

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

THE APPLE IPOD ITUNES)
ANTITRUST LITIGATION,)
_____)

NO. C-05-0037 YGR

FRIDAY, FEBRUARY 7, 2014

OAKLAND, CALIFORNIA

CASE MANAGEMENT CONFERENCE
PRE-FILING CONFERENCE

BEFORE THE HONORABLE YVONNE GONZALEZ ROGERS, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

ROBBINS GELLER RUDMAN & DOWD, LLP
655 WEST BROADWAY, SUITE 1900
SAN DIEGO, CALIFORNIA 92101

BY: BONNY E. SWEENEY, ESQUIRE
CARMEN A. MEDICI, ESQUIRE

FOR DEFENDANT:

JONES DAY
555 CALIFORNIA STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104

BY: ROBERT A. MITTELSTAEDT, ESQUIRE
DAVID C. KIERNAN, ESQUIRE, ESQUIRE

REPORTED BY:

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR
OFFICIAL COURT REPORTER

TRANSCRIPT PRODUCED BY COMPUTER-AIDED TRANSCRIPTION

1 FRIDAY, FEBRUARY 7, 2014

3:10 P.M.

2 P R O C E E D I N G S

3 **MR. MITTELSTAEDT:** GOOD AFTERNOON, YOUR HONOR. I'M
4 BOB MITTELSTAEDT FOR JONES DAY.

5 **THE COURT:** GOOD AFTERNOON.

6 **MS. SWEENEY:** GOOD AFTERNOON, YOUR HONOR. BONNY
7 SWEENEY, OF ROBBINS, GELLER, RUDMAN & DOWD FOR THE PLAINTIFFS.

8 **THE COURT:** LET US CALL THE CASE. HOLD ON.

9 **THE CLERK:** CALLING CIVIL ACTION 05-0037 APPLE IPOD
10 ITUNES ANTITRUST LITIGATION.

11 COUNSEL, PLEASE STATE YOUR APPEARANCES.

12 **MS. SWEENEY:** BONNY SWEENEY FROM ROBBINS, GELLER,
13 RUDMAN & DOWD FOR THE PLAINTIFFS.

14 **MR. MITTELSTAEDT:** ROBERT MITTELSTAEDT FOR JONES DAY
15 FOR APPLE. I HAVE TWO COLLEAGUES AND SOMEONE FROM APPLE WHO
16 ARE GOING TO JOIN. I THINK THEY WERE GOING TO BE HERE BY
17 3:30. THEY SHOULD BE HERE ANY TIME. I'M FINE PROCEEDING,
18 THOUGH, YOUR HONOR.

19 **THE COURT:** DID I SCHEDULE THIS FOR 3:30?

20 **MS. SWEENEY:** YES, YOUR HONOR.

21 **THE CLERK:** YES.

22 **THE COURT:** OKAY. WELL, I DON'T THINK IT'S GOING TO
23 TAKE THAT LONG.

24 THE ORDER TO SHOW CAUSE IS DISCHARGED. THE REASON I
25 CALLED YOU IN IS BECAUSE I DO THESE PRE-CONFERENCE --

1 PRE-SUMMARY JUDGMENT CONFERENCES AND WAS LOOKING AT MY DOCKET
2 AND ALL OF A SUDDEN I FIND MYSELF WITH THIS SUMMARY JUDGMENT
3 IN A VERY OLD ITUNES CASE, AND I DIDN'T KNOW WHAT IT WAS ALL
4 ABOUT.

5 AND I SAID, HOLD ON, HOW COME I DON'T KNOW ANYTHING ABOUT
6 THIS CASE? AND THEN REALIZED THAT YOU FOLKS NEVER CAME IN TO
7 TALK TO ME. AND I UNDERSTAND THAT THAT WAS IN PART BECAUSE I
8 HAVEN'T EVER SEEN THIS CASE AND BECAUSE JUDGE WARE HAD GIVEN
9 YOU A SCHEDULE, AND I GUESS I RUBBER STAMPED SOME STIPULATION
10 THAT YOU HAD FILED ABOUT TIMING.

11 BUT I DO LIKE TO UNDERSTAND WHAT THESE CASES ARE ABOUT AND
12 WHAT THE SUMMARY JUDGMENT IS ABOUT. AND LIKE I SAID, IT'S A
13 VERY OLD CASE. I'M TRYING TO FIGURE OUT THE CONTEXT. AND THE
14 HEARING WAS SCHEDULED ON A DAY WHEN I WASN'T EVEN IN TOWN.

15 SO, ANYWAY, THAT IS THE PRIMARY PURPOSE OF BRINGING YOU
16 IN. I HAVEN'T -- I CAN TELL YOU, I HAVE NOT LOOKED AT THE
17 SUMMARY JUDGMENT AT ALL. I'VE BEEN IN TRIAL. BUT I DO WANT
18 TO GET A SENSE OF IT BECAUSE FROM MY PERSPECTIVE, WHEN I
19 HAVE -- WHEN I UNDERSTAND THE BALLPARK, AND WHEN I GO TO THE
20 MOTION, IT ALLOWS ME TO REALLY FOCUS IN ON IT MUCH MORE
21 QUICKLY AND EFFICIENTLY, AND HEARING FROM THE PARTIES WHO KNOW
22 THEIR CASE SO MUCH BETTER THAN I DO ASSISTS ME IN THAT MATTER.

23 SO, IN A SENSE, IT'S AS IF YOU GET TO BE THE FIRST ONES TO
24 BRIEF ME ON THE ISSUES RATHER THAN A LAW CLERK WHO IS TRYING
25 TO GRASP IT JUST FROM THE PAPERS.

1 SO, I WOULD LIKE TO HEAR ABOUT THE HISTORY OF THE CASE,
2 WHAT GOT US HERE, AND REALLY WHAT IS LEFT AND WHAT THE MOTION
3 IS ALL ABOUT. I'M STILL -- SO THAT'S REALLY THE POINT OF
4 THIS. AND I APPRECIATE YOU COMING IN.

5 **MS. SWEENEY:** SURE. THANK YOU, YOUR HONOR. I'LL
6 START AND JUST GIVE YOU A LITTLE BACKGROUND ABOUT THE CASE AND
7 WHY WE ARE HERE EIGHT YEARS LATER.

8 **THE COURT:** ARE THOSE YOUR COLLEAGUES?

9 **MR. MITTELSTAEDT:** YES.

10 **THE COURT:** ALL RIGHT. PERFECT. I STARTED EARLY.
11 COME ON IN. I'VE BEEN ON THE BENCH ALL DAY SO I'M READY TO
12 GET OFF AS SOON AS THIS IS DONE.

13 GO AHEAD.

14 **MS. SWEENEY:** WE REPRESENT A CERTIFIED CLASS OF IPOD
15 PURCHASERS, BOTH CONSUMER PURCHASERS AND BUSINESSES THAT
16 PURCHASED IPODS DIRECTLY FROM APPLE. AND OUR CLIENTS FILED A
17 SERIES OF CASES BEGINNING IN 2005 ALLEGING THAT APPLE HAD
18 UNLAWFULLY MONOPOLIZED THE MARKET FOR PORTABLE DIGITAL MEDIA
19 PLAYERS, WHICH IS WHAT AN IPOD IS.

20 UNFORTUNATELY, THE CASE HAS BEEN GOING ON SO LONG THE
21 TECHNOLOGY AND THE INDUSTRY HAS CHANGED CONSIDERABLY. BUT
22 BACK IN 2005, PLAINTIFFS ALLEGED THAT APPLE HAD CREATED THIS
23 TECHNOLOGICAL TIE BETWEEN ITS DEVICE, THE MUSIC PLAYER, THE
24 IPOD AND ITS MUSIC STORY. SO THAT IF YOU WANTED TO PLAY MUSIC
25 PURCHASED FROM THE APPLE ITUNE STORE ON A PORTABLE DEVICE, YOU

1 HAD TO PLAY IT ON THE IPOD AND VICE VERSA. IN OTHER WORDS, IT
2 WAS A TIE BETWEEN THOSE TWO TECHNOLOGIES. AND THAT AND OTHER
3 THINGS ENABLED APPLE TO RAPIDLY GAIN MARKET SHARE IN THE
4 MARKET FOR PORTABLE DIGITAL MEDIA PLAYERS.

5 ALSO, IN THE ORIGINAL 2005 COMPLAINT AND SUCCESSIVE
6 AMENDMENTS TO THAT COMPLAINT, PLAINTIFFS ALLEGE THAT APPLE NOT
7 ONLY DEVELOPED THIS TECHNOLOGICAL TIE, BUT ALSO MAINTAINED
8 THAT TIE THROUGH ISSUING PERIODIC SOFTWARE UPDATES TO ITS
9 PRODUCTS THAT BLOCKED PRODUCTS THAT OTHERWISE WOULD HAVE
10 ERODED THAT, THAT MONOPOLY.

