE IS NOT, AS THIS COURT HAS JUST ACKNOWLEDGED, AN
5 ADEQUATE FACTUAL RECORD IN THIS CASE, TO DECIDE WHETHER OR NOT
6 THAT INFRINGES THE COPYRIGHT ACT.

7 **THE COURT:** NO. BUT THAT'S -- NO. BE CAREFUL HERE.
8 I DIDN'T SAY THAT. THERE IS AN ADEQUATE RECORD TO GIVE A BROAD
9 INJUNCTION. THERE IS AN ADEQUATE RECORD FOR YOUR COMPANY TO
10 PROCEED AT ITS PERIL IF IT VIOLATES THE INJUNCTION BY SELLING
11 REBEL EFI. I DON'T KNOW WHETHER IT DOES OR NOT. I DON'T KNOW
12 ENOUGH ABOUT THE PRODUCT TO TELL YOU YES OR NO ON THAT.

13 BUT IF THEN YOUR OPPONENT BROUGHT A MOTION FOR
14 CONTEMPT AND IT FELL WITHIN THE SCOPE OF THE INJUNCTION, YOUR
15 CLIENT WOULD BE IN BRINGING TROUBLE.

16 **MR. CAMARA:** YES, YOUR HONOR.

17 **THE COURT:** AT LEAST IN THIS COURT IN THIS CIRCUIT.
18 SO PLEASE DO NOT TAKE ANYTHING THAT I HAVE SAID AS SOMEHOW A
19 CONTORTED STATEMENT THAT YOU HAVE MY BLESSINGS TO SELL REBEL
20 EFI.

21 **MR. CAMARA:** I DID NOT --

22 **THE COURT:** I'M GOING TO ISSUE AN INJUNCTION. IF
23 PSYSTAR VIOLATES IT WITH REBEL EFI, THERE WILL BE A PRICE TO
24 PAY, AT LEAST IN THIS COURT.

25 I AM NOT SAYING THAT IT DOES VIOLATE IT, BECAUSE WHAT

1 YOU SUPPLIED ME IS SO SKETCHY, I CAN'T TELL. MAYBE IT DOES.
2 MAYBE IT DOESN'T.

3 THE NORMAL RULE IS THAT AN INJUNCTION IS ALWAYS
4 ALMOST ALWAYS BROADER THAN THE FOUR CORNERS OF THE COMPLAINT
5 BECAUSE, OTHERWISE, IT WOULD BE TOO EASY TO LET AN INFRINGER
6 JUST MOVE ON TO THE NEXT PROBLEM. IT WOULD ALWAYS BE ZENO'S
7 PARADOX AT WORK.

8 **MR. CAMARA:** YES, YOUR HONOR.

9 **THE COURT:** YOU COULD NEVER CATCH UP TO THE
10 INFRINGER. SO THE INJUNCTION WILL BE BROADER THAN THE FOUR
11 CORNERS OF THE COMPLAINT. I WANT THAT TO BE CLEAR, THAT YOU DO
12 NOT -- YOU HAVE A PARTICULAR FACILITY WITH TAKING A WORD OR A
13 PHRASE AND SOMEHOW MAKING IT INTO A CONCESSION ON WHICH AN
14 ENTIRE STRUCTURAL ARGUMENT IS BASED.

15 I WANT TO BE CLEAR. WHILE THIS RECORD IS SKETCHY ON
16 REBEL EFI, IT IS NOT SKETCHY ON THE HARDCORE INFRINGEMENT BY
17 YOUR CLIENT. IF IT TURNS OUT LATER THAT REBEL EFI IS JUST
18 ANOTHER INCARNATION THAT FALLS WITHIN THE SCOPE OF THE
19 INJUNCTION, THERE WILL BE CONTEMPT PROCEEDINGS THAT WILL --
20 COULD BE SEVERE ON YOUR CLIENT WHETHER OR NOT IT'S BEING
21 LITIGATED IN FLORIDA. SO TAKE THAT TO HEART.

22 **MR. CAMARA:** YES, YOUR HONOR.

