

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, August 20, 2009

Reporter's Transcript Of Proceedings

Appearances:

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By: **K.A.D. Camara, Esquire**
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Noah Radbill, Esquire
Christian Curtis, Esquire

Reported By: Sahar McVickar, RPR, CSR No. 12963
Official Reporter, U.S. District Court
For the Northern District of California

(Computerized Transcription By Eclipse)

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Thursday, August 20, 2009

12:00 P.M.

P R O C E E D I N G S

THE COURT: All right, welcome, everyone. Have a seat, please.

THE CLERK: Calling civil action 08-3251, Apple, Inc., versus Psystar Corporation.

MS. BOROUMAND SMITH: Mehrnaz Boroumand Smith, Townsend, Townsend and Crew, on behalf of Apple, Inc., Your Honor.

THE COURT: Say that name, again.

MS. BOROUMAND SMITH: Mehrnaz Boroumand Smith.

THE COURT: Smith?

MS. BOROUMAND SMITH: Yes.

THE COURT: Thank you.

MS. BOROUMAND SMITH: And I've got here with me Tyler Gee and Jim Gilliland.

THE COURT: Great.

MR. CAMARA: I'm K.A.D. Camara for the defendant, Psystar Corporation.

THE COURT: You are going to have to speak louder. Whenever each lawyer talks, I'm going as to ask you to come to the lecturn because I can't hear.

MR. CAMARA: Yes, Your Honor.

It's K.A.D. Camera for the defendant, Psystar Corporation.

1 And I'm joined at counsel table by my colleagues,
2 Kent Radford, Noah Radbill and Christian Curtis.

3 **THE COURT:** All right, welcome.

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

5 **THE COURT:** Okay, we are here on -- we're just going
6 to put to one side -- there was -- you bombarded me, and I'm
7 going to probably get a special -- I'll get a magistrate judge
8 to help me so since you are so contentious in this case, maybe.
9 I'm going to wait and see how I feel about it, but I just can't
10 continue to do the kind of discovery disputes that you are
11 bombarding me with.

12 We're going to only deal with today the first one
13 that was sent in, that was about destroying evidence. And so
14 we'll hear from Ms. Smith on that one. That one we will
15 resolve today.

16 **MS. BOROUMAND SMITH:** Thank you, Your Honor.

17 Your Honor, we spent about an hour --

18 **THE COURT:** Use the microphone.

19 You can bend it around anywhere you want.

20 **THE COURT:** Thank you. Go ahead.

21 **MS. BOROUMAND SMITH:** We spent about an hour in the
22 meet and confer discussing the spoliation motion, and both
23 parties agreed that relevant evidence that should have been
24 produced by Psystar has been erased. That evidence consists of
25 two kernel extensions: The apple decrypt kernal extension and

1 the dsmos kernel extension, as well as a boot loader file that
2 we are calling the Netkas boot loader.

3 Now, the kernel extensions are used to circumvent
4 Apple's technological protection measure, and they contain
5 Apple's copyrighted key in them. And the boot loader is used
6 to enable Mac OS X to be booted up on nonApple hardware. So
7 we've agreed that Psystar was required to preserve that
8 evidence, that they were required to produce it, and that they
9 have erased it.

10 The only dispute that we have remaining here today
11 is what the sanctions would be. We are seeking sanctions in
12 the form of a jury instruction whereby the jury is instructed
13 that the kernels were on Psystar's machines; that they were
14 used and that they were erased.

15 We are also seeking attorney's fees associated with
16 this motion as well as costs that we have had to incur to have
17 our experts find evidence that should have been provided to us
18 as part of discovery.

19 Psystar contends -- in their letter brief, their
20 opposition states that it was an honest mistake, that they
21 didn't know that they were supposed to preserve this evidence,
22 but the facts bear otherwise. Back in March of this year, we
23 deposed Rudy Pedraza, Psystar's CEO and their designee on
24 technical topics, and we specifically asked him about this
25 dsmos kernel extension as well as the Apple decrypt kernel

1 extension, and here is how the testimony went:

2 "Q. Do you know what that dsmos
3 kernel extension is?

4 "A. No, I do not.

5 "Q. Have you ever seen that reference
6 before?

7 "A. No.

8 "Q. Never?

9 "A. Never."

10 With regard to the kernel extension for Apple
11 decrypt, he testified also that they never used them on their
12 computers.

13 On May 15th, we -- as of today, when we met --
14 actually, let me kind walk you through the chronology here,
15 Your Honor.

16 We sent a letter on May 15th about the spoliation
17 usual. We met and conferred with new counsel for Psystar on
18 the 23rd, before we filed our letter brief. In that meet and
19 confer session, counsel stated that Psystar had never used the
20 dsmos kernel extension or the Apple decrypt kernel extension on
21 their computers. And then we filed our motion because we
22 believe we had evidence that they did.

23 In their opposition that came in last night, they
24 indicated that they are now acknowledging the possibility that
25 copies of these kernel extensions may have accidentally be been

1 transferred to Psystar computers.

2 In our meet and confer today, we told them that but
3 for those kernel extensions, Mac OS X would not have run on
4 Psystar's computers. They went back to their client, and as of
5 today, 24 hours after, less than 24 hours after they filed
6 their opposition, their client has told them that, yes, there
7 is a high possibility that there is dsomos and Apple decrypt on
8 the earlier Psystar computers.

9 We believe that we are entitled to sanctions, Your
10 Honor, in both the --

11 **THE COURT:** Just --

12 **MS. BOROUMAND SMITH:** Yeah.

