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27 **UNITED STATES DISTRICT COURT**
28 **NORTHERN DISTRICT OF CALIFORNIA**
29 **SAN JOSE DIVISION**

30 THOMAS WILLIAM SLATTERY,)
31 Individually, And On Behalf Of All Others)
32 Similarly Situated,)
33)
34 Plaintiff,)
35)
36 vs.)
37)
38 APPLE COMPUTER, INC.)
39)
40 Defendant.)

CASE NO.: C05-00037 JW

CLASS ACTION

**FIRST AMENDED CLASS ACTION
COMPLAINT**

1 Pursuant to the Court's September 9, 2005 Order Granting in Part and Denying in Part
2 Defendant's Motion to Dismiss the Class Action Complaint, Plaintiff Thomas William Slattery
3 hereby files his First Amended Class Action Complaint.

4 **NATURE OF THE ACTION**

5 1. Plaintiff Thomas William Slattery ("Plaintiff" or "Slattery") brings this action
6 individually on behalf of himself and on behalf of all other similarly situated persons who have
7 purchased online music recordings directly from Apple's online iTunes music store for playback on
8 portable hard drive digital music players. In the normal course of business, a music Compact Disc
9 ("CD") purchased at any neighborhood music store is playable on any CD player of the customer's
10 choosing. Thus, it would be egregious and unlawful for a major retailer such as Tower Records, for
11 example, to require that all music CDs purchased by consumers at Tower Records stores be played
12 only with CD players purchased at Tower Records. Yet, this is precisely what Apple has done.
13 Apple, which possesses monopoly market power in the relevant market for the legal sale of online
14 digital music files through its Apple iTunes online music store, prevents consumers who purchase
15 music recordings from Apple's iTunes online music store from playing this music on any portable
16 hard drive digital music player other than Apple's own iPod portable digital music player. This
17 unlawful bundling and tying arrangement violates the federal antitrust laws and California's unfair
18 competition law by suppressing competition, denying consumer choice, and forcing consumers to
19 pay supra-competitive prices for their digital portable music players. Worse yet, Apple similarly
20 requires that owners of its iPod portable hard drive digital music player only be able to purchase
21 music online to play directly on the iPod from Apple's own iTunes store. Apple has rigged the
22 hardware and software in its iPod such that the device will not directly play any music files
23 originating from online music stores other than Apple's iTunes music store.

24 2. Plaintiff brings this class action individually and on behalf of all other similarly
25 situated consumers to seek redress for Defendant's unlawful conduct.

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1 JURISDICTION AND VENUE

2 3. Counts I and II of this Complaint are brought pursuant to Section 1 of the Sherman
3 Act, 15 U.S.C. § 1, to seek redress for Defendant’s illegal tying and/or bundling conduct. This
4 Court, therefore, has subject matter jurisdiction over these counts of the Complaint pursuant to 28
5 U.S.C. § 1331.

6 4. Count III and IV of this Complaint are brought pursuant to Section 2 of the Sherman
7 Act, 15 U.S.C. § 2, to seek redress for Defendant’s monopolization of the portable hard drive digital
8 music player market and the market for online sales of digital music files, respectively. This Court,
9 therefore, has subject matter jurisdiction over these counts of the Complaint pursuant to 28 U.S.C. §
10 1331.

11 5. Counts V and VI of this Complaint are brought pursuant to Section 2 of the Sherman
12 Act, 15 U.S.C. § 2 to seek redress for Defendants’ unlawful attempted monopolization of the
13 relevant markets alleged herein. This Court, therefore, has subject matter jurisdiction over these
14 counts of the Complaint pursuant to 28 U.S.C. § 1331.

15 6. Count VII of this Complaint is brought pursuant to the California Cartwright Act,
16 California Business and Professions Code § 16700 et. seq. to seek redress for Defendant’s unlawful
17 conduct in violation of state law. Because the facts underlying this count share a common nucleus
18 of operative facts and law with the remaining counts of this Complaint, this Court has supplemental
19 subject matter jurisdiction over this Count of the Complaint pursuant to 28 U.S.C. § 1367.

20 7. Count VIII of the Complaint is brought pursuant to California’s Unfair Competition
21 Law, California Business and Professions Code Section 17200 et. seq. Because the facts underlying
22 this count share a common nucleus of operative facts and law with the remaining counts of this
23 Complaint, this Court has supplemental subject matter jurisdiction over this Count of the Complaint
24 pursuant to 28 U.S.C. § 1367.

25 8. Count IX of the Complaint is brought pursuant to the common law of
26 monopolization.

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1 **MARKET DEFINITIONS AND MARKET POWER**

2 13. For purposes of this complaint, there are two relevant product markets. The first
3 product market consists of the product market for legal online sales of digital music files. The
4 second product market consists of the product market for portable hard drive digital music players.
5 The relevant geographic market for both of these foregoing relevant product markets is the United
6 States.

7 **THE MARKET FOR LEGAL ONLINE SALES OF DIGITAL MUSIC FILES**

8 14. In the days before the advent and prevalence of the Internet music, purchases of
9 music were generally limited to sales of records, tapes, and/or compact disc recordings through
10 traditional “brick and mortar” music stores. Although this sales channel continues to exist, the
11 advent of the Internet has created a new market, wherein consumers can search for and purchase
12 music tracks of their choice via their computer by simply logging onto the Internet. When this new
13 market first came into being, its legality was called into question and was the subject of contentious
14 litigation, as was epitomized by the much publicized “Napster” litigation. The result of this
15 litigation history was that the marketplace recognized a need for legitimate outlets wherein
16 consumers could avail themselves of their Internet access to make online purchases of digital music
17 files in legitimate and
18 lawful transactions.

