

United States District Court
 Northern District of California
 Before The Honorable William Alsup

Apple, Incorporated,)	
)	
Plaintiff,)	
)	
vs.)	No. C08-3251 WHA
)	
Psystar Corporation,)	
)	
Defendant.)	
_____)	

San Francisco, California
 Thursday, November 12, 2009

Reporter's Transcript Of Proceedings

Appearances:

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1 Thursday, November 12, 2009

2:00 P.M.

2 P R O C E E D I N G S

3 **THE COURT:** Now let's go to Apple.

4 **THE CLERK:** Civil action 08-3251, Apple, Inc.,
5 versus Psystar Corporation.

6 **THE CLERK:** Counsel, can you please state your
7 appearances? And we'll get set up.tr

8 **MR. CAMARA:** Kiwi Camara for the defendant, Psystar
9 Corporation.

10 I'm joined by Christian Curtis.

11 **THE COURT:** Great.

12 **MR. GILLILAND:** Good afternoon, Your Honor.

13 Jim Gilliland and Mehrnaz Boroumand Smith for
14 Townsend and Townsend and Crew for Apple.

15 **THE COURT:** Great. Welcome to both of you.

16 All right, here's a motion for summary judgment.
17 We'll let the plaintiff go first. Each side is going to get
18 roughly the same amount of time the last group had, so please
19 make your best points. I'm very familiar with the record, so
20 you use the time in the way that you want. Okay.

21 **MR. GILLILAND:** Thank you, Your Honor. These are
22 the parties' cross-motions for summary judgment. So they have,
23 in essence, agreed that there are no disputed issues of
24 material fact at least with a couple of the key --

25 **THE COURT:** Well, so if you lose on their motion,

1 you will agree there is not a disputed issue of fact?

2 **MR. GILLILAND:** With respect to the copyright
3 infringement and Digital Millennium Copyright Act claims, Your
4 Honor, I believe the issues are joined and that the parties
5 have said there are no disputed issues of fact. So, indeed,
6 those --

7 **THE COURT:** Usually when they say that, they just
8 mean it if they win. So that's why --

9 (Laughter.)

10 **THE COURT:** But you are willing to say if you lose
11 you will stand by that.

12 **MR. GILLILAND:** I prefer to win, Your Honor, but --

13 **THE COURT:** I won't hold you to that unless you both
14 agree to it.

15 **MR. GILLILAND:** Indeed, from Apple's perspective, if
16 we were to have the good fortune of winning on our DMCA and
17 copyright infringement claims that would, in large measure, go
18 towards ultimately resolving this case. Because we do think
19 that those are the heart of the matter, and we are looking
20 forward to the Court's consideration of them.

21 And, in fact, by the fact that we have
22 cross-motions, the record, all six of those briefs put together
23 show that it is undisputed that Apple has the copyrights,
24 registered copyrights in Mac Os 10, Mac Os 10 Leopard, and
25 Don't Steal MAC OS; that Psystar has made multiple copies; that

1 it has adapted those copies to run on non-Apple hardware; that
2 in order to do that, it has circumvented our technological
3 protection measures. And then it has resold those computers to
4 the public.

5 It's not disputed that --

6 **THE COURT:** Let me ask you this: Let's say you did
7 not have any encryption codes, and so forth, that you just had
8 straightforward software, and it was sold under the same
9 agreement, same license, and so forth --

10 **MR. GILLILAND:** Yes.

11 **THE COURT:** Wouldn't your argument still be the
12 same? Or is it necessary for you to win that there is a
13 encryption thing?

14 **MR. GILLILAND:** I'll answer that in two ways, Your
15 Honor. First, it is not necessary to -- with respect to the
16 copyright infringement claims. But secondly, with respect to
17 the remedy, it is relevant to know whether there has been a
18 violation of the DMCA.

19 Let me go through something that is in the briefs
20 and that you have already seen, but that may help crystallize
21 what the issues are.

22 **THE COURT:** Um-hmm.

23 **MR. GILLILAND:** At the end of day, it does not
24 matter, actually, when the software is licensed or whether it's
25 sold to Psystar because whatever they are doing both violates

1 Apple's license and violates the Copyright Act and the Digital
2 Millennium Copyright Act. Whether you use the Essential Step
3 defense or the First-Sale defense, two-thirds of what Psystar
4 is doing is unlawful. So let me walk the Court through, if you
5 don't mind.

6 Psystar obtains one retail DVD in Mac Os 10; it's
7 the upgrade version, we say it's licensed. And they then --
8 and this is undisputed because they said that Dr. Kelly's
9 report that Apple submitted, they accept it. And they say that
10 this is clear, they agree, they confirm Dr. Kelly's report that
11 this is how Psystar makes and distributes its computer.