13 **THE COURT:** You are doing a great job of explaining
14 this, but assuming that -- assuming it was -- let's say Apple
15 decrypt was on there, so what?

16 **MS. BOROUMAND SMITH:** So Apple decrypt is the kernel
17 extension they use to actually circumvent Apple's --

18 **THE COURT:** Is that illegal?

19 **MS. BOROUMAND SMITH:** -- technological protection
20 measures.

21 **THE COURT:** What's wrong with that?

22 **MS. BOROUMAND SMITH:** It has -- it's -- you're not
23 allowed to circumvent under the DMCA technological protection
24 measures --

25 **THE COURT:** You are not allowed to do what?

1 **MS. BOROUMAND SMITH:** You are not allowed to
2 circumvent technological protection measures that are used to
3 prevent access to copyrighted works.

4 **THE COURT:** And that is what some statute says?

5 **MS. BOROUMAND SMITH:** Yes, the Digital Millennium
6 Copyright Act.

7 **THE COURT:** Okay, I take your word for it.

8 So you are saying that under that act, if you used
9 Apple decrypt that would a violation of the statute.

10 **MS. BOROUMAND SMITH:** That's correct because Apple
11 decrypt contains Apple's copyrighted keys. And what has
12 happened is they basically circumvented our technological
13 protection measure, which prevents Mac OS X from running on
14 anything but Apple Computers.

15 **THE COURT:** Okay.

16 How many units, roughly, were -- had this Apple
17 decrypt on it?

18 **MS. BOROUMAND SMITH:** It's unclear, Your Honor,
19 because we don't -- we bought -- our experts ended up buying
20 several those units, and we don't know when they started
21 shipping another decryption text on their computers.

22 But we know that at least up until September, so
23 between April and September we believe they were using either
24 Apple decrypt or dsmos.

25 **THE COURT:** What are they using now --

1 **MS. BOROUMAND SMITH:** But part of the issue is they
2 destroyed evidence, and we don't know.

3 **THE COURT:** What are they using now to run Apple?

4 **MS. BOROUMAND SMITH:** They are using another kernel
5 extension that they have written called OpenCojones.text and
6 that also contains Apple's copyrighted key.

7 **THE COURT:** Is that a violation, too?

8 **MS. BOROUMAND SMITH:** Yes, Your Honor.

9 I believe the only difference between the Apple
10 decrypt kernel extensions and the open Cojones kernel extension
11 is that in the Apple decrypt and dsmos kernel extensions the
12 key is written out, just in the form of a poem, and in open
13 Cojones, an algorithm is running to retrieve that poem, and
14 then the poem is used to go into the decryption engine.

15 **THE COURT:** Well, since you know all of this now --
16 I'm losing track of what the problem is.

17 Sounds like you we could prove everything you want
18 to prove, so what's the problem/

19 **MS. BOROUMAND SMITH:** Well, the problem is, Your
20 Honor, we have two computers on which we can prove this.
21 Psystar sold a bunch of computers. They had source code or
22 executable code that they have destroyed or written over. And
23 had we had that code and all versions of it up until today, we
24 would be able to show that, together with our master copies,
25 what they were shipping on their computers at any given point

1 in time.

2 **THE COURT:** But their brief says that there were
3 only three lines of code destroyed.

4 What am I thinking of.?

5 **MS. BOROUMAND SMITH:** So their brief says that they
6 destroyed opened Cojones -- I'm sorry, they destroyed dsmos and
7 Apple decrypt as well as the boot loader. And so --

8 **THE COURT:** Presumably, that's more than three lines
9 of code.

10 **MS. BOROUMAND SMITH:** Yeah, that -- oh, you're
11 thinking of the change in the boot loader, Your Honor, and that
12 is a different issue.

13 **THE COURT:** Different issue, all right, well, don't
14 even get to that yet.

15 **MS. BOROUMAND SMITH:** Okay.

16 **THE COURT:** So -- well, wait a minute, let's go
17 back.

18 At the master file stage, you're saying that they
19 deleted from their master file Apple decrypt, for example?

20 **MS. BOROUMAND SMITH:** So what we area saying is they
21 deleted from their code the Apple decrypt kernel extension as
22 well as the Apple -- as well as the dsmos kernel extension.

23 Maybe I should go back and explain how all this
24 stuff works together, if that's okay, if it would be helpful?

25 **THE COURT:** Do it in less than one minute, okay.

1 **MS. BOROUMAND SMITH:** Okay.

2 So in order to run Mac OS X on nonApple hardware,
3 Psystar had to do two things: They had to use the kernel
4 extensions that I've been talking about, and they also had to
5 modify the operating system by using different boot loader
6 because the boot loader that is used in Mac OS X is
7 specifically for Apple computers, and the boot loader that they
8 are using is for nonApple hardware.

9 What they do, is they take a --

10 **THE COURT:** What they did, or -- what you mean what
11 they did?

12 **MS. BOROUMAND SMITH:** So what they did was they
13 wrote over that code, Your Honor.

14 **THE COURT:** They did what?

15 **MS. BOROUMAND SMITH:** They wrote over that code.

16 **THE COURT:** Over what code?

17 **MS. BOROUMAND SMITH:** The code for Apple decrypt and
18 dsmos as well as the boot loader code for the Netkas boot
19 loader.

20 **THE COURT:** "Write over" means what?

21 **MS. BOROUMAND SMITH:** They -- from my understanding
22 of what I've been told by counsel, is that they just continued
23 to program, and they didn't save different versions of the
24 code.

25 So let's say today I'm programming, I write some

1 portion of the code, and then tomorrow I decide I want to write
2 over that, I write over it, but I don't preserve what I had
3 before.