19 15. Defendant Apple recognized the need and potential for such a market, and on
20 approximately April 28, 2003 launched its iTunes online music store (“iTunes”). iTunes, which any
21 consumer with Internet capabilities can access by merely logging onto the Apple iTunes’ website, is
22 both an online music selling venue and a software package. iTunes allows consumers to log onto
23 Apple’s iTunes online store, and browse for various digital files of songs and music recordings by
24 thousands of individual artists and virtually all of the major music recording labels.

25 16. Users of the iTunes store may then choose to purchase a particular track of music.
26 Currently, iTunes charges \$0.99 per track of music. Unlike a purchaser at a traditional “brick and
27 mortar” music store, users of iTunes who purchase a track of music do not walk away with an audio
28 cassette tape, record album or CD. Instead, upon purchasing a track of music and paying the

1 requisite price for the purchase, a digital file containing the music purchased is downloaded from
2 Apple's iTunes site to the user's computer or portable hard drive digital music player, where it may
3 be stored for further use by the user. The process by which this digital music file is transmitted and
4 used is described more fully in paragraphs 28-54 below.

5 17. There is a recognized distinct product market for the legal purchase of digital music
6 files online. Consumers and merchants have come to recognize the online digital music file sale
7 market as a separate and distinct market.

8 18. The online digital music file market offers a number of features not readily available
9 at traditional "brick and mortar" music stores, which help set this online digital music file market
10 apart as a distinct market. For example, whereas shoppers at traditional "brick and mortar" music
11 stores must typically purchase an entire album of the artist or group selected, online sales of digital
12 music files offer consumers the option to purchase only individual songs or tracks of music
13 separately. Further, unlike traditional "brick and mortar" music stores, online music selling venues
14 offer consumers the ability to create their own customized "playlists" wherein consumers can, in
15 effect, create their own customized music album comprising individual songs from various artists.
16 Thus, for example, a consumer of online music stores that had a liking for the song "Help" from the
17 Beatles and the song "Goodbye Yellow Brick Road" from Elton John could create a customized
18 playlist that would comprise just these two songs (as well as any other song from any other artist
19 that consumer wished to purchase). That consumer would only be charged for the particular songs
20 purchased (i.e. in this case, "Help" and "Yellow Brick Road"). By contrast, if that same consumer
21 wished to avail himself of these same two songs by making purchases at a traditional "brick and
22 mortar" music store, that consumer would have to purchase an entire Beatles album containing a
23 dozen songs or more, and an entire Elton John album, which also contains approximately a dozen
24 songs or tracks. Thus, while the consumer of the iTunes online music venue would only pay \$1.98
25 for his total purchase (i.e. \$0.99 per song), the price paid by the same consumer at a traditional
26 "brick and mortar" store would likely be approximately \$30.00—i.e. the price for two complete
27 albums or CDs.

28

1 19. In addition, the music selection available at online music stores is not coextensive
2 with the music selection available at traditional “brick and mortar” music stores. Due to the
3 efficiency with which music can be saved into computer digital format, online music stores provide
4 a ready outlet for independent artists and music labels whose music is not readily available at
5 traditional “brick and mortar” music stores that necessarily carry media in the more expensive CD,
6 cassette or record format.

7 20. In the eyes of consumers, the online digital music file market and the “brick and
8 mortar” market are not in price-competition with one another. For one thing, as mentioned herein,
9 whereas the online digital music file market focuses on selling individual tracks or songs, the “brick
10 and mortar” market is focused on selling whole albums or CDs, thereby making price-comparison
11 between these two distinct markets a non sequitur. Further, because of the ubiquitous nature of the
12 Internet, online music sales are available to a whole host of consumers who do not have ready
13 access to a nearby “brick and mortar” music store, let alone a nearby “brick and mortar” store
14 stocking the particular recording desired by these consumers at any given time. Similarly, because
15 search costs on the Internet are a fraction of search costs involved in the “brick and mortar” market,
16 consumers are not likely to and do not forego a purchase of a music recording online even if they
17 hypothetically would believe that the same recording could be obtained somewhat less expensively
18 at a traditional “brick and mortar” store. The costs associated with traveling to “brick and mortar”
19 music stores, searching one or more such stores for a particular recording, and comparison shopping
20 between these “brick and mortar” music stores and online stores dissuade consumers from foregoing
21 a purchase made from the comfort of their own home or office for the same piece of music, even if
22 doing the foregoing tasks could hypothetically result in a savings of a few cents per song. Put
23 differently, consumers are not likely to and do not travel miles to their nearest “brick and mortar”
24 music store in the hopes of saving a few cents off a song purchase that they could make
25 instantaneously on their home computer.

26 21. For these and other reasons, the market for legal online sales of digital music files is
27 and has been recognized as a separate relevant product market.
28

1 22. Within the relevant market for online legal sales of digital music files, Defendant
2 Apple, through its iTunes online music store, possesses and has possessed throughout the Class
3 Period monopoly market power sufficient to exclude competition. Upon information and belief,
4 during the Class Period iTunes' share of this relevant market has exceeded 80 percent. Indeed, on
5 its website, Apple touts its iTunes online music store as the "#1 music download store according to
6 Nielsen Soundscan." Apple's iTunes website also touts that iTunes is "[s]etting a new milestone for
7 the online music business, the iTunes Music Store has sold more than 200 million songs." Further,
8 as early as November 5, 2003, Apple's CEO Steve Jobs publicly confirmed at a financial analyst
9 conference that Apple's iTunes store possessed at least an 80 percent share of the legal music
10 download market.