12 Psystar copies Mac Os 10 onto an Apple Macintosh
13 computer. This is lawful; nobody disputes this. It's
14 permitted by Apple's license. If they are an owner, it's
15 covered by the Essential Step defense. But then, they make
16 multiple additional copies after that, and all of those are
17 unlawful, under the -- under the Copyright Act and under the
18 license.

19 So the next thing that Psystar does is it copies Mac
20 Os 10 again from its MAC Mini, from the Apple Computer onto
21 what Psystar calls the "imaging station." The imaging station
22 is a Psystar computer. So now we have two copies of Mac Os 10
23 made from the original, and neither the Essential Step defense
24 nor the First-Sale defense allows more than one copy.

25 Beyond that, Psystar adds its own software -- I'll

1 come back to that in a moment -- but it adds it software so
2 that Mac Os 10 can run on a non-Apple computer.

3 And then, as the record shows, and it's not
4 disputed, they make copy after copy after copy onto each of the
5 Psystar computers. And the evidence in the record shows that
6 there are approximately 800 of them that have been sold so far.

7 Again, this additional copying is not an essential
8 step for using the software; the essential step occurred back
9 here (*pointing*). This is not a reselling of the software that
10 Psystar bought under the First-Sale Doctrine; this is making
11 multiple, multiple copies.

12 And then, as the Court knows, you can't just use
13 software by sticking it into the computer. The software is
14 loaded into the hard disk drive, but in order to run it has to
15 be loaded into RAM. This is the RAM over here (*pointing*).

16 So now when Psystar tests its computers, as the
17 evidence shows that it does, it makes yet another copy for each
18 of these, so instead of making one copy, we now have 1, 2, 3,
19 4, 8 copies.

20 I've put on these disks a red and a white sliver to
21 show that in making these copies, the second thing that Psystar
22 has done is that it has adapted Mac Os 10; it's changed it.
23 I'm not going to get into the question of whether it's a
24 derivative work right now; again, that's not necessary, but it
25 has supplanted, taken out Apple's boot loader. That is

1 uncontested; it's in Dr. Kelly's report. Mr. Pedraza agrees
2 that when Psystar's software is loaded onto its computers that
3 Apple's boot loader is not used. So, it has changed the boot
4 loader like taking chapter 1 out of a book and putting in a
5 different chapter. And it has disabled or replaced certain of
6 the other kernel extensions in the software.

7 Now, why did they do that? Well, those are the
8 kernel extensions that call the technological protection
9 measure. So, if this had not been replaced, then when Mac Os
10 10 had been loaded onto the Psystar computer the kernel
11 extension would have looked for the key, the lock and the key
12 mechanism, the encrypted files, they would have looked for the
13 key, but the key is not inside the computer. Rather, the key
14 is Apple's proprietary key; it's inside the Apple Computers.

15 So, what Psystar has done is taken away our kernel
16 extensions that look for the key and replaced them with its
17 kernel extension that contain the key. So now the software
18 will run where it was not intended: On non-Apple Computers.

19 It doesn't matter whether this is pursuant to a
20 license or a sale of the software because neither the Essential
21 Step defense --

22 **THE COURT REPORTER:** I'm sorry: neither what?

23 **MR. GILLILAND:** the Essential Step defense, nor the
24 First-Sale Doctrine allow making of these repeated copies.

25 Beyond that, with respect to the -- so, take a step

1 back. Apple has, I believe, I submit, established it prima
2 facie case of copyright infringement through all of the
3 undisputed facts. We own the copyrights; they have copied;
4 they don't have the authority to do that. It's, in fact,
5 prohibited by the software agreement. And they admit that with
6 respect to the breach of contract claim liability is clear.

7 So, really, for the Court, then, this boils down to
8 the question of whether Psystar can prove that it is somehow
9 excused from its infringement, either through a statutory
10 exception, or for some other reason.

11 Now, since Psystar has to prove its defenses, it has
12 the burden: It has to come forward with admissible evidence,
13 and I submit that it hasn't. There is lots of argument in its
14 briefs, but very, very little actual evidence. And, indeed, as
15 I said, what Psystar has done is said that they agree with
16 Apple's evidence; they agree with Dr. Kelly's report.

17 Dr. Kelly, says, quote, "In order to force Mac Os 10
18 to run on it's hardware, Psystar has modified the Mac Os 10
19 operating system installed on Psystar computers by at least, A,
20 supplanting the boot loader that allows Mac Os 10 to boot on a
21 genuine MAC; B, adding kernel extensions to Mac Os 10; and C,
22 disabling kernel extensions and/or removing them from Mac Os
23 10. That is in the Kelly declaration, paragraph 35(f).