4 **THE COURT:** But some of these must have been out
5 there on real machines.

6 **MS. BOROUMAND SMITH:** Correct, because what they did
7 ways they took the -- some of this code, and they stamped it
8 onto master copies. A master copy is then taken and stamped
9 onto each computer that is sold to customers.

10 **THE COURT:** So why don't you just rely on the master
11 copy?

12 **MS. BOROUMAND SMITH:** I'm sorry?

13 **THE COURT:** Why don't you just rely on that master
14 copy?

15 **MS. BOROUMAND SMITH:** Because they haven't produced
16 the master copy, and it doesn't exist anymore.

17 So if we had the master copy for each time that --
18 from -- the master copies from April of 2008, when they started
19 shipping their computers, till today, then we would be able to
20 establish during that time frame which computers had Apple
21 decrypt on them and which computers had dsmos on them, which
22 computers had the Netkas boot loader on them. But because we
23 don't have the master copies and because they have written over
24 the source code over time and the executable code, we don't
25 have any of that information.

1 **THE COURT:** Have you requested the master copies?

2 **MS. BOROUMAND SMITH:** We have, Your Honor. And
3 they've produced what they have, but they don't have the
4 initial master copies, the ones that matter.

5 **THE COURT:** How many do they have?

6 **MS. BOROUMAND SMITH:** They have produced two.
7 They've produced one as of is July of 2009, so last month, and
8 they've produced, I believe, another one as well.

9 Is that correct?

10 **MR. CAMARA:** Yes, one earlier and one in July, Your
11 Honor.

12 **MS. BOROUMAND SMITH:** Right.

13 **THE COURT:** Okay. Have a seat. I'm going to give
14 you a chance to speak some more in a minute.

15 **MS. BOROUMAND SMITH:** Thank you, Your Honor.

16 **THE COURT:** Let me hear the other side.

17 All right, what do you have to say?

18 **MR. CAMARA:** Your Honor, I think you've identified
19 the issue correctly, which is that they have copies of what was
20 on Psystar's computers. That's, in fact, the basis for their
21 motion. They have copies of these kernel extensions, which
22 were --

23 **THE COURT:** Yeah, but they don't know how many you
24 put it on.

25 **MR. CAMARA:** Well, we don't know the answer to that

1 and they don't know to answer that.

2 **THE COURT:** If you haven't destroyed the evidence,
3 we would know.

4 **MR. CAMARA:** We would, but we have offered to
5 stipulate that until the time the computers had open Cojones on
6 them, we will stipulate that all of them had this code on them.

7 So I think there can be no prejudice to them. We
8 offered that in the meet and confer. And because we recognize
9 that the failure to preserve these documents makes it
10 impossible to tell which, if any, computers --

11 **THE COURT:** Maybe that will work. Don't go away.
12 Ms. Smith what's wrong with that?

13 **MS. BOROUMAND SMITH:** So --

14 **THE COURT:** Doesn't that proving everything you need
15 to prove?

16 **MS. BOROUMAND SMITH:** So what -- the other part of
17 the meet and confer that Mr. --

18 **THE COURT:** Wait. Just address that part about the
19 stipulation that -- what's wrong with that stipulation?

20 **MS. BOROUMAND SMITH:** So that's stipulation works,
21 so long as it's presented to the jury.

22 **THE COURT:** Of course it would be.

23 **MS. BOROUMAND SMITH:** Right. But Mr. Camera
24 indicated in meet and confer that they wanted to bifurcate and
25 not provide that information to the jury, was my understanding.

1 **MR. CAMARA:** I think that is a simple
2 miscommunication, Your Honor.

3 If what we are telling the jury is that Apple
4 decrypt dsmos and the Netkas boot loader were on all Psystar
5 computers shipped before a certain date, we are happy to have
6 that be an instruction to the jury.

7 What I was talking about was if the Court were to
8 prefer a more prejudicial instruction, like Psystar destroyed
9 evidence.

10 **THE COURT:** What's wrong with telling the jury that
11 you destroyed the evidence?

12 **MR. CAMARA:** Well, Your Honor, we think --

13 **THE COURT:** Is there an issue of bad faith in this
14 case?

15 **MR. CAMARA:** Yes, Your Honor.

16 **THE COURT:** Well, if there is an issue of bad faith
17 and somebody's been destroying evidence, that's highly
18 relevant.

19 **MR. CAMARA:** Yes, Your Honor, we think it's
20 certainly highly relevant to the pre-September 2008 computers
21 that contain that destroyed evidence, but we think it would be
22 highly prejudicial with respect to the post-2000 -- sorry, the
23 post September 2008 computers, which everyone agrees do not
24 contain and never did contain Apple decrypt, dsmos, et cetera.

25 So if we could not present to the jury with respect

1 to what Psystar is doing now --

2 **THE COURT:** We are not going to have two trials.
3 What do you mean, two trials? We are going to have one jury
4 hear everything and sort it out.

5 **MR. CAMARA:** Well --

6 **THE COURT:** If your people happened to destroy
7 evidence along the way that's relevant, then the jury is going
8 to hear about it. And that's your problem if it's prejudicial
9 because, you know, evidence can be prejudicial, but rightly so.
10 And if somebody is destroying evidence, that's your -- to my
11 mind, a jury can at least say, hey, they've been out destroying
12 evidence, they're guilty as sin.

13 **MR. CAMARA:** It's certainly relevant to the
14 computers that were printed from the -- the missing master boot
15 copies. And I certainly would have no objection to
16 Mr. Gilliland or Ms. Smith crossing our witnesses using the
17 destruction of that evidence.