11 AND THE SPECIFIC EVENT THAT IS MOST RELEVANT NOW IN THIS
12 CASE IS A COMPANY CALLED REAL NETWORKS IN 2004 DEVELOPED A
13 PRODUCT CALLED HARMONY. AND HARMONY --

14 **THE COURT:** AND IS REAL NETWORKS A PLAINTIFF.

15 **MS. SWEENEY:** REAL NETWORKS IS A COMPETITOR IN THE
16 MUSIC SIDE OF THE BUSINESS. IN OTHER WORDS, THEY HAVE
17 DIFFERENT KINDS OF MUSIC. THEY HAVE SUBSCRIPTION SERVICE AND
18 THEY ALSO SELL PERMANENT DOWNLOADS OF MUSIC, WHICH IS WHAT THE
19 ITUNES STORE SELLS.

20 **THE COURT:** BUT ARE THEY A PLAINTIFF?

21 **MS. SWEENEY:** NO, THEY ARE NOT, YOUR HONOR.

22 **THE COURT:** OKAY.

23 **MS. SWEENEY:** SO REAL NETWORKS DEVELOPED THIS PRODUCT
24 THAT ENABLED IPOD USERS TO PURCHASE SONGS DIRECTLY FROM REAL
25 NETWORKS AND PLAY THEM ON THEIR IPOD. AND THE WAY THAT -- I

1 SHOULD BACK UP A MOMENT.

2 THE TECHNOLOGICAL TIE THAT I REFERRED TO WAS PUT ON BY
3 APPLE IN PART IN RESPONSE TO A REQUIREMENT THAT THEY HAD FROM
4 THE RECORD LABELS WHO WANTED WHAT'S CALLED DRM, DIGITAL RIGHTS
5 MANAGEMENT PROTECTION SO THAT SONGS COULDN'T JUST BE COPIED
6 ENDLESSLY AFTER THEY WERE PURCHASED.

7 SO WHAT REAL NETWORKS DID WAS, UNLIKE SOME OF THESE
8 HACKERS THAT YOU'VE READ ABOUT, THEY FIGURED OUT A WAY TO DO
9 IT THAT PRESERVED THE DRM SO THE RECORD LABELS WERE HAPPY, THE
10 CONSUMERS WERE HAPPY BECAUSE THEY COULD BUY ALL THESE MUSIC
11 DOWNLOADS, THEY COULD PLAY THEM ON THEIR IPOD. TWO YEARS
12 LATER WHEN THEIR IPOD BREAKS OR IS STOLEN AND THEY WANT TO GET
13 A NEW PLAYER, THEY DON'T HAVE TO BUY ANOTHER IPOD, THEY CAN GO
14 BUY A COMPETING PRODUCT FROM RIO, OR CREATIVE, OR WHOEVER. SO
15 THAT'S WHAT HAPPENED IN 2004.

16 APPLE REACTED SWIFTLY AND SORT OF VIOLENTLY, IN OUR VIEW.
17 THEY -- THEY ISSUED A PRESS REPORT -- A PRESS RELEASE
18 ATTACKING THIS COMPANY, AND THEN THEY QUICKLY ISSUED SOFTWARE
19 UPDATES THAT ESSENTIALLY DISABLED THIS INTEROPERABILITY. AND
20 THAT'S WHAT WE CALL NOW IN OUR COMPLAINT THE 4.7 UPDATE.

21 NOW, IN OUR ORIGINAL COMPLAINT, BACK IN 2005, WE DIDN'T
22 KNOW IT WAS CALLED 4.7, SO WE DIDN'T CALL IT THAT, BUT THAT
23 WAS 4.7 AND THAT WAS IN 2005.

24 NOW, MEANWHILE THE CASE IS BEING LITIGATED IN FRONT OF
25 JUDGE WARE. AND HE HEARD A NUMBER OF SUMMARY JUDGMENT AND --

1 MOTIONS, AS WELL AS MOTIONS TO DISMISS. HE DISMISSED
2 PLAINTIFFS' TYING CLAIM UNDER SECTION 1 OF THE SHERMAN ACT.
3 THIS WAS THE TECHNOLOGICAL TIE CLAIM. AND HE ALSO DISMISSED
4 PLAINTIFFS' STATE LAW CLAIMS, BUT HE PRESERVED PLAINTIFFS'
5 SECTION 2 MONOPOLIZATION CLAIM.

6 AND IN THE MOST RECENT ORDER THAT HE ISSUED, THIS IS A
7 SUMMARY -- PARTIAL SUMMARY JUDGMENT ORDER, PLAINTIFF HAD
8 ALLEGED THAT APPLE HAD MAINTAINED ITS MONOPOLY IN THE MARKET
9 FOR PORTABLE DIGITAL MEDIA PLAYERS FROM NOT JUST ONE SOFTWARE
10 UPDATE, IT'S NOT JUST 4.7, BUT ALSO A SUBSEQUENT ONE.

11 SO AFTER APPLE ISSUED 4.7 AND DISABLED HARMONY, HARMONY
12 KEPT AT IT. THEY DEVELOPED ANOTHER PRODUCT. THEY CAME BACK
13 IN. THEY GOT THE PRODUCTS TO TALK TO EACH OTHER AGAIN. AND
14 APPLE SUBSEQUENTLY ISSUED ANOTHER SOFTWARE UPDATE -- I SHOULD
15 SAY SOFTWARE AND FIRMWARE. IT ALSO AFFECTED SOME FIRMWARE ON
16 THE IPOD -- CALLED 7.0.

17 SO IN THE LAST SUMMARY JUDGMENT MOTION, JUDGE WARE HELD
18 THAT 4.7 WAS NOT AN ANTICOMPETITIVE ACT BY APPLE. AND THE
19 REASON HE HELD THAT WAS THAT HE FOUND THAT THEIR -- THE
20 PRODUCT ACTUALLY -- THE SOFTWARE UPDATE ACTUALLY HAD SOME
21 PRODUCT IMPROVEMENTS. IT WASN'T SIMPLY TO DISABLE
22 REALNETWORKS. AND HE RELIED ON A CASE CALLED TYCO. WE
23 HAPPENED TO DISAGREE WITH JUDGE WARE'S INTERPRETATION OF THAT
24 CASE, BUT THAT'S THE BASIS FOR HIS RULING.

25 HOWEVER, JUDGE WARE HELD THAT THERE WASN'T EVIDENCE, THERE

1 WASN'T AN UNDISPUTED MATERIAL FACT AS TO 7.0 AND HE PROCEEDED
2 (SIC) PLAINTIFFS' TO PURSUE THAT CLAIM.

3 SO, IN OTHER WORDS, JUDGE WARE HAS SIGNIFICANTLY NARROWED
4 THE SCOPE OF THE CASE IN TERMS OF THE CLASS PERIOD. THE CLASS
5 PERIOD IS NOW FROM 2006 THROUGH 2009. AND I SHOULD TELL YOU
6 WHAT HAPPENED IN 2009.

7 IN 2009, BEGINNING WITH APPLE'S COMPETITORS, AMAZON,
8 WAL-MART, ET CETERA, THE RECORD LABELS DECIDED THEY WERE GOING
9 TO GO DRM FREE. THEY HEARD THE CONSUMERS. CONSUMERS
10 COMPLAINED ABOUT BEING LOCKED INTO ONE PARTICULAR PRODUCT.
11 THEY WANTED TO EXPERIMENT WITH DIFFERENT PRODUCTS, USE MUSIC
12 FROM ONE SOURCE ON A PRODUCT, ON A DEVICE PURCHASED FROM
13 ANOTHER SOURCE.

14 SO, THE LABELS GOT RID OF DRM FOR APPLE'S COMPETITORS. BY
15 THE END OF MARCH 2009, THE LABELS GOT RID OF DRM ALSO ON THE
16 SONGS THAT IT SOLD TO APPLE. SO, APPLE'S WHOLE LIBRARY NOW IS
17 DRM FREE. THAT'S WHY THE CLASS PERIOD ENDS WHEN IT ENDS
18 BECAUSE THE MUSIC WENT DRM FREE AND THE LOCK IS NO LONGER
19 THERE.

20 SO THAT'S THE SORT OF STATUS. AND LIKE I SAID, THE CLASS
21 HAS BEEN CERTIFIED. THE CLASS HAS BEEN SENT NOTICE.

22 WE'RE NOW IN A POSITION WHERE SUMMARY JUDGMENT IS FULLY
23 BRIEFED. PLAINTIFFS HAVE MOVED TO EXCLUDE PORTIONS OF
24 DEFENDANT'S ECONOMIST'S TESTIMONY. APPLE HAS MOVED TO EXCLUDE
25 PLAINTIFFS' PRINCIPAL ECONOMICS EXPERT, AND I THINK THAT'S

1 WHERE WE ARE.

2 IF YOU WANT, I CAN RESPOND TO APPLE'S SUMMARY JUDGMENT OR
3 WE CAN HEAR FROM MR. MITTELSTAEDT NOW, OR WHATEVER YOU PREFER,
4 YOUR HONOR.

5 **THE COURT:** WHY DON'T I HEAR FROM HIM FIRST.