24 So, with these multiple copies and with
25 modifications to the Mac Os 10 software, Psystar cannot win on

1 any of the defenses that it has asserted. It's asserted the
2 Essential Step defense, the First-Sale defense, and copyright
3 misuse.

4 With respect to the statutory defenses, Essential
5 Step, as I've shown here, I hope, the multiple copies were not
6 essential. Essential Step defense is a narrow exception; the
7 parties agree on that. It's intended to allow someone to use
8 their software on their computer. It's for internal use only.
9 If you adapt the software, you are not allowed to resell the
10 adapted software without the permission of the copyright
11 holder. And Psystar has exceeded all of those limitations.

12 With respect to the First-Sale Doctrine, it does not
13 allow any copies whatsoever. The First-Sale defense says that
14 you can resell the copy that you purchased if you own it,
15 that's all it says. So that would mean that Psystar could
16 resell this disk right here. It cannot do any of these other
17 things under the First-Sale Doctrine. And that assumes that
18 it's the owner of a copy rather than the licensee.

19 The Court does not have to decide whether Psystar is
20 the owner or the licensee because the Essential Step and
21 First-Sale defenses do not apply, anyhow. But, if you do wish
22 to address that issue and weigh into a debate that is going on,
23 it's clear to Apple that there is a license here, a license
24 transaction, not a sale. Apple's software license agreement
25 comes with the disk. It says on the outside of the box before

1 you ever open it up, this is subject to a license.

2 Inside the box is a copy of the license agreement.
3 On the disk is the license agreement. The license agreement
4 says the software is licensed, not sold to you. It says, yes,
5 you own the disk itself, the transfer vessel, the medium by
6 which the software is delivered to you, but Apple retains title
7 to the software.

8 And the license puts substantial restrictions on the
9 use of that software, on the number of copies that can be made,
10 where it can be installed, how it can be transferred, and a
11 requirement that if there is a breach of the license, it
12 terminates immediately, and the software has to be --

13 **THE COURT:** If you were to win this motion, what
14 would be the remedy? And what else would there be to decide?

15 **MR. GILLILAND:** Well, so Psstar has indicated a
16 willingness to stipulate to an injunction of some sort, but
17 narrowly tailored to relate only to Leopard --

18 **THE COURT REPORTER:** Only to?

19 **MR. GILLILAND:** Leopard, Mac Os 10 version 10.5. We
20 think that the remedy has to be commensurate with the
21 violations, and the violations are an infringement of Apple's
22 copyrights in Leopard and Mac Os 10 and also circumvention of
23 our technological protection measure.

24 So there would need to be an injunction that would
25 be -- prohibit circumvention of our technological protection

1 measure through distributing the key, whether it be scrambled
2 or unscrambled, in plain text, or otherwise. We believe that
3 would be a necessary predicate.

4 Then the next question is, what would be left? And
5 in truth, Your Honor, probably not very much. There are
6 trademark infringement claims; there are breach of contract
7 claims. I would envision this case playing out in a way
8 similar to the MDY Versus Blizzard Arizona. There, when the
9 District Court issued an injunction, the parties were able to
10 stipulate to a monetary damage figure, dismiss everything else
11 without prejudice, and then allow the Ninth Circuit to consider
12 the case.

13 So, of course, Psystar would have to be agreeable to
14 that, but that is what I think is a likely outcome, were the
15 Court to rule in our favor.

16 **THE COURT:** All right, let's hear from the other
17 side.

18 **MR. GILLILAND:** Thank you, Your Honor.

19 **THE COURT:** I'll give you a few moments of rebuttal.

20 **MR. CAMARA:** Your Honor, the two points I want to
21 focus on are two points that Apple didn't address at all, the
22 DMCA claim and copyright misuse. We do think that reaching the
23 DMCA claim is important because that is where the bulk of the
24 statutory damages are. Under the Copyright Act, statutory
25 damages are per work, so they get, presumably, the minimum for

1 infringement of one work, OS 10. But under the DMCA, statutory
2 damages are per active circumvention, which is literally every
3 time Psystar or one of those end users would sell one of those
4 computers that is engaged in circumvention.

5 Now, on the DMCA claim, the disagreement is over
6 whether or not you have to circumvent in order to commit
7 copyright infringement, or whether just any kind of
8 circumvention will do. Apple takes the position that any kind
9 of circumvention will do. We take the position that you have
10 to circumvent to infringe.