18 **THE COURT:** All right.

19 **MR. CAMARA:** But it isn't, relevant, I think, Your
20 Honor, to the computers that were manufactured after September
21 of 2008.

22 **THE COURT:** Why don't you just prove that the ones
23 after September 2008 don't have that -- the offending modules
24 on it?

25 **MR. CAMARA:** In fact, it's agreed that that's so,

1 Your Honor. And that's precisely the way we would like to
2 proceed, we would like to have competing lawyer argument and
3 cross-examination and testimony.

4 What we object to is an instruction that tells the
5 jury that there has been destruction of evidence because it's
6 quite possible that the jury will think that that's prejudicial
7 not only as to the preSeptember 2008 computers, but also as to
8 the post-September 2008 computers.

9 They will have a field day on cross with this
10 evidence, and that's perfectly proper, but I don't think it
11 requires an instruction from the Court for them to have the
12 advantage that they are entitled to.

13 **THE COURT:** Well, let me give you some general
14 principles. I'm missing something in this discussion, so I
15 want you to help me understand what I'm missing.

16 One way to go here is to just let Apple prove --
17 we'll have no stipulations. One way to go is no stipulations,
18 and then Apple just prove it up at trial that all this stuff
19 was destroyed. That happens in a lot of trials, and the jury
20 then says, ah-hah, they destroyed evidence, I don't like these
21 people, they are trying to infringe.

22 But the jury gets all that information because it's
23 highly relevant to the issue of intent. That's one way to go.

24 Another way to way go would be have a stipulation,
25 but if you have a stipulation, you can't have it both ways.

1 You can't then start putting in the same evidence that the
2 stipulation goes to. So you would just have a cold two or
3 three sentence stipulation that says here is what we did, here
4 is what we did not do. And then you just argue it to the jury
5 that there is bad faith, based on -- you wouldn't be putting in
6 additional evidence because that would be superfluous.

7 Those are two different ways to try a case, one with
8 a stipulation that knocks out a lot of the Q and A, one without
9 it but you don't get the benefit of the stipulation but you
10 would then get the Q and A.

11 Ms. Smith, what bothers me about your approach is
12 you want me to instruct -- I'm not going to do all this
13 instructing the jury. I can tell them that if somebody
14 destroys evidence, they can consider that on the issues of bad
15 faith, sure I can do that. But I'm not going to say that there
16 has been bad faith. I'm not going to say that there has been
17 destruction, unless something -- if you all were to stipulate
18 and say here is what was destroyed, here is what is not
19 destroyed, then I can instruct the jury along those lines, of
20 course.

21 But then that would preclude you from -- maybe not
22 100 percent, but 90 percent from getting into the details of
23 that with evidentiary material because that is the whole point
24 of the stipulation. So what am I missing here?

25 Now, I'll give you one other -- some lawyers in your

1 position, Ms. Smith, would be delighted to have all this
2 evidence, and you would just throw it in front of the jury and
3 say look how bad these people are. And you would not want a
4 stipulation. You would not -- so what is it you are trying to
5 ask me to -- be careful what you wish for, because you might
6 get it and regret it at trial.

7 What is it you want me to do?

8 **MS. BOROUMAND SMITH:** Well, to the extent Your Honor
9 is saying that the information would be -- we wouldn't be able
10 to bring that information in front of the jury --

11 **THE COURT:** To the extent -- I'm not saying -- I am
12 saying that if you have a stipulation, then the other side is
13 going to stand up and say we've covered that by the
14 stipulation, why are we going into this. And I probably at
15 some point -- I'll give you a little bit of loosey-goosey room
16 because no stipulation is perfect, but I would probably cut you
17 off before -- and you'd be unhappy about it.

18 **MS. BOROUMAND SMITH:** Then I guess you are right,
19 Your Honor, I should be careful about what I'm asking for. And
20 I would say that we want to bring that evidence in front of the
21 jury and make sure that they do realize what Psystar has done
22 as far as writing over the code and destroying evidence.

23 But we still would like to seek the expenses that we
24 have incurred bringing this motion as well as the expert --

25 **THE COURT:** What is the relief you are getting here?

1 **MS. BOROUMAND SMITH:** I'm sorry?

2 **THE COURT:** What is the relief that you are getting
3 that is -- warrants attorney's fees?

4 **MS. BOROUMAND SMITH:** Well, it's the fact that had
5 they not lied to us in their 30(b)(6) deposition, Your Honor,
6 and told us that they did -- we basically went down this whole
7 path trying to find all of this information. We have spent
8 time meeting and conferring with them, writing briefs, only to
9 find out today what we should have known back in May --

10 **THE COURT:** Go back over all that. That sounds
11 plausible. Go back through that chronology of how you got
12 misled on this.

13 **MS. BOROUMAND SMITH:** Sure.

14 So back in March, we had a 30(b)(6) deposition of
15 Psystar's CEO, Rudy Pedraza. At that deposition, we asked him
16 whether he knew what the dsmos kernel extension was, whether
17 Psystar used the dsmos kernal extension --

18 **THE COURT REPORTER:** Slow down just a little for me.

19 **MS. BOROUMAND SMITH:** I'm sorry.

20 And similarly, we asked him about the Apple decrypt
21 kernel extension and whether or not Psystar used that kernel
22 extension: The answers to all of those questions were "no."

23 We then --

24 **THE COURT:** Stop just a second.

25 **MS. BOROUMAND SMITH:** Yes.

1 **THE COURT:** That's totally false, isn't it?