6 **MR. MITTELSTAEDT:** AS YOUR HONOR KNOWS FROM JUST
7 LOOKING AT THE FILE AND THE DATE OF THIS CASE, IT DOES GO BACK
8 A LONG WAYS.

9 I THINK THAT WHAT'S PERTINENT ABOUT WHAT HAPPENED BEFORE
10 IS IT SHOWS HOW NARROW THE CASE IS AND WHY WE HAVE NOW MOVED
11 FOR SUMMARY JUDGMENT ON THE QUESTION OF WHETHER THEY CAN SHOW
12 ANY IMPACT FROM THE ALLEGED EXCLUSIONARY ACT, WHICH NOW IS
13 DOWN TO ONE THING, AND IT'S THE UPDATE TO ITUNE 7.0 WHICH WAS
14 ISSUED IN SEPTEMBER 2006.

15 BEFORE I GET TO THAT, IF I CAN JUST TAKE A COUPLE OF
16 MINUTES ON THE QUICK BACKGROUND AND FILL IN A COUPLE OF THE
17 GAPS.

18 IF WE GO BACK TO THE EARLY 2000'S, PEOPLE WERE BUYING
19 MUSIC AT BRICK AND MORTAR STORES IN THE FORM OF CD'S AND
20 PEOPLE WERE DOWNLOADING MUSIC ON THE FIRST FORM OF NAPSTER AND
21 A COUPLE OF OTHER PEER-TO-PEER NOW ILLEGAL FILE SHARING
22 SERVICES.

23 STEVE JOBS CAME UP WITH THIS IDEA OF HAVING AN IPOD THAT
24 COULD PLAY DIGITAL MUSIC, WHICH WAS A TREMENDOUS ADVANCE
25 COMPARED TO THE OLD BOOMBOXES AND THE BIG CD PLAYERS. AND HE

1 ALSO HAD THIS IDEA OF HAVING A STORE, AN ONLINE STORE WHERE
2 YOU COULD BUY DIGITAL MUSIC THAT WOULD COMPETE WITH THE FREE
3 ILLEGAL DOWNLOADS THAT PEOPLE WERE PROVIDING.

4 AND WHEN HE WENT TO THE RECORD LABELS, AND THEY -- THEY
5 WERE FIGHTING PIRACY TOOTH AND NAIL. AND JOBS GOES TO THE
6 RECORD LABELS AND SAID, I'VE GOT THIS GREAT IDEA; I'M GOING TO
7 SELL YOUR MUSIC ONLINE IN DIGITAL FORM. AND THE RECORD LABELS
8 PUSHED BACK AND SAID, THAT'S JUST GOING TO ENCOURAGE MORE
9 PIRACY.

10 SO THE DEAL THEY STRUCK WAS THAT APPLE COULD SELL DIGITAL
11 MUSIC ONLINE FROM THE RECORD LABELS, BUT THEY HAD TO PUT A
12 DIGITAL RIGHTS MANAGEMENT, SOME PIRACY PROTECTION ON IT.

13 AND THEN APPLE SAT DOWN AND SAID, WELL, WHAT KIND OF DRM
14 ARE WE GOING TO USE? CONSISTENT WITH APPLE'S PROCESS OF
15 WANTING TO HAVE EVERYTHING WORK TOGETHER EVERYTHING MADE BY
16 APPLE, APPLE SAID, WE WANT TO HAVE OUR OWN PROPRIETARY DRM.

17 THEY COULD HAVE USED MICROSOFT. MICROSOFT HAD A DRM THAT
18 SUPPOSEDLY WORKED ON EVERYTHING, BUT THEY DECIDED TO USE THEIR
19 OWN. SO THEY ENDED UP WITH A MUSIC STORE AND AN IPOD. THE
20 IPOD PLAYED A LOT OF MUSIC IN ADDITION TO MUSIC BOUGHT FROM
21 APPLE AT THE ITUNES MUSIC STORE, BUT IT ALSO BOUGHT MUSIC FROM
22 THE ITUNES MUSIC STORE. AND THEY WORKED REALLY WELL TOGETHER.
23 ITUNES, WHICH WAS THE JUKEBOX, THE DIGITAL JUKEBOX, ITUNES
24 MUSIC STORE, AND THEN THE IPOD. THEY WORKED GREAT TOGETHER.

25 THEN THE PLAINTIFFS COME ALONG REPRESENTING SOME

1 CONSUMERS, AND THEY SAY THAT THAT SETUP WAS ILLEGAL BECAUSE
2 THE MUSIC ITUNES APPLE WAS SELLING AT THE ITUNES STORE
3 WOULDN'T PLAY WITH OTHER PLAYERS THAT USED SOME DIFFERENT DRM.
4 SO THEY WERE BASICALLY SAYING, AS WE INTERPRETED IT, EVERYBODY
5 SHOULD USE MICROSOFT'S GENERIC DRM SO EVERYTHING WILL BE
6 INTEROPERABLE.

7 THEY MADE A TYING CLAIM, AND THE ESSENCE OF THE TYING
8 CLAIM WAS THAT APPLE WAS TYING MUSIC TO IPODS. JUDGE WARE
9 DISMISSED THAT CLAIM AND FOUND THAT UNDER THE FOREMOST PRO
10 CASE IN THE NINTH CIRCUIT THERE IS NO DUTY TO MAKE YOUR
11 PRODUCTS INTEROPERABLE. SO HE THREW THAT -- THEIR BASIC
12 MONOPOLIZATION TYING CLAIM OUT OF THE CASE.

13 THEN THEY CAME BACK AND AMENDED, AND THERE WERE A LOT OF
14 PROCEDURAL THINGS BACK AND FORTH, BUT FINALLY THEY ENDED UP
15 WITH A CLAIM BASED ON WHAT HAPPENED AFTER THEY FILED THE
16 COMPLAINT, WHICH WAS ITUNES 7.0 IN SEPTEMBER 2006. THEY HAD
17 THAT AND THE EARLIER ITUNES 4.7.

18 THE EFFECT OF BOTH OF THOSE WAS TO DISABLE MUSIC FROM
19 REALNETWORKS THAT USED THIS HARMONY SOFTWARE. AND WHAT
20 HARMONY DID, WHAT REALNETWORKS DID WITH ITS HARMONY SOFTWARE
21 IS, AS THEY SAID IN THE COMPLAINT, SOMEHOW REALNETWORKS, IN
22 THEIR WORDS, DISCERNED THE SOURCE CODE IN APPLE'S DRM AND MADE
23 HARMONY SO IT MIMICKED IT. AND APPLE DID RESPOND BY SAYING,
24 YOU KNOW, THAT'S HOW HACKERS DO IT. IF YOU WANT TO DEVELOP
25 YOUR OWN DRM, YOU HAVE YOUR OWN MUSIC STORE, DO IT YOURSELF.

1 DON'T HACK INTO OURS OR DISCERN OUR CODE.

2 SO, THREE MONTHS LATER AFTER HARMONY WAS INITIALLY
3 LAUNCHED, APPLE UPDATED ITS DRM, AND IT CHANGED THE DRM, AS IT
4 DID FROM TIME TO TIME, TO STAY ONE STEP AHEAD OF THE HACKERS.
5 AND WHEN IT CHANGED ITS DRM, THAT MEANT THAT HARMONY WOULD NO
6 LONGER WORK BECAUSE THEY WERE MIMICKING THE DRM.

7 SO AT EACH TURN IN THIS CASE, WE WOULD HAVE CASE
8 MANAGEMENT CONFERENCES WITH JUDGE WARE, AND I WOULD TELL HIM
9 MY VIEW WAS THAT THERE WAS NO MERIT TO THIS CASE AND IT OUGHT
10 TO COME TO AN END. HE FINALLY SAID, OKAY, MAKE A SUMMARY
11 JUDGMENT MOTION ON THE TWO UPDATES.

12 WE DID THAT, AND HE RULED THAT UNDER THE TYCO CASE IN THE
13 NINTH CIRCUIT, THE FIRST 4.7, THE FIRST UPDATE, WAS INDEED A
14 PRODUCT IMPROVEMENT. THERE'S NO DISPUTED FACT ABOUT THAT. IT
15 STOPPED THE HACKERS, AND SO IT WAS LAWFUL. BUT HE FOUND THERE
16 WERE DISPUTED FACTS ON WHETHER THE SECOND ONE WAS A PRODUCT
17 IMPROVEMENT, AND SO THAT CLAIM PROCEEDED.

18 AT THAT POINT WE CAME TO YOUR HONOR'S COURT. WE WORKED
19 OUT AN EXPERT DISCOVERY SCHEDULE AND THE EXPERT DISCOVERY HAS
20 NOW BEEN COMPLETED.

