

1 Robert A. Mittelstaedt #60359  
2 ramittelstaedt@jonesday.com  
3 Craig E. Stewart #129530  
4 cestewart@jonesday.com  
5 David C. Kiernan #215335  
6 dkiernan@jonesday.com  
7 Michael Scott #255282  
8 michaelscott@jonesday.com  
9 JONES DAY  
10 555 California Street, 26th Floor  
11 San Francisco, CA 94104  
12 Telephone: (415) 626-3939  
13 Facsimile: (415) 875-5700  
14 Attorneys for Defendant  
15 APPLE INC.

16  
17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA  
19 SAN JOSE DIVISION

20  
21  
22 THE APPLE iPod tunes ANTI-TRUST  
23 LITIGATION

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

26  
27  
28 DECLARATION OF DAVID C. KIERNAN  
IN SUPPORT OF APPLE'S OPPOSITION  
TO PLAINTIFFS' MOTION TO COMPEL

29 Magistrate Judge Howard R. Lloyd

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

33  
34 I, David C. Kiernan, declare as follows:

35 1. I am one of the counsel of record for defendant Apple Inc. ("Apple") in this action.  
36 Part of my responsibilities for the defense of this case includes supervising the document review  
37 and production process. I, and others at my direction, have gathered information to calculate the  
38 estimated fees, costs, and expenses related to Apple's document review and production of  
39 customer inquiries.

1           **Discovery Process**

2           2. Since merits discovery opened in June 2009, Apple has attempted to engage in a  
 3 cooperative process with plaintiffs. It has met and conferred numerous times over the scope of  
 4 plaintiffs' discovery, Apple's responses, and the status of production, and believed that it had  
 5 resolved all discovery disputes aside from plaintiffs' request for additional customer inquiries.

6           3. Plaintiffs' assertion that Apple has deliberately delayed producing documents is  
 7 untrue. Aside from Document Request No. 24 relating to customer inquiries to which Apple has  
 8 objected, Apple has been in the process of reviewing and producing documents requested by  
 9 plaintiffs. Notably, Apple has produced all documents responsive to plaintiffs' amended Rule 34  
 10 Document Request Nos. 10, 23, 26, 28-30, subject to Apple's objections and as limited by  
 11 agreement of the parties. The timing of Apple's production is a result of the broad scope of the  
 12 requests, the ongoing meet and confer process to limit that scope, the necessary time to obtain  
 13 information and review it for responsiveness, confidentiality, and privilege, and time expended on  
 14 the extensive briefing in this case.

15          4. Plaintiffs served discovery that was overbroad, burdensome, and sought  
 16 information that was not relevant to the claims and defenses in this case. The parties met and  
 17 conferred many times over several months to narrow the scope of plaintiffs' discovery.

18          5. For example, plaintiffs' document requests attached to their 30(b)(6) deposition  
 19 notice asked for all documents related to every single software update to iPod or iTunes  
 20 regardless of whether those updates had any bearing on plaintiffs' claims. After providing  
 21 plaintiffs with a sample of updates and meeting and conferring several times, the parties were  
 22 able to reach agreement on the scope of that discovery. Specifically, the parties agreed that Apple  
 23 would produce (i) documents that relate to updates to FairPlay, if any, that addressed conduct by  
 24 competitors or hackers that permitted direct playback of protected iTS files on a non-iPod or  
 25 permitted direct playback of non-iTS files on an iPod; (ii) documents, to the extent they exist,  
 26 sufficient to identify such software updates; (iii) documents that relate to Apple's response, if  
 27 any, to RealNetworks introduction and release of Harmony in 2004; and (iv) communications  
 28 with the record labels regarding the foregoing updates and Apple's response to RealNetworks

1 Harmony. In addition, the parties agreed to continue the deposition until the foregoing  
 2 documents had been produced.

3       6. To minimize the burden of production and to get plaintiffs what they wanted as  
 4 quickly as possible, Apple proposed running keywords against documents identified by certain  
 5 agreed-upon custodians to identify potentially relevant material. Any documents that contained a  
 6 keyword would then be reviewed for responsiveness, confidentiality, and privilege, and  
 7 nonprivileged, responsive documents would be produced. Plaintiffs agreed to this proposal. The  
 8 negotiation over the custodians and keywords has been an ongoing process. Ultimately, the  
 9 parties agreed that, for the 30(b)(6) document requests, certain keywords (“30(b)(6) keywords”)  
 10 would be run against data collected from 17 custodians. For the Rule 34 document requests, a  
 11 different set of keywords (“Rule 34 keywords”) tailored to those requests would be run against  
 12 the seventeen 30(b)(6) custodians plus ten additional custodians.