11 23. Other legal online music selling stores exist, such as: Napster, Walmart.com,
12 Musicmatch, RealPlayer, Buy.com, Sony Connect, eMusic, Music Rebellion, Audio Lunch Box,
13 Live Downloads, and Bleep among others. None of these other online music sites, however, posses
14 any significant market share in comparison to Apple's iTunes music store, and hence their existence
15 does not pose price-constraining competition to Apple's iTunes online music store.

16 **THE MARKET FOR PORTABLE HARD DRIVE DIGITAL MUSIC PLAYERS**

17 24. The second relevant market pertinent to this complaint consists of the relevant
18 market for portable hard drive digital music players. Portable hard drive digital music players are
19 portable devices that enable their users to listen to digital audio recordings without requiring users
20 to carry any external media, such as compact discs, cassette tapes, or cartridges. Since
21 approximately November 10, 2001, Apple has manufactured, marketed, sold, and shipped a portable
22 hard drive digital music player known as the "iPod."

23 25. As stated, when a consumer purchases a digital music recording online, a digital file
24 with that music recording is downloaded to that consumer's computer or portable hard drive digital
25 music player for future use. One use to which that digital audio file can be put to by the consumer is
26 to play back that audio digital file on a portable hard drive digital music player.

27 26. Through its iPod device, Apple possesses monopoly market power in the market for
28 portable hard drive digital music players. Apple's iPod accounts for over 90 percent of the market

1 for portable hard drive digital music players in the United States. Indeed, as of October 2004, Apple
2 announced that it possessed 92 percent of the market for portable hard-drive digital music players,
3 and that its nearest competitor, Creative, possessed only 3.7 percent share of this market. Other
4 portable hard drive digital music player manufacturers do exist, including: Rio, iRiver, Creative,
5 Archos, e.Digital, RCA, Panasonic, Nokia, Tatung, Epson, Gateway, and others. These other
6 portable hard drive digital music player manufacturers, however, lack the market power possessed
7 by Apple's iPod, as the combined market share of all of these alternative portable hard drive digital
8 music players amounts to less than 10 percent of the market (in comparison to Apple iPod's over 90
9 percent market share).

10 27. As detailed herein, Apple has unlawfully bundled, tied, and/or leveraged its
11 monopoly in the market for the sale of legal online digital music recordings to thwart competition in
12 the separate market for portable hard drive digital music players, and vice-versa.

13 28. As shown more fully below, Apple has engaged in this wrongdoing by embedding a
14 code in all digital music files downloaded from Apple's iTunes online music store that forces
15 consumers wishing to play these files on a portable hard drive digital music player to do so only on
16 an Apple iPod. Absent Apple's unlawful action, consumers purchasing music recordings from
17 Apple's iTunes music store would be able to play this music on the portable hard drive digital music
18 player of their choosing, including the portable hard drive digital music players manufactured by the
19 rival manufacturers listed in paragraph 24 herein. By deliberately embedding its code in this
20 manner in all digital music files sold by iTunes, therefore, Apple has unlawfully leveraged, bundled
21 and/or tied its monopoly market power in the market for online sale of digital music files to thwart
22 competition in the separate market for portable hard drive digital music players. At the same time,
23 by engaging in the foregoing conduct, Apple has managed to unlawfully maintain and/or attempt to
24 obtain monopoly market power over portable hard drive digital music players because purchasers of
25 tracks from Apple's iTunes music store, the monopoly market share holder in the online music
26 selling market, who wish to play their purchased tracks on a portable hard drive digital music player,
27 have no choice (given Apple's conduct) but to purchase an iPod player to the exclusion of all other
28 available players.

1 33. When a user plays a digital music file, the user essentially reverses the analog-to-
2 digital process. A digital audio device, such as an MP3 player or a computer sound card, uses a
3 DAC (digital-to-analog converter) to turn the 1s and 0s back into an analog signal that can then be
4 amplified and broadcast over headphones or speakers. When a digital device plays music that has
5 been compressed by a codec, software on its chip (called firmware) applies the codec to decode the
6 file, then sends the decompressed 1s and 0s to the DAC. Thus, for a digital audio device to be able
7 to play a compressed music file, that device's hardware must be able to recognize and decode the
8 codec software format that was used to initially compress that audio file.

9 34. The first format or codec to gain widespread acceptance was Motion Pictures Experts
10 Group Layer 3, known more commonly as "MP3." Today, virtually every portable digital music
11 player on the market is able to play digital music encoded using the MP3 format. Thus, virtually all
12 portable digital music players are able to play MP3 music files.

13 35. Over the years, however, codec formats other than MP3 have gained widespread
14 acceptance. These formats include WMA, AIFF, AAC, AA, and others.

15 36. Many major portable digital music players support a number of these formats in
16 addition to the MP3 format. For example, most portable hard drive digital music players, except for
17 iPod, support the WMA format, which is the acronym for Microsoft's Windows Media Audio
18 format. Thus, digital music files compressed with the WMA codec can be played on most major
19 portable digital music players on the market today, except for Apple's iPod.

20 37. Of significance to this complaint, is a codec format commonly known by the
21 acronym AAC. AAC stands for Advanced Audio Coding, and was a format developed by, *inter*
22 *alia*, Dolby Laboratories. Compressing digital audio files using the AAC format purportedly allows
23 more files to be stored per file size than would be possible if the same music files were compressed
24 using the MP3 format. Of significance, under normal operation, files compressed with the AAC
25 format, much like files originally compressed and saved on any other coded format, can be saved or
26 converted to MP3 formatted files. Thus, under normal operation, a digital music file that was
27 originally compressed and saved with an AAC codec format can be played either by a device
28 supporting AAC encoded files, or alternatively, that music file can be converted to and saved as an

1 MP3 formatted file, which would then be playable on virtually every major portable hard drive
2 digital music player (because all portable hard drive digital music players support MP3 files).