21 THEIR IMPACT THEORY, THEIR THEORY ON HOW THIS 7.0 UPDATE
22 IMPACTED IPOD PRICES IS VERY CONVOLUTED, BUT IT BASICALLY IS
23 WHAT'S CALLED A LOCK IN. THEIR THEORY WAS THAT FROM THE VERY
24 START OF ITUNES MUSIC STORE WHEN CUSTOMERS BOUGHT ITUNES MUSIC
25 THAT WORKED WELL WITH IPODS, IT DIDN'T WORK WITH SOME OTHER

1 PLAYERS, SO CONSUMERS, AS THEY PUT IT, WERE LOCKED IN. ALL
2 THAT MEANS IN ECONOMIC TERMS IS THEIR SWITCHING COSTS WERE
3 GREATER THAN IF THEY WENT TO SOME OTHER DEVICE.

4 SO, AT THAT POINT THEIR WHOLE CLAIM WAS BASED ON THIS, THE
5 LOCK IN FROM DAY ONE, IN APRIL OF 2003 WHEN THE STORE WAS
6 LAUNCHED FOR '03, '04, '05, '06, PEOPLE WERE LOCKED IN,
7 THEREFORE, THEY WERE MORE LIKELY TO BUY IPODS. THAT INCREASED
8 THE DEMAND FOR IPODS AND, THEREFORE, THE PRICE OF IPODS WOULD
9 GO UP ALL BECAUSE THEY SAY BECAUSE OF THE ILLEGAL LOCK IN.

10 WHEN JUDGE WARE RULED THAT THE LOCK IN CAUSED BY THE
11 TECHNOLOGICAL TIE WAS COMPLETELY LAWFUL, THEN THEY WERE STUCK
12 WITH THE THEORY WHERE THEY SAID ALL THESE PEOPLE WERE LOCKED
13 IN AND NOW WHAT THEY HAD TO DO WAS SHOW THAT 7.0, INTRODUCED
14 VERY LATE IN THE GAME IN SEPTEMBER OF '06, INCREMENTALLY
15 INCREASED LOCK IN ENOUGH TO RAISE THE PRICE OF IPODS
16 UNLAWFULLY.

17 AND OUR VIEW IS THAT THAT THEORY IS REALLY HARD TO FOLLOW
18 AS A THEORETICAL MATTER BECAUSE IT IS A VERY LIMITED UNIVERSE
19 OF PEOPLE WHO WOULD CONCEIVABLY BE LOCKED IN INCREMENTALLY.

20 AND WHAT WE HAVE SAID IN THE SUMMARY JUDGMENT MOTION, YOUR
21 HONOR, IS THAT THEY HAVE NO REAL WORLD EVIDENCE, NO EVIDENCE
22 THAT ANYBODY WAS LOCKED IN BECAUSE OF 7.0. IT REQUIRES
23 SOMEBODY WHO DIDN'T WANT TO BUY AN IPOD EVEN THOUGH THEY HAD
24 AN IPOD. IT INVOLVES SOMEBODY WHO WASN'T ALREADY LOCKED IN BY
25 THREE YEARS OF PURCHASES. IT INVOLVES SOMEBODY WHO WAS GOING

1 TO BUY MUSIC FROM REALNETWORKS, AND THEN AFTER 7.0 HAD TO
2 SWITCH TO ITUNES, AND THEN HAD TO BUY SO MUCH MUSIC THAT WHEN
3 IT CAME TO TIME TO DO A REPLACEMENT PURCHASE, THEY WANTED TO
4 BUY SOMETHING ELSE BUT THEY WERE STUCK BUYING AN IPOD.

5 THE NAMED PLAINTIFFS DO NOT FIT THAT DESCRIPTION. THEY DO
6 NOT CLAIM THAT THEY WANTED TO BUY REALNETWORKS AND THEY WERE
7 LOCKED IN BY, YOU KNOW, HAVING TO SWITCH TO ITUNES BECAUSE OF
8 7.0. SO THE NAMED PLAINTIFFS DON'T FIT THE DESCRIPTION OF
9 SOMEBODY THAT WAS IMPACTED.

10 **THE COURT:** THE SUMMARY JUDGMENT DOESN'T DEAL WITH
11 THAT ISSUE; IS THAT CORRECT?

12 **MR. MITTELSTAEDT:** THE SUMMARY JUDGMENT GOES TO THE
13 IMPACT ISSUE. AND WHAT WE SAY IS THEY HAVE NO EVIDENCE TO
14 SUPPORT THEIR THEORY OF LOCK IN.

15 SO, WHAT WE MEAN BY THAT IS THE PLAINTIFFS DON'T SUPPORT
16 IT. THEY HAVE TAKEN NO SURVEY OF CONSUMERS TO SUPPORT IT.
17 THEY HAVE NO DOCUMENTARY EVIDENCE.

18 IF THIS WAS SUCH A BIG DEAL, YOU WOULD THINK THERE WOULD
19 BE COMPLAINTS BY CONSUMERS TO APPLE OR TO SOMEBODY ELSE. THEY
20 SUBMITTED A LOT OF COMPLAINTS ABOUT A LOT OF THINGS THAT
21 CONSUMERS SUBMITTED TO APPLE, BUT NONE OF THEM SAY WE'RE
22 LOCKED IN OR LOCKED OUT BECAUSE OF 7.0.

23 AND SO THEY HAVE, IN OUR VIEW, AND THIS IS WHAT THE
24 SUMMARY JUDGMENT MOTION SETS OUT, NO EVIDENCE THAT ANYBODY WAS
25 LOCKED OUT, LOCKED IN. AND MORE THAN THAT, WHAT THEY WOULD

1 HAVE TO SHOW IS THAT SO MANY PEOPLE WERE LOCKED IN, THAT THAT
2 EFFECTED IPOD DEMAND SO MUCH THAT APPLE WOULD TAKE THAT INTO
3 ACCOUNT IN SETTING ITS PRICES.

4 AND WHAT WE HAVE SHOWN IS THAT THERE'S NO EVIDENCE THAT
5 APPLE EVER TOOK THE EFFECTS OF 7.0 INTO ACCOUNT. THEIR EXPERT
6 SAYS, NOW HE'S DONE THIS REGRESSION ANALYSIS AND HE SAYS THERE
7 WOULD BE A RELATIVELY SMALL PRICE IMPACT.

8 BUT APPLE HAS A PRICING STRATEGY WHERE IT PRICES WHAT IT
9 CALLS AESTHETIC TERMS, 199, 299, SO FORTH. THEIR EXPERT SAYS
10 WHEN HE DOES HIS REGRESSION, THE PRICE THAT SPITS OUT OF THE
11 REGRESSION IS \$184.17. AND THE EVIDENCE IS UNCONTROVERTED
12 THAT APPLE WOULD NEVER CHARGE \$184.17. THEY WOULD CHARGE 199.

13 SO WHAT THE MOTION DOES IS SET FORTH THE ABSENCE OF
14 EVIDENCE THAT IS NEEDED TO SUPPORT THEIR LOCK-IN THEORY, AND
15 THE REAL WORLD EVIDENCE THAT REFUTES THEIR LOCK-IN THEORY.

16 ONE LAST EXAMPLE IS THEY SAY THAT THERE WOULD BE AN
17 IMMEDIATE ORDER CHARGE ON IPODS AND IT WOULD BE CONSTANT
18 DURING THE THREE YEARS OF THE CLASS PERIOD.

19 BUT THEIR LOCK-IN THEORY WOULD NOT KICK IN IMMEDIATELY.
20 INDEED, THEIR EXPERT HAS ADMITTED THAT THE -- IF THERE WAS ANY
21 IMPACT FROM 7.0, THE INITIAL IMPACT WOULD BE TO REDUCE THE
22 DEMAND FOR IPODS BECAUSE THERE'S ONE LESS SOURCE OF MUSIC TO
23 PLAY ON AN IPOD, SO THERE WOULD BE LESS DEMAND FOR AN IPOD
24 BASED ON THEIR LOCK-IN THEORY INITIALLY. SO THERE WOULD BE NO
25 IMMEDIATE ADVERSE IMPACT ON PRICE. AND THEN IF THERE WAS ANY

1 IMPACT ON PRICE, ACCORDING TO THEIR OWN THEORY, IT WOULD BE
2 GRADUAL AND NOT CONSTANT. BUT YET THEY COME UP WITH A
3 REGRESSION THAT SHOWS AN IMMEDIATE AND A CONSTANT EFFECT.

4 SO, THERE ARE REALLY TWO PARTS TO OUR MOTION, YOUR HONOR.
5 THE FIRST ONE THEY HAVE NO REAL WORLD EVIDENCE TO SUPPORT
6 THEIR IMPACT THEORY. AND THE SECOND PART IS THEIR ECONOMIST'S
7 REGRESSION ANALYSIS DOESN'T SAVE THEM BECAUSE IT, TOO, IS
8 CONTRARY TO ALL THESE REAL WORLD FACTS. AND PLUS IT SUFFERS
9 FROM A LOT OF MORE TECHNICAL, MORE TECHNICAL PROBLEMS. THAT'S
10 THE ESSENCE OF THE IMPACT PART OF THE SUMMARY JUDGMENT.

