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UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

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COPY

THE APPLE IPOD iTUNES ANTI-TRUST LITIGATION, No. C-050037-JW(RS)

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DEPOSITION OF ROGER G. NOLL, Ph.D.

Taken before EARLY K. LANGLEY, RPR, RMR
CSR No. 3537
September 19, 2008



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1 appearing.

2 MS. SWEENEY: Bonny Sweeney from the
3 Coughlin Stoia law firm representing the direct
4 purchaser plaintiffs.

5 MS. ROACH: Paula Roach from Coughlin 10:10
6 Stoia representing plaintiffs.

7 MS. ZELDES: Helen Zeldes from Zeldes &
8 Haeggquist representing the indirect purchaser
9 plaintiffs.

10 MR. MITTELSTAEDT: And Bob Mittelstaedt 10:10
11 for the defendant with Jeff LeVee, Michael Scott
12 and Carlyn Clause.

13 THE VIDEOGRAPHER: Would the counsel
14 please state any stipulations or statements that
15 they would like on the record at this time. 10:11

16 MR. MITTELSTAEDT: None.

17 THE VIDEOGRAPHER: The reporter may now
18 swear the witness.

19 ROGER NOLL, Ph.D.

20 sworn as a witness,

21 testified as follows:

22 EXAMINATION BY MR. MITTELSTAEDT:

23 Q. Good morning. If you would state your
24 name and business address, please.

25 A. My name is Roger G. Noll and I'm in the 10:11

1 recordings from the major distribution companies
2 than any of its predecessors.

3 Q. Okay.

4 A. That was its main -- the main thing that
5 happened in 2003 is that -- this doesn't have much 12:24
6 to do with Apple. It's that between losing the
7 permanent injunction against Napster in February
8 of 2002 and the introduction of Apple, and then
9 subsequently having to spin-off MusicNet and
10 PressPlay because they were being attacked on 12:24
11 antitrust grounds.

12 Hollywood changed its mind about the role
13 of digital downloads in the music industry.
14 Sometime between the spring of 2002 and the fall
15 of 2002, it changed its mind and was -- and it 12:24
16 happened in a different sequence like BMG had
17 already decided that it was going to do this and
18 that's why it bought a piece of Napster and was in
19 the process of converting Napster to a legal site
20 when the cases took place in 2001 and 2002. 12:25

21 So BMG was the first, and then there were
22 others that were much later, and what had to
23 happen for this whole source of music to evolve as
24 an alternative to buying CDs, was that the
25 distribution companies had to change their mind 12:25

1 about what they would allow people to sell as
2 permanent downloads on the Internet. And that
3 took place, you know, sometime in the middle of
4 2002.

5 Q. What's your view on the -- on why the 12:25
6 record labels insisted on use of DRM for the legal
7 stores?

8 A. Well, we have to go back to history.
9 Right.

10 The label's original strategy was to take 12:25
11 over retailing, and they saw Digital Rights
12 Management and the Digital Millennium Copyright
13 Act as a means by which they had a window to
14 control retail distribution. And, so, their
15 initial foray in the creation of MusicNet and 12:26
16 PressPlay was that digital downloads would be
17 available only through the websites owned by the
18 labels plus MusicNet and PressPlay. And that
19 nobody else would basically be allowed to do it.
20 Now -- and with the exception of BMG. BMG didn't 12:26
21 subscribe to that, but everybody else did.

22 And, so, what had to happen was through
23 litigation and negotiations, they had to be
24 disabused of the notion that that could work.

25 Now, an essential ingredient of that 12:27

1 strategy was encryption because they had a number
2 of business models that they thought they were
3 going to be able to introduce, like they -- and
4 you've seen it in other dimensions -- other
5 products, but not so much as it would have been in 12:27
6 digital downloads.

7 They wanted to move from selling a
8 physical product, whether it's a file or a CD, to
9 selling continuous access. Basically they wanted
10 to be able to limit the number of uses of a file a 12:27
11 consumer could have and -- without the file
12 self-destructing. And they actually tried to
13 implement that in video with DivX, and they
14 originally tried to implement that with digital
15 downloads with their own Digital Rights Management 12:27
16 system that would be exploding files, that you
17 would have them for a certain amount of time or a
18 certain amount of listens and then they would
19 self-destruct.

20 All right. So Digital Rights Management 12:28
21 to Hollywood meant more than just protecting
22 against encryption. It also meant a whole series
23 of monitoring features that would enable you to
24 control use. And it wasn't until 2002 they
25 decided that wasn't going to work. 12:28

1 So there are some examples of mandatory
2 licensing of intellectual property. There are
3 examples like terminal railroads or RFK Stadium --
4 Hetck versus Pro Football where they're required
5 to share capital investment. But, they're fairly 15:09
6 rare. I mean that, you know, the number of such
7 cases is five to ten or something like that.

8 Q. Essential facility cases?

9 A. Well, they can -- yeah. That's -- that's
10 the most obvious one, but there's -- it's hard to 15:09
11 think, you know, like the settlement of the 1954
12 version of the AT&T case is not really an
13 essential facilities case.

14 Q. Okay. So, just to take the first step
15 here, if it turns out that -- let me strike that. 15:09
16 Let me go back to the very first step.

↓
17 You don't have any quarrel as an economist
18 with Apple using some form of DRM for its Music
19 Store; correct, because they were required to do
20 that -- 15:09

↑
21 A. They had no choice. That's not the issue.

22 Q. Okay. So the next step is whether to use
23 a DRM that was compatible or incompatible with
24 other music players other than the iPod, and if it
25 turns out that it was least costly for Apple to 15:10

1 are kind of expensive so they haven't had a huge
2 success in the market but they're there, they're
3 out there.

4 Q. Let me go back to my question. The basic
5 question is: What facts would satisfy you that 16:36
6 Apple's conduct was not anticompetitive, and let
7 me just list them again and stop me when you think
8 the wording ought to be different: Number one,
9 Apple used DRM because the labels required it?

10 A. We agreed to that. I don't think there's 16:36
11 an issue there. Everybody, not only Apple, but
12 everybody was required to use DRM initially.

13 Q. But that -- that's one factor that will
14 lead you to conclude that Apple's conduct was not
15 anticompetitive because if it were the other way, 16:36
16 if Apple had decided let's use DRM and the labels
17 didn't require it that would cause you some
18 concern?

19 A. Maybe, maybe not. I mean that's not
20 sufficient, all right. 16:36

21 Q. Okay. No. 2, Apple decided to develop its
22 own DRM rather than using somebody else's; that's
23 okay, right?

24 A. In principle that's not wrong. It depends
25 how and how they implement it. The act of doing 16:37

1 STATE OF CALIFORNIA)
2) ss.
3 COUNTY OF ALAMEDA)
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6 I, EARLY LANGLEY, a Shorthand Reporter, State
7 of California, do hereby certify:

8 That ROGER G. NOLL, in the foregoing deposition
9 named, was present and by me sworn as a witness in the
10 above-entitled action at the time and place therein
11 specified;

12 That said deposition was taken before me at
13 said time and place, and was taken down in shorthand by
14 me, a Certified Shorthand Reporter of the State of
15 California, and was thereafter transcribed into
16 typewriting, and that the foregoing transcript
17 constitutes a full, true and correct report of said
18 deposition and of the proceedings that took place;

19 IN WITNESS WHEREOF, I have hereunder subscribed my hand
20 this 24th day of September 2008.

21 
22 EARLY LANGLEY, CSR NO. 3537
23 State of California
24
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