11 If you look at the Federal Circuit's decision in
12 Chamberlain, this Court's decision in Facebook, and other
13 decisions around the country, I think it's clear that a
14 copyright infringement as a result of circumvention is an
15 element of a DMCA claim.

16 So, if we focus on the acts of circumvention, that
17 circumvention happens only when someone boots up a Psystar
18 computer. It does not happen when Psystar is installing OS 10
19 and its own software on the imaging station, or on any of the
20 Psystar computers. So none of those arrows on the chart have
21 anything to do with a DMCA claim as opposed to the copyright
22 infringement claim.

23 The only thing that circumvention allows you to do
24 is run OS 10, and running OS 10, whether it's by Psystar or the
25 by the end users, is in the core of the protection granted by

1 Section 117. So we argue that just like in Storage Tech,
2 because the circumvention is happening only to do something
3 which is permitted by 117, namely, running OS 10. It cannot be
4 a violation of the DMCA, and therefore we should get summary
5 judgment on that claim, and there should be no statutory
6 damages under the DMCA.

7 To answer the Court's question, we do think summary
8 judgment is appropriate either way, depending on how the Court
9 comes out on the law. We don't think there are fact issues.

10 The second point I want to reach is the defense
11 didn't address, which is copyright misuse. We think this is
12 actually a clear case of copyright misuse. And it's clear
13 because of the testimony of Apple's own witnesses. And here
14 I'm going to read or argue the testimony, so I don't know if
15 Apple wants to move to seal the courtroom.

16 But that testimony is that Apple put in place the
17 lock and key mechanism, the Haiku and the anti-circumvention
18 technology for one person, and one purpose alone, which was to
19 enforce the license term that ties OS 10 to Apple hardware. So
20 it's brought its copyright infringement and DMCA claims in this
21 case to enforce its ability to control how people use OS 10,
22 specifically, that they use OS 10 only on Apple-provided
23 hardware. And that is not a right granted by the Copyright
24 Act.

25 And the cases say, the copyright misuse cases say

1 that when you attempt to bring copyright claims to enforce a
2 right which is not one of the rights granted by the Copyright
3 Act, then that is copyright misuse. And you lose the right to
4 enforce your copyright, even on otherwise valid copyright
5 claims. We don't think those are valid claims, but we think
6 copyright misuse is dispositive of the entire case.

7 Now, on the facts, the Alcatel case in the Fifth
8 Circuit is almost exactly on point. That is the case where --
9 it was an operating system case, again, a maker of telephone
10 switches, I think, had a license provision that required that
11 the operating system be used only on their hardware. And the
12 Court in that case said that that constituted copyright misuse
13 for exactly the reasons that I just stated.

14 **THE COURT:** What was that case, again?

15 **MR. CAMARA:** It's Alcatel Versus DGI Technologies
16 Incorporated, 166 F.3d 772 at 793. And it's discussed in our
17 reply brief in support of our MSJ at page 8. I'll read the
18 quotation:

19 "DGI reasons that as DSC's software is licensed to
20 customers to be used only in conjunction with DSC manufactured
21 hardware, DSC indirectly seeks to obtain copyright protection
22 of its hardware, its microprocessor card, through the
23 enforcement of its software copyright. We agree with the DSC
24 one-panel's conjecture and the jury's finding that the DMC's
25 licensing for its imports operating system constitutes misuse."

1 And you can take one of the very next sentences and
2 just plug in Apple, and it makes perfect sense: Apple's
3 operating system is licensed to customers to be used only in
4 connection with Apple manufactured hardware. That is what the
5 Fifth Circuit held was misuse.

6 But that's not the only case: There is the Practice
7 Management case from the Ninth Circuit, which held that an
8 attempt to generate exclusive use of a certain medical billing
9 system was copyright misuse for exactly the same reason: It
10 attempts to protect a right which is not protected by the
11 Copyright Act.

12 So Apple has made a big deal about the fact that we
13 haven't offered lots of document that kind of prove up our
14 affirmative defenses and drown the Court; we haven't done that
15 because we think it's a simple case and one which we can win on
16 using only the testimony of Apple's witnesses.

17 Every single Apple witnesses who we ask this
18 question to, and I think we asked all of them, testified that
19 the only reason the technological protection measure was put in
20 was to enforce the license term.

21 And, you know, these are cited at pages 9 and 10 of
22 our reply and in the copyright misuse section of our motion.
23 But just to give you an example, this is Simon Patience the
24 head of OS 10 development, testifying:

25 "Q. Did Apple install the Apple

1 protected binaries for any reason
2 other than limiting Mac Os 10 to Apple
3 hardware?"

