

1 Robert A. Mittelstaedt (State Bar No. 60359)
 ramittelstaedt@jonesday.com
 2 Craig E. Stewart (State Bar No. 129530)
 cestewart@jonesday.com
 3 David C. Kiernan (State Bar No. 215335)
 dkiernan@jonesday.com
 4 Michael Scott (State Bar No. 255282)
 michaelscott@jonesday.com
 5 JONES DAY
 555 California Street, 26th Floor
 6 San Francisco, CA 94104
 Telephone: (415) 626-3939
 7 Facsimile: (415) 875-5700

8 Attorneys for Defendant
 APPLE INC.

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA
 12 SAN JOSE DIVISION

14 **THE APPLE IPOD iTUNES ANTI-TRUST
 LITIGATION**

**Case No. C-05-00037-JW (HRL)
 C-06-04457 JW (HRL)**

**APPLE'S OPPOSITION TO
 MOTION TO COMPEL**

Magistrate Judge Howard R. Lloyd

Date: March 23, 2010
 Time: 9:00 a.m.
 Courtroom 2, 5th Floor

20 The parties have resolved the disputes that are the subject of plaintiffs' motion with the
 21 exception of one remaining dispute: plaintiffs' request that Apple search all customer inquiries
 22 from June 1, 2007 through March 31, 2009, and produce any inquiries that relate to the alleged
 23 lack of interoperability between Apple's digital music offered on the iTunes Music Store (now
 24 called the iTunes Store ("iTS")) and devices that play digital music and between the iPod and
 25 non-iTS digital music. Apple has already produced customer inquiries from 2003 to June 2007.
 26 Plaintiffs now argue that they need these types of documents for the following two years to
 27 establish that Apple's updates to its anti-piracy software to stop illegal hacks had the effect of
 28

1 preventing complete interoperability between Apple’s music and iPods and competitors’ music
2 and players. But the 2003 to 2007 documents already produced cover the entire period when the
3 software updates identified in the amended complaint were issued. Moreover, the lack of
4 complete interoperability is not in dispute in this case. As Judge Ware ruled: “[t]he increased
5 convenience of using the two products together due to technological compatibility does not
6 constitute anticompetitive conduct under either *per se* or rule of reason analysis.” Dkt. 274, pp.
7 9-10. Plaintiffs simply do not need more documents on this issue, and there is no basis for
8 imposing on Apple the additional costs of reviewing each inquiry to determine whether it is
9 responsive to plaintiffs’ request and subsequently producing responsive documents to the extent
10 such documents exist. Accordingly, plaintiffs’ motion should be denied.

11 **BACKGROUND**

12 **A. The Limited Scope Of This Case.**

13 For the first four years of this case, plaintiffs’ central claim was that it was an antitrust
14 violation for Apple to develop and use its own FairPlay anti-piracy software (digital rights
15 management or DRM) rather than use Microsoft’s software and products. Dkt. 107 ¶¶ 39-50.¹
16 Plaintiffs’ theory was that, to promote complete interoperability among portable music players
17 and online music stores, Apple should have licensed Microsoft’s DRM and designed Apple’s
18 products around Microsoft’s software. Based on that theory, plaintiffs alleged tying and
19 monopolization under the Sherman Act, and related state law claims.

20 Last year, Judge Ware rejected that argument. Dkt. 213; Dkt. 274. In dismissing
21 plaintiffs’ tying claims, Judge Ware held that “[t]he increased convenience of using the two
22 products together due to technological compatibility does not constitute anticompetitive conduct
23 under either *per se* or rule of reason analysis.” Dkt. 274, pp. 9-10. The Court’s December 21st
24 Order made plain that this ruling also applies to plaintiffs’ monopolization claims, reasoning that
25 the alleged technological tie between Apple products was, “without more, . . . not
26 anticompetitive” and thus does not constitute exclusionary conduct for a monopoly claim. Dkt.

27 ¹ The record labels required Apple and other online stores to use anti-piracy software to
28 enforce certain content usage rules as a condition of making music available to consumers. Dkt.
322, ¶ 42; Dkt. 325, p. 3.