23 I GUESS THE ONE THEN VERY LIMITED POINT I WOULD MAKE
24 IN LIGHT OF THE COURT'S STATEMENT, WE BELIEVE THAT THIS COURT,
25 IN ITS SUMMARY JUDGMENT MOTION, DID NOT REACH THE QUESTION OF

1 WHETHER OR NOT END USERS, AS OPPOSED TO PSYSTAR, HAVE A DEFENSE
2 UNDER 17 USC SECTION 117.

3 APPLE'S BRIEFING ON SECTION 117 CLAIMED THAT PSYSTAR
4 DID NOT ENJOY 117 DEFENSE BECAUSE PSYSTAR WAS NOT USING OS X ON
5 NON-APPLE COMPUTERS FOR AN INTERNAL USE. THAT, OF COURSE, WOULD
6 NOT BE TRUE OF END USERS. AND IF IT ISN'T TRUE OF END USERS,
7 THEN PSYSTAR'S REBEL EFI, WHICH FACILITATES THAT USE, WOULD NOT
8 VIOLATE THE DMCA BECAUSE IT DOES NOT FACILITATE AN INFRINGEMENT
9 UNDER CHAMBERLAIN AND THIS COURT'S DECISION IN THE FACEBOOK
10 CASE, THE ELEMENT OF COPYRIGHT INFRINGEMENT WOULD NOT BE MET.

11 SO WE WOULD ASK THE COURT, IF THE COURT IS GOING TO
12 GRANT THE BROAD INJUNCTION, THAT IT GRANT AN INJUNCTION WITH
13 THAT LIMITING PRINCIPLE IN MIND, THAT WHETHER OR NOT SECTION 117
14 IS A DEFENSE ENJOYED BY END USERS OF PSYSTAR'S PRODUCTS IS A
15 LEGAL AND FACTUAL ISSUE THAT SIMPLY HAS NOT YET BEEN LITIGATED
16 IN THIS CASE.

17 WE UNDERSTAND, OF COURSE, THAT INJUNCTIONS SHOULD BE
18 BROADER THAN THE FOUR CORNERS OF THE COMPLAINT. FOR EXAMPLE, AN
19 INJUNCTION THAT EXTENDS TO SNOW LEOPARD, TO MAKING MEDICINES
20 THAT RUN SNOW LEOPARD, WOULD BE PERFECTLY PROPER. THAT WOULD BE
21 TRUE UNDER THE DISNEY CASE AND UNDER LOTS OF OTHER CASES BECAUSE
22 THOSE TWO SETS OF FACTS WOULD NOT DIFFER IN ANY LEGALLY RELEVANT
23 RESPECT.

24 WE SUBMIT AN INJUNCTION THAT EXTENDS TO SOMETHING
25 WHICH RAISES A NEW AND DIFFERENT FACTUAL LEGAL AND QUESTION

1 WOULD BE AN INJUNCTION WHICH IS OVERLY BROAD. THAT'S WHY WE'RE
2 SUBMITTING TO THE COURT THAT REBEL EFI SHOULD BE CARVED OUT.

3 THE PARTIES AGREE THAT REBEL EFI HASN'T BEEN
4 LITIGATED YET. THE QUESTION IS JUST WHETHER IT SHOULD BE
5 LITIGATED IN A CONTEMPT PROCEEDING OR IN A SEPARATE CASE. WE
6 SUBMIT BECAUSE IT RAISES DIFFERENT LEGAL AND FACTUAL CASES, IT
7 SHOULD BE LITIGATED IN A SEPARATE CASE. AND UNDER THE FIRST
8 FILED DOCTRINE, IT SHOULD BE LITIGATED UNDER THE FIRST CASE THAT
9 WAS FILED THAT COVERS IT, WHICH, IN THIS CASE, IS THE FLORIDA
10 CASE.

11 **THE COURT:** ALL RIGHT.

12 **MR. CAMARA:** THANK YOU, YOUR HONOR.

13 **THE COURT:** UNDER SUBMISSION. THANK YOU.

14 **MR. GILLILAND:** THANK YOU, YOUR HONOR.

15 **THE CLERK:** WE'RE IN RECESS.

16 (PROCEEDINGS ADJOURNED.)
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CERTIFICATE OF REPORTER

I, JOAN MARIE COLUMBINI, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN [REDACTED], [REDACTED] WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

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JOAN MARIE COLUMBINI, CSR 5435, RPR

WEDNESDAY, DECEMBER 16, 2009

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