11 THE SECOND PART OF THE SUMMARY JUDGMENT GOES TO RELEVANT
12 MARKET. THIS IS A MONOPOLIZATION CASE. THEY ALLEGE WE
13 MONOPOLIZED THE MARKET IN WHICH IPODS PLAYED A PART. THEY
14 DEFINE THE MARKET VERY NARROWLY. THE ONLY EVIDENCE TO DEFINE
15 A MARKET NARROWLY -- DEFINE A MARKET AT ALL FROM THE
16 PLAINTIFFS IS, AGAIN, THEIR EXPERT. AND IN THE SUMMARY
17 JUDGMENT MOTION WE SET FORTH THE WAYS -- THE REASONS THAT THAT
18 EXPERT'S ANALYSIS OF THE MARKET IS INSUFFICIENT.

19 THAT'S THE ESSENCE OF IT, YOUR HONOR.

20 **MS. SWEENEY:** SHALL I RESPOND, YOUR HONOR?

21 **THE COURT:** YES, PLEASE.

22 **MS. SWEENEY:** OKAY.

23 ALL RIGHT. SO, I WANT TO TAKE ISSUE WITH A COUPLE OF
24 MR. MITTELSTAEDT'S COMMENTS.

25 FIRST OF ALL, IN -- HE SAID, AND I THINK HE MISSPOKE, HE

1 SAID THAT JUDGE WARE THREW OUT THE MONOPOLIZATION CLAIMS.
2 THAT'S NOT TRUE. WE HAVE A MONOPOLIZATION CLAIM. IT HAS BEEN
3 IN THE CASE SINCE THE GET-GO AND THAT CLAIM IS STILL IN
4 EFFECT.

5 NOW, GOING TO THE IMPACT ARGUMENT AND THE LOCK-IN THEORY.
6 APPLE HAS SORT OF CREATED THIS FALSE STANDARD THAT IT ASSERTS
7 PLAINTIFFS MUST MEET. AND WHAT APPLE IGNORES IS THAT THIS IS
8 A STRAIGHTFORWARD MONOPOLIZATION CASE.

9 PLAINTIFFS CLAIM THAT BECAUSE OF ITS CONDUCT IN LOCKING IN
10 ITS USERS AND LOCKING OUT COMPETITORS BY -- BY DISABLING THIS
11 PRODUCT WHICH WOULD HAVE INCREASED THE PRICE ELASTICITY FOR
12 IPODS, APPLE WAS ABLE TO INCREASE THE PRICE OF ITS IPODS. AND
13 THERE IS NOTHING IN ECONOMIC THEORY, AND WE -- WE CITE TO
14 PROFESSION NOLL, AND HE HAS A VERY LONG DISCUSSION IN HIS
15 EXPERT REPORT ABOUT WHY APPLE'S THEORY DOES NOT MAKE SENSE AS
16 AN ECONOMIC MATTER.

17 OUR EXPERT IS PROFESSOR ROGER NOLL.

18 **THE COURT:** I KNOW WHO HE IS.

19 **MS. SWEENEY:** OKAY. SO -- AND THEN, IN ADDITION,
20 APPLE CLAIMS THAT THERE'S NO REAL WORLD EVIDENCE THAT ANYONE
21 CARED ABOUT THIS. WE HAVE THOUSANDS OF COMPLAINTS FROM
22 CONSUMERS WHO COMPLAIN ABOUT NOT BEING ABLE TO USE MUSIC
23 PURCHASED FROM OTHER SOURCES ON THEIR IPODS.

24 NOW, WE ONLY CITED A CERTAIN NUMBERS OF THEM IN OUR
25 SUMMARY JUDGMENT OPPOSITION IN ORDER NOT TO OVERBURDEN THE

1 COURT WITH EVERY SINGLE EXAMPLE. AND WHAT'S MORE, CONTRARY TO
2 WHAT MR. MITTELSTAEDT SAID, OUR PLAINTIFFS TESTIFIED AND WE
3 HAVE THE TESTIMONY ALSO IN OUR OPPOSITION, THAT THEY -- AFTER
4 THEIR FIRST IPOD PURCHASE, THEIR SECOND OR PERHAPS THIRD IPOD
5 PURCHASES WERE BECAUSE THEY HAD ASSEMBLED A LIBRARY OF MUSIC
6 THAT THEY PURCHASED FROM THE ITUNES STORE, AND IT WOULD HAVE
7 BEEN TOO COSTLY TO SWITCH TO ANOTHER PRODUCT.

8 SO THAT'S SIMPLY NOT TRUE THAT THERE'S NO REAL WORLD
9 EVIDENCE. THERE, A, IS NO ECONOMIC THEORY BEHIND APPLE'S
10 ARGUMENT AND, B, IT'S NOT TRUE THAT THERE'S NO REAL WORLD
11 EVIDENCE TO SUPPORT PLAINTIFFS' LOCK-IN THEORY.

12 NOW, PROFESSOR NOLL TOOK ALL OF APPLE'S TRANSACTIONAL DATA
13 AND CONDUCTED A VERY THOROUGH --

14 **THE COURT:** CAN YOU EXPLAIN THAT? I'M TRYING TO
15 UNDERSTAND HOW THEY SAY THAT THEY ARE DAMAGED. SO, THEY ARE
16 DAMAGED BECAUSE --

17 **MS. SWEENEY:** YEAH, I CAN EXPLAIN THAT, YOUR HONOR.
18 ALL RIGHT. SO PROFESSOR NOLL'S ANALYSIS IS A
19 MULTIVARIABLE REGRESSION ANALYSIS, AND IT'S INTENDED TO AND
20 DOES SHOW TWO THINGS. ONE, IT QUANTIFIES THE DAMAGES, BUT
21 ALSO DEMONSTRATES IMPACT. IT DEMONSTRATES THE FACT OF
22 DAMAGES. THIS IS WHAT HE DOES. HE TAKES -- HE STARTS WITH A
23 HEDONIC, IT'S CALLED A HEDONIC PRICE REGRESSION.

24 SO HE LOOKS AT THE DIFFERENT FACTORS THAT WOULD EFFECT THE
25 PRICE OF AN IPOD, AND THEN HE PLUGS INTO THE EQUATION A NUMBER

1 OF WHAT HE CALLS COMPETITIVE VARIABLES.

2 SO, FOR EXAMPLE, THE INTRODUCTION OF HARMONY IN 2004.
3 APPLE'S DISABLING OF HARMONY WITH 4.7 AND THEN APPLE'S
4 SUBSEQUENT DISABLING OF HARMONY WITH 7.0, AND THEN HE ALSO
5 LOOKS AT WHAT HAPPENS WHEN THE MUSIC INDUSTRY GOES DRM FREE.

6 AND WHAT PROFESSOR NOLL FINDS IS EXACTLY CONSISTENT WITH
7 HIS ECONOMIC THEORY, AND, THAT IS, WHEN HARMONY WAS
8 INTRODUCED, IPOD PRICES WENT DOWN. WHEN HARMONY WAS DISABLED,
9 IPOD PRICES WENT UP. WHEN THE MUSIC INDUSTRY WENT DRM FREE,
10 IPOD PRICES WENT DOWN.

11 SO, IN OTHER WORDS, THERE IS A VERY RECOGNIZABLE AND
12 SIGNIFICANT IMPACT THAT ARISES FROM APPLE'S CONDUCT OF
13 SHUTTING OUT THIS ONE COMPETITOR WHO TRIED TO MAKE AN INROAD
14 INTO APPLE'S MONOPOLIZATION.

15 **THE COURT:** BUT THE COMPETITOR IS NOT A PARTY.

16 **MS. SWEENEY:** THAT'S TRUE. AND HERE'S WHERE WE GET
17 TO HOW OUR CLIENTS' CONSUMERS AND BUSINESSES WERE IMPACTED.

18 SO WHAT PROFESSOR NOLL'S REGRESSION ANALYSIS DOES, IT
19 QUANTIFIES THE IMPACT ON THE IPOD PURCHASERS. THOSE ARE THE
20 ONES WHO WERE INJURED BY APPLE'S CONDUCT. SO THAT INCLUDES
21 STORES LIKE BEST BUY. IT INCLUDES CONSUMERS WHO PURCHASED
22 FROM THE APPLE STORE. AND HE CONCLUDED THAT THEY SUFFERED
23 SIGNIFICANT DAMAGES. HE ESTIMATED THE AMOUNT OF OVERCHARGE
24 PAID BY THOSE PURCHASERS. HE ESTIMATED DAMAGES AT LITTLE OVER
25 \$350 MILLION FOR BOTH, WHAT WE CALL THE RESELLER SEGMENT OF

1 THE CLASS AND THE CONSUMER SEGMENT OF THE CLASS, AND THAT'S
2 SINGLE DAMAGES, YOUR HONOR.

3 SO THAT'S HOW WE GET TO IMPACT. WE RELY ON ECONOMIC
4 THEORY. IT'S A MONOPOLIZATION CLAIM, AND PROFESSOR NOLL HAS
5 DEMONSTRATED IMPACT THROUGH HIS REGRESSION ANALYSIS.