3 38. Apple's iPod is a portable digital music player capable of playing music files
4 compressed with the AAC codec format. Other rival portable digital music players, including those
5 manufactured by Nokia, Creative, Panasonic, Epson, Tatung, Gateway, Digital Square, and others
6 are also similarly equipped to play AAC digital music files. In addition, of course, because AAC
7 files can readily be converted to MP3 format, virtually every portable digital music player on the
8 market today can play a file that was originally encoded in AAC format by merely having that same
9 file converted and saved to MP3 format.

10 **Apple's Unlawful Manipulation of the AAC Format To Force Use of Apple's iPod**

11 39. Apple's iTunes online music store's music files are encoded in AAC format. As the
12 foregoing illustrates, therefore, consumers purchasing music from iTunes should and would be free
13 to play the songs purchased from iTunes at any of a number of portable hard drive digital music
14 players that can play AAC formatted files, or at virtually any portable digital music player by merely
15 converting the AAC file to an MP3 file.

16 40. Apple, however, has manipulated and rigged the AAC format to prevent this
17 competitive scenario. Specifically, Apple has altered the AAC format used to compress and record
18 the song recordings available at its iTunes online music store so that these songs cannot be played
19 on any portable hard drive digital music player other than Apple's own iPod. Apple has done so by
20 incorporating into the AAC file format an Apple addition known as Fairplay Digital Rights
21 Management ("DRM").

22 41. Fairplay DRM is an extra piece of software code that Apple adds to every music file
23 sold by Apple on its iTunes online music store. The addition of this extra software code has the
24 effect of preventing any portable hard drive digital music player, other than Apple's own iPod
25 player, from playing songs purchased from Apple's iTunes music store. Users purchasing songs
26 from iTunes can still play those songs on their computers (whether they be manufactured by Apple
27 or not), but if these users wish to play the music they just purchased from iTunes on a portable hard
28 drive digital music player, they can only do so on an iPod. Thus, in effect, Apple has turned an open

1 and interactive standard into an artifice that prevents consumers from using the portable hard drive
2 digital music player of their choice, even where players exist that would otherwise be able to play
3 these music files absent Apple's actions.

4 42. Another consequence of Apple's manipulation of the AAC codec format, is that
5 Apple's addition of its Fairplay DRM code portion to these music files makes it impossible to
6 convert these AAC music files into MP3 files that can be decompressed and played by portable hard
7 drive music players other than the iPod. Thus, whereas absent Apple's action, all AAC files could
8 be converted to MP3 format and therefore could be played on virtually any major portable hard
9 drive digital music player on the market, Apple's action prevents this from happening, and forces a
10 user to use only Apple's iPod device as the sole portable hard drive digital music player capable of
11 playing files purchased at Apple's iTunes music store.

12 43. Apple calls this rigged digital format, obtained after incorporating Apple's extra
13 Fairplay DRM software code to the AAC file, an "AAC Protected" format or file. Apple blatantly
14 announces that the difference between a regular AAC formatted music file and Apple's "Protected
15 AAC" music file is that if one desires to play the latter type of file (which is an artifice of Apple's
16 iTunes online music store) on a portable hard drive digital music player, one can only do so on an
17 Apple iPod player. In this regard, Apple's website proclaims the following with respect to AAC,
18 AAC Protected music files, and the relationship between iTunes, iPod, and other portable players:

19 To play AAC and AAC Protected songs, your iPod must have iPod Software
20 1.3 or later installed. Not all digital music players can play AAC songs and *only*
iPod can play AAC Protected songs.

21

22 *Songs purchased from the iTunes Music Store are encoded using the AAC*
Protected format and cannot be converted to MP3 format. You can burn them to
23 audio CDs and play them in consumer audio CD players.

24 A copy of Apple's webpage containing the foregoing restriction is attached hereto as Exhibit A to
25 this complaint.

26 44. Thus, as Apple itself admits on its website, "[s]ongs purchased from the iTunes
27 Music Store are encoded using the AAC Protected format and cannot be converted to MP3 format."
28 Further, "only iPod can play AAC Protected songs." The result is readily apparent-customers

1 buying music online from Apple's iTunes store can play their music at their computer or CD player,
2 but if they wish to play the music on a portable hard drive digital music player, they can do so only
3 via Apple's iPod. Moreover, this restriction, as Apple itself admits, is brought about only because
4 Apple has unilaterally incorporated its Fairplay DRM extra software code into the otherwise
5 interactive AAC format.

6 45. But for Apple's action, any consumer owning any portable digital music player
7 would have been able to convert a song purchased on AAC format from iTunes into an MP3
8 formatted file, and could have played that file on his portable hard drive digital music player of
9 choice. This is necessarily the case because virtually any portable digital music player on the
10 market today is capable of playing MP3 music files. Further, even without this conversion from
11 AAC to MP3 formats, absent Apple's manipulation of the AAC format for the songs it sells through
12 iTunes, songs purchased from iTunes would have been able to be played on a whole host of portable
13 hard drive digital music players that are capable of playing AAC formatted files, such as players
14 manufactured by Panasonic, Nokia, Gateway, Epson, Tatung, and others. Apple's unilateral action
15 to rig the AAC format in this fashion for the songs it sells through iTunes, by inserting its own
16 Fairplay DRM extra software code onto the AAC format, prevents any of the foregoing from taking
17 place, and restricts consumers to using Apple's iPod as their only available portable hard drive
18 digital music player.

19 46. Apple has steadfastly refused to license its Fairplay DRM or otherwise let any other
20 manufacturer of portable hard drive digital music players gain interactive access to files sold by
21 Apple through iTunes so that these music files could be played in the portable hard drive digital
22 music player of the consumer's choice.