2 **MR. CAMARA:** Well --

3 **THE COURT:** I mean, sounds totally false based on
4 what I'm hearing today that that testimony was just false.

5 **MR. CAMARA:** Well, here's what happened. They --
6 the people at Psystar -- well, I won't defend that, Your Honor,
7 I think those answers were false.

8 **THE COURT:** All right.

9 **MR. CAMARA:** Coming from a 30(b)(6) deponent.

10 **THE COURT:** All right.

11 **MR. CAMARA:** Robert Pedraza at the business was in
12 charge of this, but, certainly, Rudy Pedraza should have had
13 that information at the 30(b)(6) deposition.

14 If I could give the Court some background?

15 **THE COURT:** Go ahead.

16 **MR. CAMARA:** We came into this case a month ago, as
17 the Court knows. And after coming in, we have done our best to
18 clean up the discovery that took place. We have just produced
19 a massive amount of documents curing, I think, almost all of
20 the outstanding problems, if not all of the outstanding
21 problems.

22 We have produced witnesses for depositions,
23 including Mr. Pedraza, again, in Miami. Mr. Pedraza's is being
24 deposed still again next week here in San Francisco.

25 So we have taken major steps. We have implemented a

1 source control program to maintain changes. All changes that
2 are committed to the source code so that something like that
3 won't happen again in the future.

4 Rudy and Robert Pedraza, this is a startup in Miami.
5 It's a small office. There are five guys running this
6 business. They did not receive advice from former counsel
7 about how the preservation rules applied to things like source
8 code and things like the document images. And, regretfully,
9 some of this has not been preserved.

10 We have offered stipulations, as Your Honor just
11 heard, that we think cure the problem from a substantive point
12 of view. And so we think that Rudy and Robert acted in good
13 faith and continued to act in good faith, especially over the
14 past month, taken steps to cure all the substantive objections
15 so that a substantial penal argument is not warranted.

16 With respect to the missing files, Apple decrypt,
17 dsmos and the Netkas boot loader, it's clear that Apple and
18 Apple's counsel would have undertaken an independent
19 investigation to verify whether or not those files were on our
20 computers, no matter what with Psystar had produced in
21 discovery. That's what any good lawyer would do.

22 So certainly, if there is any award, we would hope
23 that it be narrowly tailored to any additional work that this
24 discovery fight has generated. Certainly, the independent
25 investigation into computers that they bought would have been

1 performed no matter what.

2 **THE COURT:** Here is one thing that I think should be
3 done, and this is not a stipulation, per se, it's going to be a
4 court ordered interrogatory.

5 But Ms. Smith, you are going to write it. I don't
6 want a big firm -- I don't want a big firm thing with
7 definitions and instructions, just a plain interrogatory with
8 no lead-in that says something like, do you admit that Apple
9 decrypt was used on computers? You make it, you know, refine
10 that.

11 Then I assume your answer is going to be "yes."

12 **MR. CAMARA:** Well, Your Honor, I think so, too, but
13 we haven't seen the basis for their motion. They haven't
14 supplied the expert testimony.

15 **THE COURT:** They don't need to.

16 Listen, you ought to go what was on your own
17 computers. If you don't know what's on your own computers, I'm
18 going to get upset.

19 **MR. CAMARA:** We have offered that as a stipulation,
20 and the answer will be yes, Your Honor.

21 **THE COURT:** All right.

22 And then the next question is on how many computers
23 was it on? And then you ask the same question, dms0, and how
24 many was it on. And then these are going to be court-ordered
25 interrogatories which you can read to the jury.

1 **MS. BOROUMAND SMITH:** Okay.

2 **THE COURT:** And so you get this done by Monday.
3 And then you answer it by Monday of the following
4 week.

5 **MR. CAMARA:** Yes, Your Honor.

6 **THE COURT:** And now, I don't want 36
7 interrogatories, I'm thinking about like 8 or 9 that would pin
8 down this information that's come out today.

9 Ms. Smith, are you following me?

10 **MS. BOROUMAND SMITH:** I am, Your Honor.

11 **THE COURT:** All right, so at least you'll get that
12 much relief. You'll get a clear-cut interrogatory answer and
13 -- that you can read to the jury. That's not a stipulation,
14 that's a interrogatory answer.

15 Now, the jury may take into account that during the
16 course of discovery you tried to clean up the problem. But
17 they can also figure out, probably, that there was some monkey
18 business going on earlier. And maybe that indicates bad faith,
19 and that's up to them.

20 If they want to -- you know this would be classic
21 evidence that goes to intent, if they were lying about whether
22 the Apple decrypt was used or not. So that part I think should
23 be done.

24 And then explain the boot loader thing to me -- boot
25 loader thing to me.

1 **MS. BOROUMAND SMITH:** Sure.

2 So the boot loader, Your Honor, is a -- it's a file
3 that allows the computer to boot up on certain hardware.

4 **THE COURT:** Right, I understand that.

5 **MS. BOROUMAND SMITH:** And what they've done -- in
6 order to run Mac OS X on nonApple hardware, you have to modify
7 the boot loader that is contained within the copyrighted works
8 that constitute the Mac OS X.

9 So what they have done is basically taken a new boot
10 loader, put it in together with the Mac OS X software in order
11 to allow it to run on the hardware that they want it to run on.
12 They have created a derivative work, in essence.

13 And what they have done is they have not provided to
14 us, in either master copy or as part of executable code, the
15 Netkas boot loader that they used, which is separate and
16 different from the boot loader that is used by Apple as part of
17 Mac OS X.