6 NOW, APPLE'S RESPONSE IS NOT ONLY TO ATTACK PROFESSOR
7 NOLL'S THEORY, BUT ALSO TO PICK APART HIS REGRESSION ANALYSIS.
8 AND IT HAS A NUMBER OF CRITICISMS. APPLE BRINGS IN ITS OWN
9 EXPERTS. ONE OF THOSE CRITICISMS IS THAT PROFESSOR NOLL'S
10 RESULTS SUPPOSEDLY ARE NOT STATISTICALLY SIGNIFICANT. AND
11 APPLE SAYS THIS IS BECAUSE PROFESSOR NOLL SHOULD HAVE
12 CLUSTERED THE ERRORS, CLUSTERED THE STANDARD ERRORS, AND IF HE
13 HAD DONE THAT, THEN HE WOULD FIND THAT THE RESULTS AREN'T
14 SIGNIFICANT SO YOU CAN'T REPLY UPON THEM.

15 WELL, THAT THEORY SIMPLY DOES NOT HOLD UP UNDER THESE
16 FACTUAL CIRCUMSTANCES BECAUSE IT'S -- IT'S A VERY SPECIALIZED
17 ECONOMIC -- ECONOMETRIC ISSUE WHICH APPLIES IN OTHER CASES,
18 FOR EXAMPLE, WHERE YOU DRAW A, WHAT'S CALLED A CLUSTER SAMPLE
19 OF DATA. HERE WE HAVE THE ENTIRE UNIVERSE OF DATA. WE HAVE
20 EVERY APPLE IPOD TRANSACTION FOR THE CLASS PERIOD. SO WE HAVE
21 MOVED TO EXCLUDE APPLE'S EXPERT'S TESTIMONY ON THE CLUSTERING
22 ANALYSIS.

23 AND WE PUT IN ANOTHER DECLARATION BY PROFESSOR NOLL AND WE
24 ALSO PUT IN A DECLARATION BY A PROFESSOR AT MICHIGAN STATE
25 UNIVERSITY, PROFESSOR WOOLDRIDGE WHO IS AN ECONOMETRICIAN WHO

1 SPECIALIZES IN THIS FAIRLY ESOTERIC AREA OF SAMPLING AND
2 CLUSTER SAMPLING. SO WE -- NOT ONLY DO WE DISAGREE, WE ARE
3 MOVING TO EXCLUDE THAT OPINION ALTOGETHER.

4 APPLE ALSO CRITICIZES PROFESSOR NOLL FOR OMITTING WHAT
5 THEY CALL SIGNIFICANT VARIABLES IN THE REGRESSION ANALYSIS.
6 NOW, PROFESSOR NOLL RESPONDED TO THAT CRITICISM, AND WE THINK
7 IT'S COMPLETELY UNMERITED. HE LOOKED AT ALL THE DIFFERENT
8 FACTORS THAT AFFECT PRICE, AND THERE ARE A FEW FACTORS THAT
9 APPLE SAYS HE SHOULD HAVE INCLUDED IN HIS ANALYSIS. PROFESSOR
10 NOLL LOOKED AT THOSE FACTORS AND CONCLUDED THAT THEY DON'T ADD
11 ANY EXPLANATORY POWER TO THE REGRESSION.

12 AND WHAT'S MORE, THEY -- BECAUSE THEY ARE CORRELATING WITH
13 ONE ANOTHER, THESE INDEPENDENT VARIABLES, THEY LEAD TO A
14 PROBLEM CALLED MULTICOLLINEARITY, WHICH WOULD DESTROY THE
15 EXPLANATORY POWER OF THE ANALYSIS.

16 THEY ALSO CLAIM -- AND THIS IS SORT OF AN ODD CRITICISM
17 THAT APPLE MAKES. APPLE -- ABOUT -- PROFESSOR NOLL PUT IN HIS
18 EXPERT REPORT ON DAMAGES LAST APRIL. AT THAT TIME PLAINTIFFS
19 WERE UNDER THE UNDERSTANDING BASED ON TESTIMONY AND A SWORN
20 DECLARATION BY APPLE'S WITNESS THAT ALL IPODS SOLD AFTER
21 SEPTEMBER 6TH, 2006 HAD THIS 7.0 UPDATE. AND SO THAT'S HOW HE
22 RAN THE REGRESSIONS BACK THEN.

23 WELL, SUBSEQUENT TO PUTTING THAT IN THE REPORT, APPLE
24 PRODUCED A CORRECTED DECLARATION FROM THIS EMPLOYEE. AND IT
25 TURNS OUT THAT NOT ALL IPODS HAD 7.0 ON IT. SO, IN OTHER

1 WORDS, SOME OF THEM WERE NOT UPDATED WITH THE 7.0 SOFTWARE
2 THAT DISABLED HARMONY. SO IN HIS REBUTTAL REPORT, PROFESSOR
3 NOLL TOOK THIS INTO ACCOUNT AND HE MODIFIED HIS REGRESSIONS.

4 NOW, INTERESTINGLY, APPLE HAS ATTACKED PROFESSOR NOLL FOR
5 MAKING THAT CORRECTION. AND THEY SAY THAT IF YOU MAKE THIS
6 CORRECTION, YOU ADD IN THESE FACTORS THAT THEY SAY ARE
7 IMPORTANT, AND YOU TREAT ALL THE REGRESSION ANALYSIS AS IF 7.0
8 AFFECTED IPODS THAT WE NOW KNOW WERE NOT AFFECTED, THEN YOU
9 END UP WITHOUT ANY DAMAGES. IT'S A -- IT'S A VERY SORT OF
10 STRANGE ARGUMENT, BUT CONVENIENTLY GETS APPLE TO ZERO DAMAGES
11 AND, THEREFORE, ZERO IMPACT.

12 SO WE OBVIOUSLY CONTEST APPLE'S CRITICISM OF PROFESSOR
13 NOLL'S IMPACT AND DAMAGES REPORT.

14 **THE COURT:** IS THERE A MOTION, A DAUBERT MOTION?

15 **MS. SWEENEY:** THERE IS. YOUR HONOR, WE HAD MOVED TO
16 EXCLUDE, AS I SAID, THE CLUSTERING PORTIONS OF APPLE'S EXPERT
17 OPINIONS AND APPLE HAS MOVED TO EXCLUDE ALL OF PROFESSOR
18 NOLL'S OPINION.

19 **MR. MITTELSTAEDT:** YOUR HONOR, COULD I FILL IN ONE
20 PART THERE?

21 **THE COURT:** HOLD ON.

22 I'M STILL TRYING TO UNDERSTAND THE CONNECTION BETWEEN THE
23 DAMAGES ANALYSIS, THE CAUSATION, THE NEXUS BETWEEN A PURCHASER
24 AND --

25 **MS. SWEENEY:** SURE.

1 **THE COURT:** -- AND WHAT?

2 **MS. SWEENEY:** SURE. YEAH.

3 **THE COURT:** WHERE IS THE NEXUS TO WHAT PROFESSOR NOLL
4 IS OPINING ON?

5 **MS. SWEENEY:** SURE.

6 MEMBERS OF THE CLASS PURCHASED IPODS THAT WE ALLEGE APPLE
7 CHARGED INFLATED PRICES FOR. AND THE REASON APPLE WAS ABLE TO
8 DO THAT WAS BECAUSE IT HAD MONOPOLY POWER IN THIS MARKET. AND
9 THE WAY --

10 **THE COURT:** BUT --

11 **MS. SWEENEY:** YEAH.

12 **THE COURT:** OKAY. GO AHEAD.

13 **MS. SWEENEY:** SO, THE LOCK IN OCCURS BECAUSE ONCE AN
14 IPOD USER ASSEMBLES A LIBRARY OF SONGS THAT ARE PURCHASED FROM
15 ITUNES, AND BACK THEN THEY WERE PRETTY MUCH 99 CENTS A SONG,
16 YOU CAN GET TO A FAIRLY SIGNIFICANT SUM OF MONEY PRETTY
17 QUICKLY -- ONCE YOU ACQUIRE A LIBRARY OF ITUNE SONGS YOU
18 PURCHASED FROM APPLE'S ITUNE STORE --

19 **THE COURT:** HOW DOES THAT RELATE TO THIS 7.0 UPGRADE
20 THAT DEALT WITH THIS PARTY THAT'S NOT -- THIS ENTITY THAT'S
21 NOT A PARTY?