23 47. Through the foregoing actions, Apple has misused its monopoly market power in the
24 market for the legal sales of digital music files (which it holds by virtue of its iTunes online music
25 store) to unlawfully suppress competition in the separate market for portable hard drive digital
26 music players.

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1 **Apple's Resistance to Rival Online Song Outlets for Apple iPod**

2 48. As stated in paragraph 31, for a device to play a digital music file compressed with a
3 particular format, firmware within the chip of the device must be able to recognize and decode the
4 encoding format used to compress the music file. Because Apple has rigged the otherwise
5 interactive AAC format, through the addition of its extra Fairplay DRM software code to music files
6 sold via iTunes, only portable hard drive digital music players whose firmware recognizes this
7 "Protected AAC" format can decode and play songs purchased from iTunes. Apple has not licensed
8 or given access to this "Protected AAC" format to any other portable hard drive device
9 manufacturer, thereby ensuring two results-both of which are anticompetitive. First, through the
10 foregoing, Apple has managed to ensure that songs purchased from iTunes can only be played on
11 portable hard drive digital music players manufactured by Apple; namely, the Apple iPod. Second,
12 through the foregoing, Apple has managed to ensure that owners of iPod hard drive digital music
13 players wishing to purchase music files online to be directly played on their iPod can only do so by
14 purchasing these files at Apple's iTunes music store.

15 49. Despite this anticompetitive restriction, RealNetworks, a rival seller of online digital
16 music recordings through its RealNetworks Music Store, managed to independently analyze the
17 firmware within the Apple iPod portable hard drive digital music player. As a result of this analysis,
18 RealNetworks was able to discern the necessary extra software code added by Apple to make
19 downloaded songs playable on the Apple iPod. Armed with this knowledge, RealNetworks was
20 able to insert a corresponding code of its own into song files sold through its RealNetworks Music
21 Store so that they too would be playable on the Apple iPod.

22 50. Thus, on July 26, 2004, RealNetworks announced publicly that songs sold through its
23 online RealNetworks Music Store would now be playable on the Apple iPod portable hard drive
24 digital music player, thereby giving iPod owners a competitive outlet for their purchases of online
25 music files. This announcement was significant not only because it represented the first alternative
26 to the stronghold that Apple's iTunes store had heretofore exerted as the sole supplier of
27 downloaded digital music files that could be played on Apple's iPod player, but also because
28

1 RealNetworks began selling its digital online songs for as low as 49 cents per track, well below the
2 99 cents per track charged by Apple's iTunes store.

3 51. Rather than embracing this competitive offering to consumers and owners of its iPod
4 device, Apple immediately threatened RealNetworks and iPod users. On Thursday, July 29, 2004,
5 merely four days after RealNetworks' announcement, Apple issued its own public statement
6 warning RealNetworks and iPod users that "[w]e are stunned that RealNetworks has adopted the
7 tactics and ethics of a hacker to break into the iPod, and we are investigating the implications of
8 their actions under the DMCA and other laws. We strongly caution Real and their customers that
9 when we update our iPod software from time to time it is highly likely that Real's Harmony
10 technology will cease to work with current and future iPods."

11 52. True to its threat, by December 2004, Apple updated its iPod software to prevent
12 songs downloaded from RealNetworks Music Store (or any other online music store) from being
13 played on Apple iPod devices. Thus, Apple continues to impede competition, and forces iPod users
14 who wish to buy music online to do so exclusively from Apple's iTunes store.

15 **Apple's Proffered Justification For Rigging the AAC Format In This Restrictive Manner Is**
16 **Irrelevant, And In Any Event, Unavailing**

17 53. Faced with the obvious anticompetitive effect and impact of its actions to restrict the
18 use of music purchased on iTunes to only iPod portable music players, and to restrict the source of
19 online music files playable on its iPod device to only its own iTunes store, Apple has attempted to
20 defend its actions by citing that these restrictions are necessary to protect the copyrights owned by
21 the artists or music labels for the songs sold through iTunes. That defense, however, is both
22 irrelevant and unavailing.

23 54. In fact, other than Apple's iTunes, no other online music vendor has such a
24 restriction in place; yet these other online vendors still manage to provide copyright protection
25 mechanisms to artists and record labels-often the same artists and labels whose same songs are sold
26 online through iTunes.

27 55. Similarly, Apple's Fairplay DRM addition to the otherwise interactive AAC
28 encoding format is not a device that effectively controls access to copyrighted works because, as

1 Apple itself admits, the extra Fairplay DRM software code inserted by Apple has no effect
2 whatsoever on the ability of any user using any computer to access, purchase, and playback any of
3 the song files sold through Apple's iTunes music store on the user's computer. Only when the user
4 wishes to play the song on a portable hard drive digital music player does Apple restrict that user to
5 using the iPod device, presumably to protect Apple's market dominance in that market.

6 56. In truth and in fact, as widely reported in the press, artists and record label companies
7 have urged Apple to release its stronghold on the online source for music files playable on the Apple
8 iPod, and to allow music files from other legitimate online music vendors play on the Apple iPod.
9 Opening this restriction would benefit both the artists and record labels by providing them with
10 additional outlet channels for selling music playable on the most prevalent portable hard drive
11 digital music player (i.e. the iPod). Similarly, opening this restriction would also benefit consumers
12 by providing iPod owners with a competitive choice of where they can purchase their online music
13 files for playback on their iPod devices. Despite these pleas and the anticompetitive impact of
14 Apple's actions, Apple has steadfastly refused to permit any vendors other than its own iTunes store
15 to sell digital music files that can be played on Apple's iPod. At the same time, Apple has also
16 steadfastly refused to allow the music files Apple sells through its iTunes store from being played
17 on any portable hard drive digital music player other than the iPod.