4 The witness:

5 **"A.** The April binaries were installed
6 specifically to enforce the license
7 section, which requires you to run Mac
8 Os 10 on Apple hardware."

9 There is similar testimony from Michael Culbert
10 (*phonetic*), from Robert Mansfield, and from several other Apple
11 witnesses, again, cited in the briefing. So we think copyright
12 misuse is clear, and we think that's dispositive of the case.

13 If the Court decides to reach the 117 and 109
14 arguments, we think it's clear that 109 and 117 apply because
15 the software license agreement states expressly that you are
16 the owner of the media on which the Apple software is recorded,
17 "you" in this case meaning Psystar. And the Copyright Act,
18 Section 101, defines a copy as the material object on which a
19 copyrighted work is recorded.

20 So, Apple talks a lot about how they have only
21 licensed OS 10, how they retain title to OS 10, how Psystar
22 doesn't own the OS 10; those are all true and not the point.
23 The question is whether or not Psystar has title to a copy of
24 OS 10, not to OS 10 itself, because if Psystar does have title
25 to such a copy, then it gets the benefit of 109 and 117.

1 If you look at 117, you know, the other argument
2 they make, they try to compare Psystar to a kind of a pirate,
3 and they do it using things like this diagram here, where they
4 make the suggestion that we take one copy of OS 10, that disk
5 in the upper left-hand corner, and generate all these other
6 copies of OS 10, but that simply isn't the way Psystar's
7 business operates. Psystar buys one copy of OS 10 for every
8 computer that it makes.

9 **THE COURT:** Is that sworn to in this record?

10 **MR. CAMARA:** Kelly says it, and we don't oppose it.
11 So they try to create a fact question about it by citing to the
12 declaration of Ms. Smith, where she says she reviewed a variety
13 of financial records which aren't disclosed. So we think that
14 testimony is incompetent, and we didn't produce any because we
15 agree with Apple and Kelly.

16 **THE COURT:** Kelly is the Apple expert?

17 **MR. CAMARA:** Kelly is Apple's expert.

18 **THE COURT:** Read to me what Kelly says.

19 **MR. CAMARA:** Let me find where Apple says it.

20 Okay, so it's at the Apple motion at page 7. It's
21 cited at page 5 of our reply. And the quotation from Apple's
22 motion is, "as a result, Psystar actually transfers two copies
23 of Mac Os 10 with every computer it sells. Psystar includes
24 both a Mac Os 10 DVD and a hard drive copy of Mac Os 10 onto
25 the Psystar computer." So that is Apple talking at Apple

1 motion 7. And let me pull up what Apple cites. We, of course,
2 think that's sufficient since they've stated it in their
3 motion.

4 (Searching through motion.)

5 **MR. CAMARA:** So the citation is at page 7 of Apple's
6 motion for summary judgment. It's Footnote 38. And it cites
7 the Kelly declaration at paragraph 20; the Chung declaration at
8 Exhibit 9. It cites some deposition testimony.

9 I can pull that up --

10 **THE COURT:** Sorry, what is the page number in the
11 Apple motion?

12 **MR. CAMARA:** Page 7 of the Apple motion and Footnote
13 38. And so the Apple motion itself says that we include a disk
14 with every computer. And then, it cites the Kelly declaration
15 and some deposition testimony.

16 So the only question --

17 **THE COURT:** But the copy that is on the hard drive
18 is not made from that particular disk, it's --

19 **MR. CAMARA:** That's correct.

20 **THE COURT:** -- it's made from your master system.

21 **MR. CAMARA:** That's correct. So it is, I suppose, a
22 conceivable outcome, and it seems to be Apple's argument, that
23 we could have our business if only we do it in the
24 time-consuming way, which is we tear open the Apple packages,
25 put in the Apple CD, and install them all by hand.

1 So that is the only difference here, but that
2 difference was addressed by this -- by the Ninth Circuit in
3 Wall Data in that footnote where they say that if everything
4 else were covered by 117, then the fact that you use an imaging
5 station, and, in fact, it was exactly like ours, an imaging
6 station that pushed out copies on multiple computers, that
7 alone would not would create copyright infringement. And if
8 forced to pick a doctrine, the Court would have picked fair
9 use.

10 But the fundamental point is that, surely, the
11 difference between a legal business and not, the difference
12 between millions of dollars in damages and not, is not whether
13 or not we pick out the CD, put it in the drive, and load them
14 manually that way as opposed to using the imaging station. The
15 question should turn on whether or not what we are really
16 doing, which is installing OS 10 with some Psystar software, is
17 legal or not and not with -- you know, whether we do it in an
18 efficient way or an inefficient way, which takes us to the next
19 point, which is the question of whether -- these white and red
20 slices.