22 **MS. SWEENEY:** WELL, THIS IS -- BECAUSE IT'S A
23 MONOPOLIZATION CASE. WHAT HARMONY -- WHAT REALNETWORKS DID
24 WAS IT UNDERMINED APPLE'S MONOPOLY. AND APPLE WAS ABLE TO
25 MAINTAIN SUPER COMPETITIVE PRICES AS A RESULT OF HAVING THIS

1 MONOPOLY.

2 **THE COURT:** WELL, IS THERE AN ANALYSIS -- I'VE BOUGHT
3 PLENTY OF IPODS. I CAN'T NOW REMEMBER IN 2005, YOU KNOW, WHAT
4 ELSE WAS ON THE MARKET AT THE TIME AND WHETHER -- SOMETIMES
5 WHAT WE DO SEE IS WE SEE AN ANALYSIS OF VARIOUS PRODUCTS IN
6 THE MARKET. I JUST -- I'M STRUGGLING TO THINK BACK AND FIGURE
7 OUT WHAT THE MARKET LOOKED LIKE AT THAT JUNCTURE.

8 **MS. SWEENEY:** WELL, PROFESSOR NOLL HAS ANALYZED THE
9 MARKET IN HIS EXPERT REPORT, YOUR HONOR, AND HE DESCRIBES THE
10 VARIOUS PRODUCTS THAT WERE ON THE MARKET, AND THEIR PROS AND
11 CONS, AND EXPLAINS HOW APPLE WAS ABLE TO ACHIEVE A HUGE MARKET
12 SHARE. AND PART OF THE REASON THAT INITIALLY ARRIVED AT ITS
13 MONOPOLY POWER WAS THROUGH THIS LOCK-IN EFFECT CREATED BY ITS
14 TIE --

15 **THE COURT:** BUT THAT WAS THROWN OUT OF THE CASE.

16 **MS. SWEENEY:** THAT'S RIGHT. BUT WHAT PERSISTED, YOUR
17 HONOR, WHAT WE CHALLENGE AND WHAT JUDGE WARE PERMITTED US TO
18 PURSUE IS THE CLAIM THAT APPLE -- ONCE THERE WERE CHINKS IN
19 THE ARMOR, IN OTHER WORDS, JUDGE WARE HELD IT WAS OKAY FOR
20 APPLE TO ESTABLISH THE MONOPOLY IN THE FIRST INSTANCE, BUT THE
21 LAW SAYS, THE LAW OF MONOPOLIZATION SAYS YOU CAN ACQUIRE A
22 MONOPOLY LEGALLY, BUT YOU CAN TAKE CERTAIN ACTIONS THAT RENDER
23 THE CONTINUED MAINTENANCE OF THAT MONOPOLY ILLEGAL.

24 SO THAT'S REALLY WHAT IT IS, IT'S MONOPOLY MAINTENANCE
25 CLAIM. IN OTHER WORDS, APPLE TOOK DIRECT CONDUCT TO EXCLUDE

1 COMPETITORS TO MAINTAIN ITS MONOPOLY, AND THAT'S HOW IT KEPT
2 PRICES ABOVE WHAT THEY WOULD HAVE BEEN IN A COMPETITIVE MARKET
3 IN WHICH APPLE HAD NOT MAINTAINED ITS MONOPOLY.

4 **THE COURT:** ALL RIGHT. NOW YOU CAN RESPOND.

5 **MR. MITTELSTAEDT:** THEIR THEORY FROM THE START HAS
6 BEEN, THEIR THEORY OF IMPACT HAS BEEN LOCK IN. AND WHEN YOUR
7 HONOR ASKED TO LAY OUT THE THEORY, THE REASON THE RESPONSE WAS
8 AS IT IS IS BECAUSE WHEN YOU LAY OUT THE LOCK-IN THEORY
9 SPECIFICALLY, AND WHEN THEY SAY WHAT THEY WOULD HAVE TO PROVE,
10 IT'S CLEAR THAT THEY HAVEN'T PROVED IT AND THEY CAN'T PROVE IT
11 BECAUSE THERE IS -- IT'S COMPLETELY IMPLAUSIBLE AND COMPLETELY
12 UNPROVEN THAT THERE WOULD BE ANY IMPACT NOT FROM ITUNES STORE
13 IN GENERAL, BUT FROM 7.0. AND I WILL -- I'LL SAY THIS MORE
14 SLOWLY BECAUSE IT IS COMPLICATED TO TRY AND FIGURE OUT THIS
15 CHAIN OF EVENTS THAT WOULD HAVE TO HAPPEN FOR THEIR IMPACT
16 THEORY TO BE RIGHT.

17 FIRST OF ALL, IT WOULD NOT INCLUDE CONSUMERS WHO PREFER
18 IPODS FOR REASONS UNRELATED TO ITUNES MUSIC STORE. SO, IF YOU
19 LIKE AN IPOD BECAUSE IT'S SLEEK, IT PLAYS A LOT OF MUSIC, IT'S
20 BETTER THAN HUNDREDS OF THE OTHER PLAYERS THAT WERE ON THE
21 MARKET, YOU'RE GOING TO STAY WITH AN IPOD, AND ITUNES 7.0
22 ISN'T GOING TO INCREASE YOUR DEMAND FOR AN IPOD. SO, THEY
23 HAVE TO FIND PEOPLE WHO DIDN'T PREFER IPODS FOR REASONS
24 UNRELATED TO 7.0.

25 THEN THEY HAVE TO FIND PEOPLE WHO WERE NOT ALREADY, UNDER

1 THAT THEORY, LOCKED IN BECAUSE THEY HAD BIG ITUNES MUSIC STORE
2 LIBRARIES LONG BEFORE 7.0. SO THOSE TWO UNIVERSES OR SUBSETS
3 OF PEOPLE DON'T HELP THEM IN THIS CASE.

4 WHAT THEY NEED TO FIND, AND I TRIED TO WRITE THIS AS
5 PRECISELY AS I COULD, FOR THEIR LOCK-IN THEORY TO ARISE FROM
6 7.0, THEY NEED ONLY PEOPLE WHO OWNED IPODS AS OF
7 SEPTEMBER 2006 BUT WANTED TO SWITCH TO A NONIPOD BUT COULDN'T
8 SWITCH BECAUSE INSTEAD OF BUYING -- CONTINUING TO BUY MUSIC
9 FROM REALNETWORKS TO PLAY ON THE IPOD, AFTER 7.0 THEY SWITCHED
10 TO THE ITUNES MUSIC STORE AND, THEREFORE -- OR THEREAFTER
11 BUILT UP A LIBRARY AND THAT LED THEM TO BUY AN IPOD RATHER
12 THAN THEIR PREFERRED NONIPOD.

13 TO JUST SAY THAT THAT WAY I THINK SHOWS HOW IMPLAUSIBLE IT
14 IS THAT THERE'S ANYBODY IN THAT GROUP.

15 THE BASIS FOR OUR SUMMARY JUDGMENT IS IF THERE'S NOBODY IN
16 THAT GROUP, THE IMPACT ARGUMENT -- IMPACT THEORY IS DEAD AT
17 THE START. IF THERE ARE PEOPLE IN THE GROUP, THEY STILL NEED
18 TO SHOW THAT THE DEMAND IMPACT WAS HIGH ENOUGH, THAT APPLE
19 ACTUALLY TOOK IT INTO ACCOUNT, AND THAT APPLE WAS GOING TO
20 DEPART FROM ITS VERY, VERY FIRM POLICY OF ADHERING TO
21 AESTHETIC PRICING.

22 BUT EVEN ON THAT FIRST STEP, YOUR HONOR, YOU KNOW, WHO'S
23 IN THIS GROUP THAT'S SUPPOSEDLY LOCKED IN, OUR POINT IS, YOU
24 KNOW, THEY SAY THE PLAINTIFFS, BUT WHEN YOU LOOK AT THE
25 DEPOSITION TESTIMONY, IT'S CLEAR THE PURCHASES BY THE

1 PLAINTIFFS OF IPODS HAD NOTHING TO DO WITH 7.0 OR HARMONY.
2 THEY NEVER SAID THEY WERE GOING TO USE HARMONY. THEY NEVER
3 SAID 7.0 SWITCHED THEM BACK TO ITUNES AND THEN MADE THEM BUY
4 AN IPOD AGAINST THEIR WILL.

5 SO THE PLAINTIFFS, IF THEY'RE REPRESENTATIVE, YOU KNOW,
6 THAT MEANS THERE AREN'T PEOPLE IN THIS GROUP. BUT MORE THAN
7 THAT, THEY DON'T POINT TO ANYBODY WHO WAS. THEY DON'T TELL US
8 IT WAS A BIG GROUP. THEIR ONLY RESPONSE TO THAT, YOUR HONOR,
9 AND THIS IS IN THE THREE-PAGE LETTER IS THEY SAY WE'RE
10 SUPPOSEDLY ASKING THEM FOR THE EXACT NUMBER OF PEOPLE WHO
11 BECAME LOCKED IN. WE ARE NOT ASKING FOR THE EXACT NUMBER,
12 WE'RE ASKING FOR A SHOWING THAT THERE WAS ANYBODY IN THERE OR
13 A SUFFICIENT NUMBER THAT IT WAS GOING TO EFFECT DEMAND.

14 AND THEY REFER TO A LOT OF COMPLAINTS. IN THE RECORD,
15 YOUR HONOR, THERE IS NO COMPLAINT WHERE SOMEBODY SAID 7.0 KEPT
16 ME FROM BUYING REALNETWORKS, MADE ME PLAY ITUNES OR BUY ITUNES
17 MUSIC AND THAT MADE ME BUY AN IPOD.