1 303, p. 2. Accordingly, plaintiffs were directed to file an amended complaint to clarify “what
2 actions they allege Apple took to maintain monopoly power beyond initial technological
3 relationships between its products.” *Id.*

4 Plaintiffs filed their amended complaint on January 26. In their amended complaint,
5 plaintiffs no longer claim that Apple’s decisions to use FairPlay and not license Microsoft’s DRM
6 were unlawful. They also dropped other claims, including claims that Apple disabled the iPod’s
7 processor chips so that it could not play certain digital music file formats. Plaintiffs’ sole
8 remaining claim is that Apple’s updates to FairPlay to maintain and improve its security were
9 purportedly anticompetitive. Dkt. 322, ¶¶ 5 (“Apple’s use of software updates . . . constitutes a
10 violation of United States and California antitrust law.”); *id.* ¶¶ 52-67 (“Apple’s Anticompetitive
11 Use Of Software Updates”); *id.* ¶¶ 91, 97 (“[t]hrough the anticompetitive use of software updates
12 described herein”); *see also id.* ¶¶ 101, 108 (same conduct is basis of their claim of attempted
13 monopolization).

14 On February 22, 2010, Apple moved to dismiss or for summary judgment. Dkt. 325, p. 3.
15 As that motion demonstrates, the amended complaint fails as a matter of law for the same reason
16 the initial complaint failed. Just as it was lawful for Apple to use its own DRM to comply with
17 the labels’ demand for anti-piracy software, it was also lawful for Apple to update and improve
18 that software. *Id.* at 6-10, 19-23. Alternatively, under Rule 56, the undisputed facts show that
19 the challenged software updates are lawful, because they were issued to stop illegal hacks that
20 violated the Digital Millennium Copyright Act (DMCA) and because Apple was obligated to
21 stop such hacks and maintain the security of FairPlay pursuant to its contracts with the labels.
22 *Id.* at 10-23. The hearing on Apple’s motion is set for April 26, 2010.

23 **B. Apple’s Review And Production Of Documents.**

24 Merits discovery did not open until June 2009. Dkt. 225. From the outset, Apple has
25 attempted to engage in a cooperative process with plaintiffs. It has met and conferred numerous
26 times over the scope of plaintiffs’ discovery, Apple’s responses, and the status of production, and
27 believed that it had resolved all discovery disputes aside from plaintiffs’ request for additional
28 customer inquiries. Declaration of David C. Kiernan (Kiernan Decl., ¶ 2.). Plaintiffs’ assertion

1 that Apple has deliberately delayed producing documents is untrue. Kiernan Decl., ¶ 3. The
2 timing of production has been a result of the broad scope of the requests, which seek highly
3 confidential information; the ongoing meet and confer process to limit that scope; and the
4 necessary time to obtain information and review it for responsiveness, confidentiality, and
5 privilege. *Id.*

6 Plaintiffs' sweeping discovery requests were not tailored to the claims in the original
7 complaint, much less the significantly narrowed amended complaint. *Id.* ¶ 4. For example,
8 plaintiffs served several document requests attached to a 30(b)(6) deposition notice that asked for
9 all documents and communications related to every single software update to iPod or iTunes
10 regardless whether those updates had any bearing on plaintiffs' claims or Apple's defenses. *Id.* ¶
11 5; Roach Decl., Ex. 7. The parties met and conferred several times to narrow the scope of
12 plaintiffs' discovery. Kiernan Decl., ¶¶ 4-6; Roach Decl., Exs. 10-20; 24-31, 35.²

13 To minimize the burden of production and to get plaintiffs what they wanted as quickly as
14 possible, Apple proposed running keywords against documents identified by certain agreed-upon
15 custodians to identify potentially relevant material. Kiernan Decl., ¶ 6. Any documents that
16 contained a keyword would then be reviewed for responsiveness, confidentiality, and privilege,
17 and nonprivileged, responsive documents would be produced. *Id.* Plaintiffs agreed to this
18 proposal. *Id.* The negotiation over the custodians and keywords has been an ongoing process.
19 *Id.*; *see, e.g.*, Roach Decl., Exs. 30-31. Ultimately, the parties agreed that, for the 30(b)(6)
20 document requests, certain keywords ("30(b)(6) keywords") would be run against data collected
21 from 17 custodians. Kiernan Decl., ¶ 6. For the Rule 34 document requests, a different set of
22 keywords ("Rule 34 keywords") tailored to those requests would be run against the seventeen
23 30(b)(6) custodians plus ten additional custodians. *Id.*; *see also* Roach Decl., Ex. 25.