18 **ANTICOMPETITIVE EFFECT ON CONSUMERS - ANTITRUST INJURY**

19 57. As a direct, proximate, and foreseeable result of Apple's actions, consumers, like
20 Plaintiff and the members of the Class he seeks to represent, have been injured in their business
21 and/or property. By restricting the sources of online digital music files that can be directly played
22 on Apple's iPod to only such files purchased from Apple's iTunes online music store, Apple has
23 restrained competition, denied consumers a competitive choice of online music sellers for use on
24 their iPod devices, maintained its monopoly and/or attempted to obtain a monopoly in the market
25 for portable hard drive digital music players, and forced consumers to pay supra-competitive prices
26 for their purchases of online digital music files and their purchases of portable hard drive digital
27 music players. Similarly, by restricting the portable hard drive digital music players that can play
28 songs downloaded from the iTunes online music store to just the Apple iPod device, Apple has

1 restrained competition, denied consumers a competitive choice of portable hard drive digital music
2 players, unlawfully maintained and/or attempted to obtain a monopoly in the market for the legal
3 sale of online digital music files, and caused consumers to pay supra-competitive prices for their
4 purchases of portable hard drive digital music players, and for their purchases of online music files.

5 CLASS ACTION ALLEGATIONS

6 58. Pursuant to Federal Rule of Civil Procedure 23, Plaintiff brings this action on behalf
7 of himself and on behalf of all other similarly situated consumers who, during the period of April
8 28, 2003 to the present (“the Class Period”) purchased an iPod device directly from Apple, and
9 online digital music files from Apple’s iTunes store. Excluded from the Class are all judicial
10 officers and their staff, as well as all governmental entities.

11 59. The number of putative class members is sufficiently large, such that joinder of all
12 individual class members would be impracticable, if not impossible. Although the precise number
13 of class members is not presently known to Plaintiff, based on the sales volumes of the Apple iPod
14 device and the iTunes online music store during the Class Period, it is reasonable to assume that the
15 number of individual class members is at least in the tens or hundreds of thousands.

16 60. Plaintiff’s claims are typical of the claims of the class. Specifically, Plaintiff claims
17 that by restricting the use of the iPod to only those online digital music files purchased from iTunes,
18 Apple has injured Plaintiff and the class members in their business and/or property, in violation of
19 the federal and state antitrust laws, California’s unfair competition law, and the common law.
20 Similarly, Plaintiff claims that by restricting the portable hard drive digital music players that can
21 play music files purchased from the iTunes store to only the iPod, Apple has injured Plaintiff and
22 the class members in their business and/or property, in violation of the federal and state antitrust
23 laws, California’s unfair competition law, and the common law. There are no conflicts or defenses
24 unique to Plaintiff that would render his claim atypical from the claims of the absent class members.

25 61. Common questions of fact and law exist in this litigation, and these common
26 questions affecting the class as a whole predominate over any individual questions that may affect
27 only individual class members. Among these common questions of fact or law are the following:
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- 1 a. the definition of the relevant market(s);
- 2 b. Apple's market power within these relevant market(s);
- 3 c. whether Apple unlawfully restrained competition in any or all of these
- 4 relevant markets;
- 5 d. whether any unlawful restriction of competition caused by Apple caused
- 6 injury to the business or property of Plaintiff and the class members;
- 7 e. the extent of any such injury;
- 8 f. the appropriate remedy for any such injury.

9 62. Plaintiff is an adequate representative of the interests of the absent class members in
10 this litigation. During the Class Period, Plaintiff purchased an Apple iPod directly from Apple, and
11 purchased music files for use on his iPod directly from Apple's iTunes music store. Plaintiff has
12 retained competent counsel experienced in antitrust and class action litigation to vigorously
13 prosecute and litigate this action on behalf of the putative class members.

14 63. This action is manageable as a class action. The identity of all class members, or of a
15 significant majority, is ascertainable, as each class member, by definition, must have made online
16 purchases from Apple iTunes store, requiring the class member to provide his identifying
17 information. Prosecuting this action on an individual, as opposed to a classwide basis, would risk
18 the prospect of conflicting findings and adjudications with respect to the rights and obligations of
19 the parties. Further, the average overall amount of monetary injury sustained by each individual
20 class members is likely to be too small relative to the costs of individual litigation of this action so
21 that classwide litigation effectively provides the only available means for individual class members
22 to seek judicial redress for their injuries.

23 **COUNT I**

24 **(UNLAWFUL TYING OR BUNDLING OF APPLE iTUNES TO PURCHASE OF**
25 **APPLE IPOD IN VIOLATION OF 15 U.S.C. § 1)**

26 64. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
27 the same force and effect as if fully restated herein.

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1 65. Through its iTunes online music store, Apple has monopoly market power in the
2 U.S. market for legal sales of online digital music files. In any event, Apple has sufficient market
3 power in this relevant market to coerce consumers of Apple's iTunes store to purchase an Apple
4 iPod portable hard drive digital music player, even if these same consumers would have preferred to
5 purchase a portable hard drive digital music player other than Apple's iPod.

6 66. There are manufacturers and models of portable hard drive digital music players,
7 other than Apple's iPod, that, but for Apple's anticompetitive conduct, would be able to play digital
8 music files downloaded from Apple's iTunes music store.

9 67. During the Class Period, Apple has rigged the otherwise interactive and open AAC
10 codec format in the manner described herein, such that digital music files purchased from Apple's
11 iTunes online music store could not be played back on any portable hard drive digital music player
12 other than Apple's iPod.