21 Does the fact that Psystar installs its own software
22 along with OS 10, software that interoperates with OS 10
23 somehow cause there to be a problem. And we think not, for the
24 fundamental reason that if it is the case that installing two
25 different pieces of interoperable software creates a derivative

1 work or creates an adaptation under 117, then those derivative
2 works and adaptations are on every single computer that drives
3 multiple pieces of software. And all those software companies
4 would have, to be technically legal, obtain cross-licenses from
5 each other for all those derivative works. But that is not the
6 way the industry works.

7 What Apple would have this Court do is rule that way
8 so that the legality of all of these derivative works, supposed
9 derivative works that exists on all the computers, exists kind
10 of at the sufferance of the industry. And you can see why they
11 want that, because Apple is not going to sue Microsoft, and
12 Microsoft is not going to sue Apple. Who they are going to sue
13 are people like Psystar, who have nothing else to offer them,
14 and who are making these derivative works.

15 That Psystar doesn't create a derivative work when
16 it installs its own software along with Apple's, it does that
17 by right, it doesn't do that at the sufferance of Apple. And
18 that is not an argument we are making up: The Ninth Circuit
19 considered the question in Galooob when it talked about spell
20 checkers that replaced the spell checker in a word processing
21 program. Does introducing an improved spell checker create a
22 derivative work? Galub held, no. Galub held that it would be
23 contrary to the purpose of copyright to hold in the opposite
24 direction because it would stifle the creation of new works
25 like the improved spell checker.

1 **THE COURT:** What do you improve on here?

2 **MR. CAMARA:** We --

3 **THE COURT:** Why is your software an improved
4 version -- well, whether it's improved or not is subject to
5 argument. And we think we should be able to compete with
6 Apple.

7 We think it's improved because it allows OS 10 to
8 run a wider range of hardware, which is something that our
9 customers enjoy. Whether that is better or not is to be a
10 subject of market competition, not legal competition.

11 And incidentally, we don't do this through some
12 obscure method. When they talk about kernel extensions, they
13 repeatedly try to argue as though this were some kind of hack,
14 basically, but it's not. We deposed their witnesses about
15 that, too. And when we deposed their witnesses about kernel
16 extensions -- and this testimony is in, I think, pages 1
17 through 8 of our response to their motion for summary judgment,
18 they testified that kernel extensions are part of both Darwin
19 and OS 10; that it's something they expected third parties to
20 do; that, in fact, the most common thing for kernel extensions
21 is to make OS 10 compatible with other hardware. They go on
22 and on.

23 So we're using the feature of OS 10 just like its
24 ability to run applications: It can run applications, and it
25 can run new hardware, like a digital camera. That is not the

1 problem; the problem is that Apple doesn't want it to run on a
2 specific kind of hardware, namely, computers not manufactured
3 by Apple. And why do they want that? Again, it goes back to
4 the misuse argument: It is not to protect their right in OS
5 10. Psystar increased its sales in OS 10 because we buy a copy
6 for every computer we sell. It is to protect other proprietary
7 rights; namely, their right to control our customers' use of OS
8 10, on which computers they use OS 10, and that is not a right
9 that is protected by the Copyright Act.

10 I would like to use the remainder of my time for any
11 questions the Court has. I can talk about remedies if the
12 Court would like.

13 **THE COURT:** What is your view on remedies?

14 **MR. CAMARA:** Our view on remedies is that the case
15 is moot if the Court agrees with us. If the Court agrees with
16 us on the DMCA claim, then the case is practically moot because
17 that eliminates their claim for statutory damages.

18 If the Court also agrees with us on the copyright
19 claim, then the case is really moot because Apple has waived
20 its claims for actual damages on all of its other causes of
21 action. Disgorgement is not a remedy for breach of contract.
22 And we have cited some California cases contrary to what Apple
23 asserts. And we think no injunction is appropriate because
24 neither party sells Leopard anymore, so there is nothing to
25 enjoin.

1 **THE COURT:** No party what?

2 **MR. CAMARA:** Sells OS 10 Leopard anymore. That is
3 the prior version of Mac Os 10 that we both sold at the time
4 this litigation commenced. And then we filed a case in Florida
5 over OS 10 Snow Leopard and over Rebel EFI, which is the
6 stand-alone version of our software.

7 **THE COURT:** Where does that case stand right now?

8 **MR. CAMARA:** It was served last week, so the answer
9 is due.