24
25 ² For example, Apple agreed to produce (i) documents that relate to updates to FairPlay,
26 if any, that addressed conduct by competitors or hackers that permitted direct playback of
27 protected iTS files on a non-iPod or permitted direct playback of non-iTS files on an iPod; (ii)
28 documents, to the extent they exist, sufficient to identify such software updates; (iii) documents
that relate to Apple's response, if any, to RealNetworks' introduction and release of Harmony in
2004; and (iv) communications with the record labels regarding the foregoing updates and
Apple's response to RealNetworks' Harmony. Kiernan Decl., ¶ 5; Roach Decl., Ex. 14.

1 Since September 2009, Apple has focused on producing documents requested in
2 connection with the 30(b)(6) deposition notice so that the parties can schedule that deposition.
3 Plaintiffs do not want to schedule the deposition until they receive all documents relating to the
4 30(b)(6) notice. To date, Apple has reviewed over one million pages of documents that were
5 identified by the 30(b)(6) search terms and produced the majority of the responsive documents.
6 The remaining responsive, non-privileged documents are in the final stages of review before
7 production. Apple anticipates producing these documents on or before March 15th. Kiernan
8 Decl., ¶ 7.

9 Plaintiffs try to make much of the fact that Apple collected some documents in 2007,
10 claiming that Apple should have been able to immediately produce those documents. However,
11 plaintiffs did not serve the 30(b)(6) requests or amended requests for production until April and
12 May 2009, respectively, and merits discovery did not open until June 2009. The parties did not
13 reach agreement on search terms and custodians until the fall of 2009. Although Apple collected
14 potentially relevant documents in 2007, it still had to run the 30(b)(6) and Rule 34 keywords
15 against those documents and review them for responsiveness, confidentiality, and privilege.
16 Moreover, at the insistence of plaintiffs, Apple also had to collect documents that were generated
17 after the 2007 initial collection, which added significant time to the process. *Id.* ¶ 8.

18 C. Plaintiffs' Motion To Compel.

19 In light of the December 21st Order, which directed plaintiffs to file a narrowed amended
20 complaint and anticipated a dispositive motion addressed to any remaining claims (Dkt. 303),
21 plaintiffs should have refined their discovery requests and begun a dialogue with Apple over the
22 scope of discovery. Instead, on December 29th, plaintiffs served additional, exceedingly broad
23 document requests and interrogatories. *Id.* ¶ 15, Exs. 1-2.³ A week later, despite Apple's

24 ³ For example, plaintiffs seek, among other things, documents relating to definitions of
25 relevant product and geographic markets for iPods and iTunes files; licensing DRM technology;
26 costs to develop and maintain FairPlay; transactional data for iPod sales to wholesalers and
27 resellers, including quantity sold, date of sale, iPod model number, and price from October 2001
28 to present; features or functionality of an iPod, including comparisons to competing music
players; iPod pricing strategy; quarterly costs to develop, maintain and advertise iTunes; quarterly
revenue, costs, and component costs for each iPod model; quarterly number of songs available on
iTunes; prices of iPods to direct purchaser end users; negotiations or communications regarding any
contracts with Hewlett-Packard for the sale of iPods and the use of iTunes on Hewlett-Packard
computers; the transfer of digital audio files directly from iTunes to Motorola phones, including

1 ongoing cooperation and good faith efforts to search for and produce documents, plaintiffs filed
2 their motion to compel without meeting and conferring with Apple. *Id.* ¶ 9.

3 It was not until February 19th, that plaintiffs finally attempted to contact Apple to discuss
4 their motion. Ultimately, the parties were able to reach agreement on all of the items that are the
5 subject of plaintiffs' motion except for production of additional customer inquiries. *Id.* ¶ 10.