18 **THE COURT:** Just a second. I want your
19 interrogatories -- write this down -- to state that they admit
20 that the masters were destroyed, and that the dates -- and they
21 ask for the dates that they were destroyed. I'm talking about
22 the ones that had those Apple and dsmos on it.

23 **MS. BOROUMAND SMITH:** Okay.

24 **THE COURT:** All right, so, now, coming back to the
25 boot loader, what do you say to the boot loader problem?

1 **MR. CAMARA:** Your Honor, it's exactly the same
2 problem. Just as Apple decrypt and dsmos were on those images,
3 so was Netkas. And we would be happy to answer the same
4 interrogatories --

5 **THE COURT:** All right, those -- add those to the
6 interrogatories.

7 Now, how much are you asking for by way of
8 sanctions?

9 **MS. BOROUMAND SMITH:** We are seeking the amount that
10 we expended on filing this motion.

11 **THE COURT:** How much is that?

12 **MS. BOROUMAND SMITH:** I haven't done the
13 calculation. I apologize.

14 **THE COURT:** You get \$5000.

15 **MS. BOROUMAND SMITH:** Okay, thank you, Your Honor.

16 **THE COURT:** Probably a lot less than you really
17 spent. But --

18 You going to complain about \$5000?

19 **MR. CAMARA:** No, Your Honor.

20 **THE COURT:** All right, \$5000.

21 Now, on the other one -- you know, I just got -- you
22 are using this as an occasion to argue over this one, and then
23 -- and then instead of replying, I get these brand new
24 arguments, brand new products.

25 So Ms. Smith, what's going on here?

1 **MS. BOROUMAND SMITH:** So, Your Honor, this -- we
2 have a motion that was filed by Mr. Camera with regards to
3 topic three deposition that they noticed up on a 30(b)(6).
4 This is our opposition. I know you didn't order us to respond.
5 It's an opposition, as well as a motion for protective order on
6 certain issues.

7 **THE COURT:** Just a minute.

8 Why can't they take a deposition of your people on
9 what that harm has been? I don't buy -- it's bogus to say that
10 this is for experts. How are their experts going to prepare
11 their reports without knowing what you contend are the damage
12 items?

13 **MS. BOROUMAND SMITH:** So, Your Honor, we did provide
14 testimony on harm to Apple. We provided testimony on
15 irreparable injury to Apple, specifically. And Mr. Schiller
16 was designated to testify on that topic, and he did testify for
17 several hours, actually, during his personal --

18 **THE COURT:** Well, then, what's the problem?

19 **MR. CAMARA:** Your Honor, he was not designated on
20 irreparable injury. Irreparable injury, as you know, is a
21 predicate to an injunction, it has nothing to do with harm. I
22 can read from (*sic*) you from our brief exactly what those were,
23 and, indeed, Apple's agreement that provides --

24 **THE COURT:** All right.

25 **MS. BOROUMAND SMITH:** So I did misspeak, Your Honor.

1 I meant to say injury and not irreparable injury. But what we
2 did have him testify on was irreparable injury.

3 **THE COURT:** Well, somebody should be testifying
4 about damages.

5 **MS. BOROUMAND SMITH:** So our damages except is going
6 to be testifying about that as well. We're not --

7 **THE COURT:** But, how are they going to do their
8 damage study?

9 You know, it's not just the plaintiff gets a damage
10 study; they get to go out and hire an expert, and they got to
11 be feeding him information all this time. And if you are
12 stonewalling on the issue of how you have been damaged, they
13 are going to have two weeks to prepare.

14 **MS. BOROUMAND SMITH:** That's correct, Your Honor. I
15 understand they have the right to have certain information, but
16 we are not seeking lost profits in this case, and we have told
17 them that.

18 The information that they are seeking is subject to
19 another topic, topic 8, and not to topic three. They are
20 seeking information about profit margins and revenues, and what
21 not.

22 **THE COURT:** What are you seeking, then? What kind
23 of damages are you seeking?

24 **MS. BOROUMAND SMITH:** So for our breach of contract
25 case, we are seeking disgorgement as well as -- or nominal

1 damages. For our copyright infringement and our DMCA claims,
2 we are seeking statutory damages. And for our trademark
3 claims, we are going to prove that there has been harm to
4 Apple's brand and tarnishment, as well.

5 **THE COURT:** How are you going to prove that?

6 **MS. BOROUMAND SMITH:** We are going to prove that
7 through secondary -- establishing evidence of secondary meaning
8 and likelihood of confusion surveys that we are going to submit
9 tomorrow.

10 **THE COURT:** What do you say to what counsel just
11 said, Mr. Camera?

12 **MR. CAMARA:** Your Honor, first, they only waived the
13 lost profits claim after we had this fight at the deposition.
14 So to say that that somehow excuses the failure to present the
15 witness on the topic is not correct.

16 If we look at their objections to our deposition
17 topic, they have all the big firm objections, and then at the
18 end they say, subject to and without waiving these objections
19 and a general statement and objections. Apple will provide a
20 witness to testify on injury suffered by Apple as a result of
21 the unlawful acts committed by Psystar that Apple complains
22 about in this action. We went to that deposition, prepared to
23 take it, and Mr. Schiller refused to give us testimony on that
24 point.

25 With respect to the relevance of lost profits from

1 Apple, that is relevant to the statutory damages award that
2 they seek in this case.

3 **THE COURT:** Say that again. You said it okay, I
4 just was back on that point.

5 Say it again.

6 **MR. CAMARA:** Sure, Your Honor.

7 They are claiming that lost profits are no longer
8 relevant because they have stipulated not to seek them, agreed
9 not to seek them.

