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

19 THE APPLE IPOD ITUNES ANTI-TRUST) Lead Case No. C-05-00037-JW(HRL)
LITIGATION)
20) CLASS ACTION
This Document Relates To:)
21) PLAINTIFFS' MEMORANDUM IN
ALL ACTIONS.) OPPOSITION TO APPLE'S MOTION FOR
22) SUMMARY JUDGMENT

23 JUDGE: Hon. James Ware
DATE: April 18, 2011
24 TIME: 9:00 a.m.
CTRM; 8, 4th Floor

25 [REDACTED]
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1 **I. INTRODUCTION**

2 To prevail on its motion for summary judgment, Apple must show that no reasonable jury
3 could fail to accept Apple’s explanation for its suppression of the competitive threat posed by
4 RealNetworks’ Harmony technology. The problem for Apple is that its exculpatory explanation –
5 that RealNetworks was an unintended collateral victim of Apple’s efforts to block genuine hackers –
6 is squarely at odds with the contemporaneous record.

7 As shown below, there is ample evidence to permit a jury to conclude that Apple used the
8 *pretext* of fighting hackers – indeed going so far as to disparage RealNetworks itself as a hacker (a
9 position it no longer seems to endorse) – to shut down a technology that would have dramatically
10 enhanced competition and benefitted consumers by allowing them to play songs legally purchased
11 from Apple’s competitors on their iPods. Contrary to Apple’s assertion, the record labels did not
12 require Apple to shut down the competition. Rather, the labels *supported* Harmony because it
13 provided interoperability while preserving digital rights management (“DRM”) protection. Nor was
14 Harmony merely an unintended victim of Apple’s fight against “hacks” that stripped DRM
15 protection from iTunes songs. The record shows that Apple treated Harmony as a far more serious
16 threat than any hack – as demonstrated by its swift and punishing response to RealNetworks’
17 Harmony announcement – and deliberately re-designed its FairPlay DRM in ways that disabled
18 Harmony but did not improve the software’s ability to withstand attacks that stripped DRM
19 encryption from iTunes Music Store (now called “iTunes Store” or “iTunes”) songs. Finally, Apple
20 has failed to demonstrate that the software updates that disabled Harmony provided any benefit to
21 consumers. Apple’s claim that the labels would have stopped supplying music if it had not made the
22 changes it did finds no support in the record. Moreover, Apple’s own customer service reports
23 demonstrate that consumers greatly preferred the interoperability provided by Harmony to the
24 dubious “protection” Apple’s software updates provided against the “injection of foreign DRM
25 keys.”

26 Neither of the two cases that pervade Apple’s motion, *Allied Orthopedic Appliances Inc. v.*
27 *Tyco Health Care Group*, 592 F.3d 991 (9th Cir. 2010) (“*Tyco*”) and *Verizon Commc’ns Inc. v. Law*
28 *Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 124 S. Ct. 872 (2004) (“*Trinko*”), grant Apple the

1 broad immunity it claims. To the contrary, the line between exclusionary conduct and legitimate
2 product improvement is a very fine one for a monopolist, requiring close examination by the fact-
3 finder of the unique facts and circumstances of each case.¹ See, e.g., *Eastman Kodak Co. v. Image*
4 *Technical Servs., Inc.*, 504 U.S. 451, 467, 112 S. Ct. 2072 (1992) (affirming reversal of summary
5 judgment on Section 2 claim); *Image Technical Serv., Inc. v. Eastman Kodak Co.*, 903 F.2d 612,
6 620-21 (9th Cir. 1990) (“*Image Tech. Serv. I*”) (reversing summary judgment on Section 2 claim);
7 see also *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 545 (9th Cir. 1983) (“We
8 do not, of course, hold that product innovation is immune from antitrust scrutiny and may never
9 provide the requisite conduct element in support of a claim for monopolization or attempted
10 monopolization under section 2 of the Sherman Act.”).