13       7. Since September 2009, Apple has focused on producing documents requested in  
 14 connection with the 30(b)(6) deposition notice so that the parties can schedule that deposition.  
 15 Plaintiffs’ counsel, Thomas R. Merrick, informed me that plaintiffs do not want to schedule the  
 16 deposition until they receive all documents relating to the 30(b)(6) notice. To date, Apple has  
 17 reviewed over one million pages of documents that were identified by the 30(b)(6) search terms  
 18 and produced the majority of the responsive documents. The remaining responsive, non-  
 19 privileged documents are in the final stages of review before production. Apple anticipates  
 20 producing these documents on or before March 15, 2010.

21       8. The parties did not reach agreement on search terms and custodians until the Fall  
 22 of 2009. Although Apple collected potentially relevant documents in 2007, it still had to run the  
 23 30(b)(6) and Rule 34 keywords against those documents and review them for responsiveness,  
 24 confidentiality, and privilege. Moreover, at the insistence of plaintiffs, Apple also had to collect  
 25 documents that were generated after the 2007 initial collection, which added significant time to  
 26 the process.

27       9. Plaintiffs failed to meet and confer or give any warning to Apple about their  
 28

1 motion to compel.<sup>1</sup> Indeed, plaintiffs never stated to Apple that they would seek court  
 2 intervention if Apple were unable to produce a category of information by a certain date.  
 3 Plaintiffs' last correspondence to Apple simply requested further clarification regarding which  
 4 documents were being searched and responses regarding certain custodians. Roach Decl., Ex. 18.

5       10. On February 19, 2010, plaintiffs' counsel left me a voice mail requesting to meet  
 6 and confer regarding their motion. This was the first communication I received seeking to meet  
 7 and confer over the motion. Ultimately, the parties were able to reach agreement regarding all of  
 8 the items that are the subject of plaintiffs' motion except for production of additional customer  
 9 inquiries. Plaintiffs agreed to take such items off calendar.

10           **Customer Inquiries**

11       11. Plaintiffs' counsel, Paula Roach, asserted that plaintiffs need customer inquiries  
 12 from June 1, 2007 through March 31, 2009 in addition to the previously produced inquires from  
 13 April 2003 through June 2007 to demonstrate that consumers purchased products from  
 14 competitors that they were then unable to use with the iPod or iTS files due to software updates.<sup>2</sup>  
 15 In other words, plaintiffs allegedly need the inquiries to show that updates to FairPlay had the  
 16 effect of preventing complete interoperability—i.e., preventing music from iTS from playing  
 17 directly on non-iPods and preventing non-iTS music from playing directly on iPods.

18       12. According to the Declaration of Beth Kellerman, there are approximately 220,000  
 19 customer inquiries that would need to be reviewed to determine if they relate to plaintiffs'  
 20 requests. Each inquiry must be reviewed to determine whether it is responsive to plaintiffs'  
 21 request. Indeed, based on the experience reviewing customer inquiries collected in 2007, a  
 22 significant percentage of customer inquiries are likely to be nonresponsive and will not relate to  
 23 the plaintiffs' claims whatsoever.

24       13. Any meaningful review of documents by an attorney takes time and due care.

---

25           <sup>1</sup> For example, with respect to Interrogatory No. 5, on August 20, 2005, plaintiffs' counsel  
 26 Thomas Merrick told me that plaintiffs did not know which consumer electronic products they  
 27 were interested in and agreed to attempt to narrow the interrogatory. *See also* Roach Decl., Ex.  
 25. Plaintiffs never followed up before filing their motion to compel.

28           <sup>2</sup> During the meet and confer process, plaintiffs' counsel dropped the two arguments in the  
 plaintiffs' motion to compel in light of their amended complaint.

1 Based on my years of experience managing large document reviews, I have found, and can  
2 estimate in good faith, that a reviewer of documents can review an average of 200 - 500  
3 documents a day, for an eight hour period per day. The customer inquiries contain personal  
4 information that must be redacted before production, which will lower the review rate. Assuming  
5 a rate of review of 300 inquiries within an eight hour day, the review would require an estimated  
6 6,000 hours of review time at a cost exceeding \$350,000.

7           14. Apple tried to reach a compromise with plaintiffs by offering to review a sample  
8 of the 220,000 customer inquiries. Plaintiffs rejected that proposal.

9           15.     Exhibit 1 is a true and correct copy of plaintiffs' second set of request for  
10 production of documents. Exhibit 2 is a true and correct copy of plaintiffs' second set of  
11 interrogatories.

12 I declare under penalty of perjury that the foregoing is true and correct. Executed on the  
13 2nd day of March, 2010 at San Francisco, California.

14  
15 /s/ David C. Kiernan  
David C. Kiernan