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

11 **MR. CAMARA:** They are still relevant to the
12 statutory damages claim because one factor that a jury can
13 consider in setting statutory damages under the Copyright Act
14 is the amount of injury to the plaintiff. And a major part of
15 the injury to the plaintiff, Apple, based on the sale of
16 Psystar computers running Mac OS X, is any decline in sales and
17 any loss of profit that Apple suffered.

18 And the legislative history and the cases
19 interpreting the statutory damages provision of the Copyright
20 Act bear that out. If the Court will indulge me, to quote,
21 simply, from the Senate report, quote, "The plaintiff in an
22 infringes suit is not obliged to submit proof of damages and
23 profits and may choose to rely on the provision for minimum
24 statutory damages."

25 But that's not what they are seeking, they want the

1 jury to pick a number from the range. However, there is
2 nothing in section 504, this section, to prevent a court from
3 taking account of evidence concerning actual damages and
4 profits in making an award of statutory damages.

5 And the Supreme Court in Feltner, the decision that
6 guarantees a jury trial on statutory damages in a copyright
7 case, says that in setting what it believes is a just award,
8 the jury can be presented with all evidence relevant to what is
9 a just award.

10 And here, I think the actual damages suffered by the
11 plaintiff are plainly relevant. It's their election whether to
12 pursue actuals or statutory. But even if they pursue the
13 statutory, we get to argue that the actuals weren't that
14 large.

15 **MS. BOROUMAND SMITH:** Your Honor, may I respond?

16 **THE COURT:** What do you say?

17 **MS. BOROUMAND SMITH:** So the case law on statutory
18 damages in copyright case does look at different factors as to
19 what the range of damages will be, whether they should be on
20 the higher end or the lower end. But what they look at
21 specifically, and this is throughout all the copyright cases,
22 is not lost profits, but lost revenues to the plaintiff. They
23 do look at lost profits for the defendant, but they look at
24 lost revenues for the plaintiff.

25 **THE COURT:** Say that again.

1 **MS. BOROUMAND SMITH:** They don't look at lost
2 profits.

3 **THE COURT:** The "they" is who?

4 **MS. BOROUMAND SMITH:** The courts.

5 **THE COURT:** Court don't look at?

6 **MS. BOROUMAND SMITH:** Don't look at lost profits for
7 the plaintiff, they look at lost revenues. That is the factor
8 that they consider rather than lost profits.

9 What they do look at is lost profits for the
10 defendant as a factor.

11 **THE COURT:** How can the defendant lose anything?
12 They are the wrongdoer.

13 **MS. BOROUMAND SMITH:** That's true.

14 **THE COURT:** So how do they lose anything?

15 Maybe you mean profits, disgorgement.

16 **MS. BOROUMAND SMITH:** Sorry, not lost profits, but
17 profits.

18 **THE COURT:** All right.

19 Mr. Camera, what do you say to Ms. Smith? She says
20 that the case law does not allow for -- you got to look only at
21 revenue, not profits, for the plaintiff.

22 **MR. CAMARA:** With respect, Your Honor, the statute
23 does not say that. The cases that Counsel's discussing are
24 mainly District Court cases that cite kind of a popular
25 paragraph that lists some factors but doesn't purport to be

1 exclusive.

2 The Supreme Court, in Feltner, held that you are
3 entitled to a jury trial on statutory damages and that the jury
4 may hear anything relevant to setting that award.

5 I think it's clearly relevant to what amount of
6 penalty is fair to know what injury was done. And here, the
7 injury is that sales that would have gone to Apple went to
8 Psystar instead, that's the central element of injury.

9 So when we are arguing to the jury that the number
10 from the range, which is quite large, 750 to 150,000 for wilful
11 infringement, should be on the low end of that range, I think
12 we're entitled to say, hey, the computer's price was 2 or
13 \$3000, and not all of that was profit. In fact, quite a small
14 amount of it was profit.

15 **THE COURT:** I'm not prepared to make a legal ruling
16 on what the statute would allow a jury to consider on the issue
17 of statutory damages.

18 So are you willing to state on the record that you
19 had no profits, Ms. Smith? I can't believe that would be true.

20 **MS. BOROUMAND SMITH:** Well, Your Honor, it's not
21 that we had no profits -- I'm sorry.

22 **THE COURT:** Well, why -- so his argument,
23 Mr. Camera's argument, is the jury can consider the extent to
24 which Apple would have made any profit on this, anyway. And I
25 am not going to make a legal ruling on that now, so why don't

1 you just go give him the information?

2 **MS. BOROUMAND SMITH:** Your Honor, we have several
3 concerns about giving our profit margins to -- to the
4 defendants in this case.

5 One of them stems from recent activity on their
6 website where they have stated that -- they have actually
7 listed all the people that are being deposed from our side,
8 given the dates, and asked people to provide questions for
9 those depositions. At the end of that listing, they have
10 indicated that after this case is over they will provide
11 information that comes out of those depositions to the public.

12 We have -- we are very concerned. Our profit
13 margins, all of this information that they are seeking is
14 extremely confidential to Apple, they don't release it at all.
15 And so they're concerned that if they hand over this
16 information to anyone on the other side that it will be
17 released to the public. And it's a legitimate concern based on
18 the statements that are on Psystar's website.

19 Additionally, this information, Your Honor, is not
20 relevant. And we would be happy to further brief this issue of
21 statutory damages and what information is relevant to the
22 assessment of statutory damages.