11 Therefore, Apple’s admission that its actions “had the effect” of disabling competition from
12 RealNetworks only raise further disputed and genuine issues of material fact: Did Apple engage in
13 exclusionary conduct beyond simply stopping genuine hackers or improving its product? Are
14 Apple’s *post hoc* business justifications for its actions against Harmony valid and sufficient? And,
15 do the anticompetitive effects of Apple’s exclusionary conduct outweigh any even arguable
16 procompetitive benefits to consumers? Under *Eastman Kodak* and the record presented, the
17 resolution of each of these factual questions remains the prerogative of the jury.

18 **II. APPLICABLE STANDARD FOR SUMMARY JUDGMENT**

19 Apple’s motion is based on the purported lack of a genuine dispute for trial as to two distinct
20 issues under Section 2 (though these two issues are frequently conflated in its motion): (1) whether
21 Apple engaged in “exclusionary conduct”; and (2) the validity and sufficiency of Apple’s “business
22 justifications” defense. As movant, Apple bears the initial burden of demonstrating the lack of any
23 dispute for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548 (1986); *Eastman*
24 *Kodak*, 504 U.S. at 456 (the “respondents’ version of any disputed issue of fact is presumed
25 correct”). If Apple carries that burden, Plaintiffs then must come forward with specific facts

26
27 ¹ Unless otherwise noted, citations are omitted and emphasis is added.

1 demonstrating the presence of a genuine dispute for trial. *Celotex*, 477 U.S. at 324. All justifiable
2 inferences are to be drawn in Plaintiffs' favor. *Eastman Kodak*, 504 U.S. at 456 (citing *Anderson v.*
3 *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505 (1986)). Summary judgment is warranted
4 only where the record, taken as a whole, could not lead a rational trier of fact to find for the non-
5 moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct.
6 1348 (1986).

7 **III. BACKGROUND**

8 The factual record presents a compelling picture of unjustifiable exclusionary conduct by
9 Apple directed squarely against RealNetworks.²

10 When Apple and the record labels negotiated the terms under which Apple could sell digital
11 music files online through its iTS, most of the labels required that the recordings have "content
12 protection to guard against piracy," in order to prevent consumers from making an unlimited number
13 of copies.³ Ex. 1, Declaration of Howie Singer ("Warner Decl."); Ex. 2, Declaration of Lawrence
14 Kanusher ("Sony Decl."); Ex. 3, Declaration of Amanda Marks ("Universal Decl."); Ex. 4,
15 Declaration of Mark Piibe ("EMI Decl."). [REDACTED]

16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 Critically, none of the labels required Apple to use a proprietary DRM system that made iTS
21 music incompatible with portable digital media players other than the iPod. Rather, all of the labels
22 would have preferred a system that allowed their music to be played on multiple competing devices,
23

24 ² Plaintiffs have developed this record despite the unprecedented and unfair "data dump" in the
25 final two weeks of the discovery period. *See* Dkt. No. 486 at 7 n.7. (Plaintiffs' Notice of Motion
and Renewed Motion for Class Certification and Appointment of Lead Class Counsel).

26 ³ Unless otherwise noted, all references to "Ex." and Exs." are to the exhibits attached to the
27 Declaration of Bonny E. Sweeney in Support of Plaintiffs' Opposition to Apple's Motion for
Summary Judgment, filed concurrently.

1 because they had an interest in having their music sold “in the widest manner possible, through as
2 many channels as possible.” Ex. 1, Warner Decl.; Ex. 3, Universal Decl.; *see also* Ex. 2, Sony Decl.
3 (“Apple did not accommodate Sony’s request for a solution that would both protect the content as
4 well as be interoperable with other devices.”); Ex. 4.