10 **THE COURT:** Has a motion to transfer been made?

11 **MR. CAMARA:** No.

12 **THE COURT:** All right.

13 Let me give a short rebuttal --

14 **MR. CAMARA:** Thank you, Your Honor.

15 **THE COURT:** -- to the other side. And then we'll
16 bring it to a close.

17 **MR. GILLILAND:** Thank you, Your Honor.

18 A couple of things. A motion for transfer will be
19 made now that the complaint has been served on us in Florida.
20 That would be due shortly before Thanksgiving.

21 I'll try to take Mr. Camara's points in order. He
22 talked about copyright misuse: There are two recognized
23 doctrines for copyright misuse. One is unfair competition,
24 antitrust. This Court has already found that there is no
25 antitrust -- viable antitrust allegation here.

1 The other would be proof, proof by Psystar that
2 Apple has done something to suppress creativity, that Apple has
3 used its copyrights in some way that would prevent Psystar from
4 developing its own operating system or its own computers. No
5 such evidence has been submitted whatsoever.

6 Mr. Camara made reference to the Alcatel case from
7 the Fifth Circuit, but he ignored the Triad case from the Ninth
8 Circuit. And this decision is controlled by Triad, which is at
9 64 F. 3rd 1330.

10 In the Triad case, the plaintiff's license agreement
11 said you can only use our software together with our hardware.
12 And the Ninth Circuit said, "We conclude that defendant cannot
13 show that it is likely to prevail on it's asserted copyright
14 misuse defense. Triad did not attempt to prohibit Southeastern
15 from developing its own service software to compete with
16 Triad." Precisely the same thing is true here; Apple has done
17 nothing to prevent Psystar from developing its own software.

18 Secondly, Mr. Camara says that under the DMCA we
19 have to prove infringement; that is not true. Section
20 1201(a)(1) says that circumventing a technological protection
21 measure which protects access to a copyrighted work is -- does
22 violate the DMCA.

23 And, of course, Mac Os 10 is a copyrighted work; the
24 technological protection measure protects access to it so that
25 it cannot be copied onto non-Apple Computers, which is one of

1 the rights of the copyright holder, the right to prohibit
2 reproduction of its copyrighted work.

3 Likewise, Judge Patel, in the RealNetworks case,
4 said that there is no fair use defense or anything of that
5 nature to a DMCA violation. The question is, rather, whether
6 the technological protection measure is reasonably related to
7 the right of the copyright owner. And, here, we say it most
8 assuredly is.

9 With respect to Mr. Camara's argument that Psystar
10 has purchased one copy of Mac Os 10 for each of its computers
11 that it has sold, I say again that they have the burden of
12 proving this if they are going to claim a First-Sale defense or
13 an Essential Step defense.

14 **THE COURT:** They cite to your brief --

15 **MR. GILLILAND:** They cite --

16 **THE COURT:** -- and to your expert. So what do you
17 say to that?

18 **MR. GILLILAND:** I will direct the Court to Mr. --
19 Dr. Kelly's declaration, paragraph 15, Table 2. What Dr. Kelly
20 says is: In the computers that I looked at, the disk that came
21 with them had a different version of Mac Os 10 on it than the
22 computers. It does not say that they sold the disk with the
23 computer, it says specifically the opposite of that.

24 **THE COURT:** By that, does Kelly mean the encryption
25 segment is the only difference, or --

1 **MR. GILLILAND:** No, Your Honor. And if that -- if
2 the Court's has the opportunity later to look at Table 2,
3 you'll see that what Dr. Kelly says --

4 **THE COURT:** Show it to me. I don't remember that.

5 **MR. GILLILAND:** It's right here. I apologize for my
6 markings.

7 **THE COURT:** I'll give it back to you.

8 **MR. GILLILAND:** It looks like your letter that you
9 used -- you'll see that he says: On computer A, loaded onto it
10 was version 10.5.2, but, in the box, was version 10.5.0.

11 **THE COURT:** I see. All right.

12 **MR. GILLILAND:** Maybe I have them reversed, but that
13 is the point.

14 Beyond that, Exhibit 68 is a letter from a customer
15 saying there is no disk in my box. And, as Mr. Camara pointed
16 out, the records that they produced show substantially fewer
17 purchases of Mac Os 10 DVDs.

18 **THE COURT:** What was the page number of Kelly there?

19 **MR. GILLILAND:** This is Dr. Kelly's declaration in
20 support of Apple's motion for summary judgment. It's page 6,
21 Table 2, and summarized in his paragraph 15, Your Honor.

22 **THE COURT:** All right.