13 68. As a direct and proximate result of Apple's anticompetitive actions, consumers of
14 Apple's iTunes store who wish to play the digital music files they purchased from iTunes on a
15 portable hard drive digital music player must also purchase an Apple iPod device, even where other
16 portable hard drive digital music players exist at lower prices that would otherwise be able to
17 playback the music files sold by Apple's iTunes store.

18 69. Apple's actions have caused injury to the business and/or property of Plaintiff and
19 the class members he seeks to represent by: forcing consumers to buy Apple's iPod as the portable
20 hard drive digital music player of their choice, to the exclusion of all competing portable hard drive
21 digital music players; suppressing competition in the market for portable hard drive digital music
22 players; and, forcing consumers to pay supra-competitive prices for their portable hard drive digital
23 music players.

24 70. Apple's unlawful bundling or tying of its Apple iTunes store to use of its Apple iPod
25 portable hard drive digital music player is unlawful per se under the antitrust laws. Alternatively,
26 Apple's unlawful bundling or tying of its Apple iTunes store to use of its Apple iPod portable hard
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28

1 drive digital music player is unlawful under the antitrust rule of reason because the anticompetitive
2 effects of this conduct are not outweighed by procompetitive considerations.

3 **COUNT II**

4 **(UNLAWFUL TYING OR BUNDLING OF APPLE'S IPOD TO APPLE iTUNES IN**
5 **VIOLATION OF 15 U.S.C. § 1)**

6 71. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
7 the same force and effect as if fully restated herein.

8 72. Through its iPod device, Apple has monopoly market power in the U.S. market for
9 portable hard drive digital music players. In any event, Apple has sufficient market power in this
10 relevant market to coerce consumers of Apple's iPod device to make purchases of online music files
11 only from Apple's iTunes online music store, even if these same consumers would have preferred to
12 purchase their online music files from a source other than iTunes.

13 73. There are online music stores, other than Apple's iTunes music store, that, but for
14 Apple's anticompetitive conduct, would and could sell online music files to consumers for direct
15 playback on Apple's iPod portable hard drive digital music player.

16 74. During the Class Period, Apple has rigged the otherwise interactive and open AAC
17 codec format in the manner described herein, such that owners of Apple iPods cannot purchase
18 digital music files online from online music stores, other than Apple's iTunes store, for direct play
19 back on the iPod.

20 75. As a direct and proximate result of Apple's anticompetitive actions, consumers of
21 Apple's iPod who wish to purchase music online for use in their iPods must make their purchases
22 only from Apple's iTunes music store, even where other online music stores exist that, but for
23 Apple's unlawful conduct, would otherwise be able to sell online digital music files for playback on
24 an iPod at less expensive prices than the prices charged by iTunes.

25 76. Apple's actions have caused injury to the business and/or property of Plaintiff and
26 the class members he seeks to represent by: forcing consumers to buy online digital music files only
27 from Apple's iTunes store, to the exclusion of all other competing legal online digital music file
28 vendors, if consumers wished to play downloaded songs on their iPod devices; suppressing

1 competition in the market for the legal online sale and purchase of digital music files; and, forcing
2 consumers to pay supra-competitive prices for their online purchases of digital music files.

3 77. Apple's unlawful bundling or tying of its Apple iPod device to purchases from
4 Apple's iTunes store is unlawful per se under the antitrust laws. Alternatively, Apple's unlawful
5 bundling or tying of its Apple iPod device to purchases from its Apple iTunes store is unlawful
6 under the antitrust rule of reason because the anticompetitive effects of this conduct are not
7 outweighed by procompetitive considerations.

8 **COUNT III**

9 **(UNLAWFUL ACQUISITION OR MAINTENANCE OF MONOPOLY**
10 **MARKET POWER IN MARKET FOR LEGAL ONLINE DIGITAL MUSIC FILES**
11 **IN VIOLATION OF 15 U.S.C. § 2)**

12 78. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
13 the same force and effect as if fully restated herein.

14 79. Through its iPod device, Apple possesses monopoly market power in the U.S. market
15 for portable hard drive digital music players.

16 80. Given the prevalence of the iPod, owners of this device have a need for legal online
17 sellers of digital music files to be played on the iPods. Although a number of competing legal
18 online sellers of digital music files exist, Apple has rigged the operating AAC codec format and
19 corresponding firmware in the iPod so that only online digital music files purchased from Apple's
20 iTunes music store, to the exclusion of all other online music files purchased from any other online
21 store, can be directly played on the iPod. In this manner, Apple has been able to acquire and/or
22 maintain monopoly market power in the U.S. market for the legal sale of digital music files. But for
23 Apple's rigging of the AAC codec format and firmware in the iPod, any number of existing legal
24 sellers of digital music files, other than Apple's iTunes music store, would be able to sell competing
25 digital music files for play back on the iPod.

26 81. Thus, Apple has acquired and/or maintained its monopoly market power in
27 the U.S. market for the legal sale of online digital music files, not through superior skill, business
28 acumen, or enterprise, but rather through the foregoing anticompetitive and exclusionary conduct.

1 suppressing competition in this relevant market, and forcing consumers to pay supra-competitive
2 prices for their portable hard drive digital music players.

3 **COUNT V**

4 **(UNLAWFUL ATTEMPTED MONOPOLIZATION OF MARKET FOR PORTABLE
5 HARD DRIVE DIGITAL MUSIC PLAYERS IN VIOLATION OF 15 U.S.C. § 2)**

6 88. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
7 the same force and effect as if fully restated herein.