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 Apple thus created a closed system that locked iTS customers into using the iPod for direct
12 playback of their digital audio files. [REDACTED]

13 [REDACTED] As a result, digital audio files purchased from other
14 internet sites (such as Amazon.com or Walmart.com) could not play directly on an iPod. Similarly,
15 songs purchased from the iTS could not play directly on any portable digital media player other than
16 the iPod. This closed system allowed Apple to rapidly leverage its market power in the digital audio
17 file market into the market for portable digital media players. [REDACTED]

18 [REDACTED] With
19 iTS, Apple was able to achieve dominance in the portable digital media player market almost
20 immediately. By mid-2004, Apple had achieved positions of dominance in *both* the online audio
21 and portable digital media player markets, with market shares in both markets exceeding [REDACTED]

22 [REDACTED]
23 [REDACTED] From that point forward, to compete in the digital audio download market any would-be
24 competitor had to make its music playable on the iPod; by the same token, manufacturers of
25 competing portable digital media players could not effectively compete in that market because their
26 products were not compatible with the digital audio files sold through iTS. [REDACTED]

27 [REDACTED]

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[REDACTED]

RealNetworks launched an online music store that competed directly with iTunes in January 2004. [REDACTED] Ex. 20; see also Ex. 1, Warner Decl.; Ex. 2, Sony Decl.; Ex. 3, Universal Decl.; Ex. 4 EMI Decl. From the outset, RealNetworks recognized that in order to compete successfully in the digital audio file market, its music had to be directly playable on the dominant portable digital media player, the iPod.

[REDACTED]

⁴ See Apple's Motion for Summary Judgment ("Mtn.") at 8. [REDACTED]

[REDACTED] See Declaration of Dr. John P. J. Kelly in Support of Defendants' Renewed Motion for Summary Judgment, dated January 18, 2011 ("Kelly Decl."), ¶5.

⁵ See Dkt. No. 396 (Apple Inc.'s Motion for Protective Order Preventing the Deposition of Steve Jobs). [REDACTED]

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[REDACTED]

According to RealNetworks, the Harmony technology followed “in a well-established tradition of fully legal, independently developed paths to achieve compatibility. . . . Harmony creates a way to lock content from Real’s music store in a way that is compatible with the iPod, Windows Media DRM devices, and Helix DRM devices. Harmony technology does not remove or disable any digital rights management [DRM] system.” Ex. 23.

[REDACTED]

RealNetworks’ Harmony technology represented the first real threat to Apple’s monopoly in the digital audio download market and, because dominance in the digital audio download market enabled Apple to achieve dominance in the market for portable digital media players, that market as well. Moreover, RealNetworks’ product was legal and received the full endorsement of the record labels that had licensed content to Apple and RealNetworks. Ex. 24; *see also* Ex. 1 (“WARNER has an interest in having its music sold in the widest manner possible, through as many channels as possible” and entered into an agreement with RealNetworks to sell Warner’s sound recordings.);

[REDACTED]

Mr. Glaser has evaded service of Plaintiffs’ deposition subpoena. *See* Ex. 27, Affidavit of Reasonable Diligence.

⁶ *See* Declaration of David F. Martin in Support of Plaintiffs’ Opposition to Apple’s Motion for Summary Judgment (“Martin Decl.”), filed concurrently.

1 Ex. 2 (“SONY entered into agreements with other companies, including Real Networks.”);
2 Ex. 3 (“Universal has always had an interest in having its music sold in the widest manner possible,
3 through as many channels as possible” and entered into an agreement with RealNetworks to sell
4 Universal’s music.); Ex. 4 (“EMI was interested in having its recorded music made widely available
5 though many different channels” and had an agreement with RealNetworks to sell downloads of
6 EMI sound recordings.).

7 [REDACTED]
8 [REDACTED]
9 Customers flocked to RealNetworks because it offered better prices than iTunes. *Id.* In August 2004,
10 RealNetworks sold its audio downloads for as low as .49 cents per-track – less than half the price of
11 Apple’s .99 cent per-track price. *Id.* [REDACTED]

12 [REDACTED]
13 Apple’s response to the RealNetworks threat was swift and punishing. [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]

22 [REDACTED] Thus, instead of welcoming the interoperability
23 created by RealNetworks, Apple unfairly disparaged its competitor and made clear to any other

24 _____
25 7 [REDACTED]
26 [REDACTED]

27 8 [REDACTED]
28 [REDACTED]

1 would-be rival that Apple would take all necessary steps to prevent any inroads into its dual
2 monopolies.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
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