23 **MR. GILLILAND:** Last point with respect to
24 derivative works. As I said earlier, it's not necessary to
25 address that question. The Essential Step talks about

1 adaptations, doesn't talk about derivative works. If there is
2 an adaptation made, Section 117(b) says it cannot be sold
3 without the permission of the copyright holder, the original
4 copyright holder. There can be no doubt that there is an
5 adaptation going on here because otherwise this would not run
6 on a non-Apple Computer.

7 Beyond that, we think that it's a false simile being
8 used here: Running a word processor on top of the operating
9 system is an authorized use of the operating the system.
10 Ripping out the boot loader and putting in a new one, or
11 turning off the kernel extensions and putting in your own is
12 not authorized by any license agreement or any agreement
13 between Apple and Psystar.

14 **THE COURT:** All right.

15 **MR. GILLILAND:** That's all I got, Your Honor. Thank
16 you.

17 **THE COURT:** Mr. Camara, I will give you a couple of
18 minutes if you want to have any response.

19 **MR. CAMARA:** I'd like to direct my comments at
20 whatever the Court's interested in. I can pick some topics,
21 if --

22 **THE COURT:** What do you say to the Kelly thing,
23 the -- Kelly is not quite as expansive as -- you said that you
24 accepted Apple's version that you include a disk with every
25 single Psystar unit sold, but the actual Kelly testimony is

1 narrower than that and was really making a different point,
2 that the versions that they sampled were not the same versions
3 that were loaded onto the hard drive.

4 **MR. CAMARA:** I have two responses, Your Honor.
5 First, Mr. Gilliland cited a different section of the Kelly
6 report, which is not the section cited in his brief, which is
7 what I quoted to you word for word. So, their brief does say
8 exactly what I said in exactly those words. And the Court can
9 obviously verify that.

10 **THE COURT:** Let's get to the bottom of that now.

11 **MR. CAMARA:** Sure.

12 **THE COURT:** Go get the place that you cited.

13 And I -- I think you said it was page 7, Footnote
14 38.

15 **MR. CAMARA:** Page 7 of Apple's motion for summary
16 judgment.

17 **THE COURT:** Footnote 38. So, what do they cite
18 to -- there, for Kelly, there?

19 **MR. CAMARA:** Here is page 7 of their motion. This
20 is them talking, the direct quotation:

21 "As a result, Psystar actually transfers two copies
22 of Mac Os 10 with every computer it sells. Psystar includes
23 both a Mac Os 10 DVD, which was not used in any way during the
24 installation of Mac Os 10, and a hard drive copy of Mac Os 10
25 on the Psystar computer."

1 That is a direct quotation. They stated it in their
2 motion. We didn't contest it. We seek summary judgment based
3 on the facts as they have asserted them.

4 Now they have a footnote --

5 **THE COURT:** But that is in their opening motion.

6 **MR. CAMARA:** Yes.

7 **THE COURT:** When was your opening motion?

8 **MR. CAMARA:** In our opening motion, we simply
9 asserted -- frankly, Your Honor, we weren't aware that this was
10 a contested thing, so we have just asserted it. It may be that
11 in some deposition testimony cited by one of the parties; I
12 don't have that citation for the Court right now.

13 As soon as we got this motion from Apple, we thought
14 it was genuinely not contested because Apple says it right
15 here. I can explain what Kelly is talking about, if the Court
16 would like that.

17 **THE COURT:** Well, but you said that this Footnote 38
18 cited some different part of the Kelly; what does it cite to?

19 **MR. CAMARA:** Kelly declaration, paragraph 20; Chung
20 declaration, Exhibit 9 at 87, 9 to 89, 23; 112, 19 to 113, 25;
21 and Exhibit 17 that numbers 55 to 56.

22 **THE COURT:** All right.

23 **MR. CAMARA:** I must apologize, Your Honor, I don't
24 know quite what all those things are, but, again, our position
25 is they have asserted it; they have cited authority for it, so

1 we think we are entitled to take it as an undisputed fact, if
2 we are willing to agree to it, which we are.

3 **THE COURT:** All right, time's up. Sorry.

4 **MR. CAMARA:** Thank you, Your Honor.

5 **THE COURT:** Under submission. Thank you.

6 **MR. GILLILAND:** Thank you, Your Honor.

7 **THE COURT:** You're welcome.

8 (Proceedings adjourned at 2:53 p.m.)

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CERTIFICATE OF REPORTER

I, Sahar McVickar, Official Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings 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. The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

/s/ Sahar McVickar

Sahar McVickar, RPR, CSR No. 12963

Monday, November 16, 2009