8 89. The foregoing allegations of predatory and/or anticompetitive conduct, including,
9 *inter alia*: a) Apple's rigging of the open AAC format to an "AAC-protected" format; b) Apple's
10 predatory change to its software to prevent less expensive music files sold by RealNetworks from
11 playing directly on Apple's iPod; c) the tying allegations forming part of Counts I and II of this
12 Complaint; and, d) Apple's unlawful monopoly leveraging, wherein Apple has used its monopoly
13 market power, however acquired, in the market for legal sales of online digital music files, in an
14 attempt to monopolize the separate market for portable hard drive digital music players, all form
15 part of Apple's unlawful attempted monopolization of the market for portable hard drive digital
16 music players.

17 90. Apple undertook the foregoing conduct with the specific intent to monopolize the
18 relevant market for portable hard drive digital music players.

19 91. If left unrestrained, Apple's attempt to monopolize the market for portable hard drive
20 digital music players is likely to succeed.

21 92. The foregoing conduct has caused injury to Plaintiff and the class members in their
22 business and/or property by unlawfully thwarting competition in the market for portable hard drive
23 digital music players and by forcing consumers, like Plaintiff and the class members, to pay supra-
24 competitive prices for their portable hard drive digital music players.

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1 **COUNT VI**

2 **(ATTEMPTED MONOPOLIZATION OF MARKET FOR THE LEGAL ONLINE**
3 **SALE OF DIGITAL MUSIC FILES, IN VIOLATION OF 15 U.S.C. § 2)**

4 93. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
5 the same force and effect as if fully restated herein.

6 94. The foregoing predatory and/or anticompetitive allegations, including, *inter alia*: a)
7 Apple's rigging of the open AAC format to an "AAC-protected" format; b) Apple's predatory
8 change to its software to prevent less expensive music files sold by RealNetworks from playing
9 directly on Apple's iPod; c) the tying allegations forming part of Counts I and II of this Complaint;
10 and, d) Apple's unlawful monopoly leveraging conduct, wherein Apple has used its monopoly
11 market power, however acquired, in the market for portable hard drive digital music players, in an
12 attempt to and actual monopolization of the separate market for the legal online sale of digital music
13 files, all form part of Apple's unlawful attempt to monopolize the relevant market for the legal
14 online sales of digital music files, in violation of 15 U.S.C. § 2.

15 95. Apple undertook the foregoing conduct with the specific intent to monopolize the
16 relevant market for the legal online sales of digital music files.

17 96. If left unrestrained, Apple's attempt to monopolize the market for the legal online
18 sales of digital music files is likely to succeed.

19 97. The foregoing conduct has caused injury to Plaintiff and the class members in their
20 business and/or property by unlawfully thwarting competition in the market for the legal online
21 purchases of digital music files, and by forcing consumers, like Plaintiff and the class members, to
22 pay supra-competitive prices for their purchases of online digital music files.

23 **COUNT VII**

24 **(VIOLATION OF CALIFORNIA'S CARTWRIGHT ACT, CALIF. BUS. AND**
25 **PROFESSIONS CODE SECTION 16700 ET. SEQ.)**

26 98. Plaintiff hereby incorporates by reference all of the allegations of this complaint with
27 the same force and effect as if fully restated herein.
28

1 I. Requiring Defendant to establish a common fund from which compensation can be
2 made to Plaintiff and the class members, and from which Plaintiff's counsel may recover their
3 reasonable attorneys' fees, expenses, and costs of suit;

4 J. Awarding such other relief as this Court deems just and appropriate.

5 **JURY DEMAND**

6 Plaintiff demands a trial by jury on all counts so triable.
7

8 Dated: September 23, 2005

Michael D. Braun
BRAUN LAW GROUP, P.C.

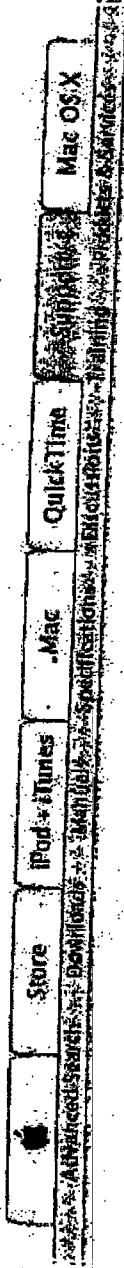
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Attorneys for Plaintiff

EXHIBIT A



iTunes 4 for Mac OS X: Compatible Players

Learn which digital music players and CD/MP3 players you can use with iTunes 4 and Mac OS X.

iTunes 4 for Mac OS X has built-in support for digital music players and for CD/MP3 players.

Notes

1. To play AAC and AAC Protected songs, your iPod must have iPod Software 1.3 or later installed. Not all digital music players can play AAC songs and only iPod can play AAC Protected songs.
2. Songs you import from an audio CD using the AAC format can be converted to MP3 files, which you can burn to MP3 CDs or play on third-party digital music players.
3. Songs purchased from the iTunes Music Store are encoded using the AAC Protected format and cannot be converted to MP3 format. You can burn them to audio CDs and play them in consumer audio CD players.

Digital Players	Manufacturer	Connection
iPod	Apple	FireWire/ USB
Nomad III	Creative Labs	USB
Nomad III MC	Creative Labs	USB
Nomad III c	Creative Labs	USB
Nomad iJukebox	Creative Labs	USB

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I served the above document(s) as follows:

BY MAIL. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in an affidavit.

I further declare, pursuant to Civil L.R. 23-2, that on the date hereof I served a copy of the above-listed document(s) on the Securities Class Action Clearinghouse by electronic mail through the following electronic mail address provided by the Securities Class Action Clearinghouse:

jcarlos@law.stanford.edu

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on September 23, 2005, at Los Angeles, California 90025.

S/ LEITZA MOLINAR
Leitza Molinar