23 One other thing, Your Honor: We have agreed to
24 produce a witness to testify as to our revenues, our costs --
25 sorry, our revenues associated with Mac OS X and the CPUs, our

1 R & D costs and the advertising and marketing costs associated
2 with those. What we do not want to reveal is our profit
3 margins on a product-by-product line.

4 There are profit margins for Apple, generally across
5 the board in our 10Ks, but they are not reliant on a
6 profit-by-profit line. They are highly confidential. And if
7 any of that information at any point got out, it would be very
8 problematic for Apple.

9 **THE COURT:** Is there any information -- sorry. Is
10 there any briefing on this point in this paper paperwork now?

11 **MS. BOROUMAND SMITH:** There is --

12 **THE COURT:** On the legal point.

13 **MS. BOROUMAND SMITH:** There is very little briefing
14 on the legal point with the exception of on page 3, where I
15 cite to some cases with regards to the statutory damages, but
16 it's not briefed extensively.

17 **THE COURT:** Is this what this whole issue is,
18 Mr. Camera, is on profit margin by product?

19 **MR. CAMARA:** No, no. That's one part of the issue,
20 Your Honor, but we would ask other questions about harm to
21 Apple of the 30(b)(6) witness designated on that topic.

22 This is also a procedural aspect to this, Your
23 Honor, which is that we made that designation, they made a
24 variety of objections to it, but not this one. And, indeed,
25 they, in their objections, stated affirmatively that they would

1 provide a witness to testify about harm to Apple. It's only at
2 the deposition itself that this objection was asserted.

3 As Your Honor knows, the expert deadline is tomorrow
4 for case in chief evidence, and rebuttal experts are a few
5 weeks after that. And then the summary judgment deadline hits.
6 So we would request that the Court rule on the legal issue at
7 the appropriate time, perhaps in a motion in limine, but not
8 hold up fact discovery and thereby delay our ability to prepare
9 for experts, summary judgment, and trial.

10 **THE COURT:** Well, you ought to go ahead and do the
11 depositions on what they are willing to provide. And then in
12 the meantime, I'm going to ask you to submit by Monday briefs
13 on the issue of whether or not Townsend is correct that the
14 profit margins for the plaintiff are irrelevant, irrevocably
15 irrelevant.

16 **MS. BOROUMAND SMITH:** Your Honor, may we be
17 permitted to do the deposition on the topic that -- on the
18 information that we are willing to provide next week?

19 **THE COURT:** Go ahead and do that, yes. Because, I
20 mean, I won't rule on this, probably, next week. I won't even
21 be here next week.

22 **MS. BOROUMAND SMITH:** Okay, Your Honor.

23 **THE COURT:** So I won't be able to rule on it. But
24 you can get the briefing done -- in fact, I'll give you till
25 Thursday of next week. My law clerk can be looking at it. And

1 both sides simultaneously submit, and as soon as I get back,
2 I'll try to rule on it around August 31.

3 **MS. BOROUMAND SMITH:** So submit by Thursday of next
4 week?

5 **THE COURT:** You got all these problems: I may have
6 to undo the trial date if you continue to have all these
7 problems because, see, now you are putting me in a position
8 where you are going to come in and say, oh, we go to redo the
9 experts, oh, we got to do all this after-the-fact discovery.

10 I'm not going to undo the trial date yet, but this
11 is what -- all these discovery motions put a lot of pressure on
12 the trial date and the schedule.

13 **MS. BOROUMAND SMITH:** We understand that, Your
14 Honor.

15 **MR. CAMARA:** Your Honor, given that the witness
16 designated to testify on damages refused to do so, might we
17 request that that deposition take place in Houston, which would
18 be far more convenient for us and for our cash-strapped client?

19 **MS. BOROUMAND SMITH:** Your Honor, they are out here
20 next week for depositions for Rudy Pedraza, anyways, because
21 one point that Mr. Camera didn't mention was the fact that all
22 of their financials documents were not provided to us until
23 last Friday.

24 **THE COURT:** All right, do all of that out here. I
25 don't think it's warranted to go to Houston yet.

1 Is there another dispute you have, or is that it?

2 **MR. CAMARA:** That is all on our side, Your Honor.

3 **MS. BOROUMAND SMITH:** I believe that's it for us
4 right now, as well, Your Honor.

5 **THE COURT:** Now, Ms. Smith, in your submission next
6 week, in addition to saying you are not going to seek lost
7 profits, you might offer whatever proviso that would be on the
8 issue of statutory damages, such as Apple has refused to or
9 will refuse to tell the jury what that profit margins are. And
10 the jury is entitled to assume the worst. I don't know, I'm
11 making that up, but, you know, on the one hand you don't want
12 -- you want to accuse them of stonewalling, and then whenever
13 it comes time for you to turn over some information, you don't
14 want the jury to know it.

15 **MS. BOROUMAND SMITH:** Your Honor --

16 **THE COURT:** So think about whether or not you are
17 being even-handed.

18 **MS. BOROUMAND SMITH:** Your Honor, we don't believe
19 the information is relevant, but we will do what you say.

20 **THE COURT:** Well, you may be right. I'm not going
21 to say -- but you may be wrong on that, too. And if under
22 statutory damages that's relevant and you refuse to turn it
23 over, I'm going to tell the jury that you have stonewalled.

24 **MS. BOROUMAND SMITH:** Okay, Your Honor.

25 **THE COURT:** Just like we are going to let the jury

1 know that they have destroyed evidence.

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

3 **MS. BOROUMAND SMITH:** Thank you.

4 **THE COURT:** All right, see you soon.

5 (Proceedings adjourned at 12:45 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

Friday, August 21, 2009