6 ARGUMENT

7 Courts may deny a motion to compel where "the burden or expense of the proposed
8 discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(2)(C)(iii); *Hall v. Keller*, 256 Fed.
9 Appx. 960, 960-61 (9th Cir. 2007) (holding that district court had not abused its discretion by
10 denying plaintiff's motion to compel due to undue burden on defendant). Courts may also limit
11 or deny discovery that "is unreasonably cumulative or duplicative, [and] can be obtained from
12 some other source that is more convenient, less burdensome, [and] less expensive." Fed. R. Civ.
13 Proc. 26(b)(2)(C)(i). As detailed in the accompanying declarations, there are approximately
14 220,000 customer inquiries (approximately 800,000 pages) that would need to be reviewed to
15 determine if they relate to plaintiffs' request. Kellermann Decl., ¶¶ 3-4; Kiernan Decl., ¶¶ 12-13.
16 That review would require an estimated 6,000 hours of review time at a cost exceeding \$350,000.
17 Kiernan Decl., ¶ 13. Apple tried to reach a compromise by offering to review a sample of the
18 220,000 inquiries. Plaintiffs rejected that offer. *Id.* ¶14. The cost to review the inquiries is not
19 justified given plaintiffs' purported need.

20 Plaintiffs argue that they need customer inquiries from June 1, 2007 through March 31,
21 2009 in addition to the previously produced inquiries from April 2003 through June 2007 to show

22 _____
(continued...)

23 documents reflecting negotiations or communications regarding same; surveys, reports, or other
24 marketing analyses that concern iPods or iTunes; surveys, reports or other marketing analyses that
25 concern iPod owners and their use of iTunes, other music stores or players other than iPod;
marketing studies of iPod or iTunes competitors; and testimony by Apple before the Copyright
Royalty Board on music royalties. Kiernan Decl., Ex. 1.

26 Plaintiffs also served interrogatories that seek, among other things, information relating to
27 the geographic markets for iPods and factors used to define and segregate them; each product
28 considered to compete with iPod or iTunes; quarterly market share for iPods and online music; and
the identity of all facts, documents and people with knowledge that support Apple's denials of
certain allegations in the consolidated complaint and affirmative defenses. *Id.*, Ex. 2.

1 that updates to FairPlay had the effect of preventing complete interoperability—i.e., preventing
2 music from iTunes from playing directly on non-iPods and preventing non-iTunes music from playing
3 directly on iPods. Kiernan Decl., ¶ 11. Plaintiffs are referring to updates to FairPlay designed to
4 restore its integrity after hackers breached it. Dkt. 325, pp. 3-5, 10-12. However, the lack of
5 complete interoperability, both before the hacks and after the updates, is not in dispute. *Id.* at 8-
6 10. It was the function of different online digital music stores using different DRMs.

7 Moreover, as noted, the previously produced customer inquiries from April 1, 2003
8 through June 1, 2007 cover the entire period when the specific updates referred to in plaintiffs'
9 amended complaint were issued. Dkt. 322, ¶¶ 52-67 (identifying updates issued between 2004
10 and September 2006). Apple is also in the process of producing documents that relate to updates
11 to FairPlay, if any, that addressed conduct by competitors or hackers that permitted direct
12 playback of protected iTunes files on a non-iPod or that permitted the iPod to play music protected
13 by another entity's DRM. Kiernan Decl., ¶ 4. And the parties are scheduling a 30(b)(6)
14 deposition regarding these very issues. *Id.* Anything more is unreasonably cumulative and
15 duplicative, and thus any conceivable benefit of production does not justify imposing additional
16 expense on Apple.

17 Plaintiffs' brief makes two other arguments regarding why they purportedly need the
18 customer inquiries. During the meet and confer process, however, plaintiffs dropped these
19 arguments in light of their amended complaint, and for good reason. Kiernan Decl., ¶ 11, n.2.
20 Beyond the generalized, unsubstantiated argument that they "go to the heart of" their case,
21 plaintiffs' brief claims (pp. 15-16) that the additional customer inquiries are needed to show that
22 iTunes customers are unhappy with their previously-purchased iTunes files protected by FairPlay.
23 Since writing their brief, however, plaintiffs dropped their claims for a class of iTunes customers
24 seeking an injunction requiring Apple to give DRM-free upgrades for all iTunes music previously
25 sold with FairPlay. Dkt. 238.⁴ Accordingly, plaintiffs no longer pursue this purported
26 justification for their discovery request.

27 ⁴ Plaintiffs' brief also argues that they need the inquiries to rebut Apple's contention that
28 iTunes purchasers were happy with their purchases. The hearing transcript makes plain that Apple
was addressing plaintiffs' request to represent iTunes purchasers, seeking an injunction to compel
Apple to provide DRM-free music. As discussed above, plaintiffs no longer seek that relief.