18 **THE COURT:** I THINK THE QUESTION IS, AND I'LL SEE
19 WHEN I LOOK AT THE PAPERS, IS THERE -- HAVE YOU CITED TO LAW
20 THAT DEALS WITH WHAT IS FUNDAMENTALLY A NEXUS REQUIREMENT?
21 THAT'S WHAT I HEAR YOU SAYING IS THERE IS NO NEXUS BETWEEN THE
22 DAMAGES CLAIM AND ANY CLASS MEMBER.

23 WHAT I HEAR THE OTHER SIDE SAYING IS, WE DON'T NEED A
24 NEXUS, ALL WE NEED TO SHOW IS THAT THEY WERE MAINTAINING THEIR
25 MONOPOLY.

1 **MS. SWEENEY:** WELL, I DON'T -- I DON'T THINK I
2 WOULD -- I THINK WE HAVE TO SHOW A NEXUS AND I BELIEVE WE HAVE
3 SHOWN A NEXUS. BUT YOU'RE CORRECT, YOUR HONOR, THAT APPLE
4 NEVER, IN ITS MOTION FOR SUMMARY JUDGMENT, PUT IT THAT WAY OR
5 CITED ANY CASE LAW IN SUPPORT OF ITS ARGUMENT. IT'S JUST MADE
6 THESE AD HOMONYM ATTACKS ON THE WHOLE LOCK-IN THEORY THAT
7 PERTAIN TO SOME OTHER CASE OUTSIDE THE MONOPOLY SECTION 2
8 CONTEXT.

9 ALSO, I JUST WANT TO CORRECT ONE THING MR. MITTELSTAEDT
10 SAID. HE SAID THAT NONE OF THE COMPLAINTS THAT WE CITED
11 COMPLAIN ABOUT 7.0. WELL, THAT'S TRUE. I'M SURE THAT NO
12 CONSUMER WHO FILED A COMPLAINT KNEW THAT 7.0 WAS THE NAME OF
13 APPLE'S SOFTWARE UPDATE, BUT THERE WERE CERTAINLY COMPLAINTS
14 AFTER SEPTEMBER 6, 2006.

15 **THE COURT:** YEAH, BUT WHAT WERE THEY COMPLAINING
16 ABOUT?

17 **MS. SWEENEY:** THEY WERE COMPLAINING THAT THEY COULD
18 NOT USE MUSIC THAT THEY PURCHASED FROM ANOTHER SOURCE,
19 INCLUDING REALNETWORKS HARMONY ON THEIR IPOD.

20 **THE COURT:** OKAY. WELL, I THINK I HAVE A SENSE OF
21 WHAT'S IN THE BOX OR BOXES. I DON'T EVEN KNOW HOW MUCH IT IS.

22 **MR. MITTELSTAEDT:** YOUR HONOR, COULD I JUST ADD ONE
23 THING?

24 THEY ARE CLAIMING A MONOPOLIZATION OF THE DEVICE MARKET.
25 AND REALNETWORKS WAS NOT IN THE DEVICE MARKET. REALNETWORKS

1 WAS SELLING MUSIC. SO THEY HAVE, AGAIN, AN ATTENUATED
2 ARGUMENT WHICH WE DON'T THINK IS SUPPORTED.

3 **THE COURT:** THE ONLY POINT THAT I HEAR ABOUT THE ROLE
4 OF THAT PARTICULAR COMPANY IS THAT IT IS THE -- IT IS THE
5 TRIGGER FOR THE CONDUCT THAT YOU'RE ALLEGING MAINTAINED THE
6 MONOPOLY. THAT'S WHAT I HEAR.

7 **MS. SWEENEY:** CORRECT, YOUR HONOR. THEY --
8 REALNETWORKS ESTABLISHED THIS PROGRAM THAT WOULD HAVE ALLOWED
9 CONSUMERS TO MIGRATE AWAY FROM IPODS AND THEREBY REDUCING
10 APPLE'S MONOPOLY POWER AND ITS ABILITY TO PRICE AT SUPER
11 COMPETITIVE LEVELS.

12 **MR. MITTELSTAEDT:** YOUR HONOR, IF I COULD LEAVE YOU
13 WITH ONE THOUGHT, WHICH IS, WE TALKED ALL THIS TIME ABOUT
14 THEIR LOCK-IN THEORY. IN THE VERY LAST ROUND OF EXPERT
15 REPORTS AND SUBMISSIONS, THEIR EXPERT DR. NOLL SAYS, AS IT
16 TURNS OUT, LOCK IN IS NOT IMPORTANT FOR NEW PURCHASERS OF
17 IPODS.

18 AND THE REASON HE SAID THAT -- AND THEN HE QUICKLY WENT ON
19 TO, BUT THEY ARE STILL A LOCK OUT, WHICH IS REALNETWORKS'
20 MUSIC PURCHASERS NOT BEING ABLE TO BUY AN IPOD.

21 THE REASON HE SAID THAT IS HE RECOGNIZED THE STRENGTH OF
22 OUR ARGUMENT THAT LOCK IN DOESN'T GET HIM AN IMMEDIATE IMPACT,
23 IT DOESN'T GET HIM A CONSTANT IMPACT, SO IT IS INCONSISTENT
24 WITH THE OUTPUT OF HIS REGRESSION AND SHOWS THERE'S A PROBLEM
25 WITH HIS REGRESSION.

1 SO HE SAYS, DESPITE LOCK IN BEING THEIR THEORY, THE THEORY
2 THAT GOT HIM CLASS CERTIFIED -- AND ONE THING ON THE CLASS
3 BECAUSE MS. SWEENEY MENTIONED THIS. THIS CLASS IS VERY
4 STRANGE BECAUSE 70 PERCENT OF THE PURCHASES, DIRECT PURCHASES
5 ARE BY RESELLERS LIKE BEST BUY, TARGET, AND OTHERS. AND WE'VE
6 GOT -- I LOST THIS ARGUMENT BEFORE JUDGE WARE, BUT I JUST WANT
7 TO NOTE IT.

8 WE HAVE THREE INDIVIDUAL CONSUMERS WHO CLAIM THEY BOUGHT
9 MUSIC DIRECTLY FROM APPLE, AND THEY SEEK TO REPRESENT NOT JUST
10 CONSUMERS WHO BOUGHT MUSIC FROM APPLE -- IPODS FROM APPLE, BUT
11 THEY ALSO SEEK TO REPRESENT THE WAL-MARTS AND THE BEST BUYS OF
12 THE WORLD WHO DIRECTLY BUY IPODS FROM APPLE AND THEN RESELL
13 THEM.

14 SO WE'VE GOT WHAT I THINK IS UNACCEPTABLE, IT IS CERTAINLY
15 AN UNUSUAL SITUATION WHERE THE VAST MAJORITY OF THE CLASS ARE,
16 IN MY VIEW, DIFFERENT FROM THE NAMED PLAINTIFFS.

17 BUT BE THAT AS IT MAY FOR THE TIME BEING, NOW DR. NOLL
18 SAYS THE REAL BASIS FOR HIS DAMAGES IS LOCK OUT, THAT
19 CONSUMERS WHO HAD THESE BIG REALNETWORKS LIBRARIES HAD TO BUY
20 DEVICES OTHER THAN IPODS, THEREBY DECREASING THE DEMAND FOR
21 THE IPOD.

22 SO BASIC ECONOMIC SAYS IF YOU DECREASE THE DEMAND, IT'S
23 GOING TO REDUCE THE PRICE. BUT THEIR THEORY IS NO LOCK OUT
24 MEANS APPLE WOULD INCREASE THE PRICE.

25 FINAL POINT, WHEN COUNSEL SAYS THAT IPOD PRICES WENT UP AS

1 A RESULT OF THIS, IPOD PRICES NEVER WENT UP. THEIR THEORY IS
2 THAT THEY WOULD HAVE GONE DOWN FASTER. WHEN YOU LOOK AT THE
3 IPOD PRICE CHART, WHICH IS IN THE RECORD, IPOD PRICES
4 CONTINUALLY WENT DOWN.

5 **MS. SWEENEY:** YOUR HONOR, YOU'VE BEEN VERY PATIENT.
6 I APPRECIATE THAT. I JUST WOULD WANT TO POINT OUT THAT I
7 THINK MR. MITTELSTAEDT LOST THE CLASS ARGUMENT TWICE ON
8 WHETHER THE RESELLERS COULD BE INCLUDED IN THE CLASS. IT WAS
9 AN EXTENSIVE SEPARATE BRIEFING ON THE WHOLE QUESTION OF
10 WHETHER PLAINTIFFS ADEQUATELY REPRESENTED THOSE PURCHASERS.

11 WITH RESPECT TO PROFESSOR NOLL LOCK IN VERSUS LOCK OUT,
12 PROFESSOR NOLL HAS BEEN THE EXPERT IN THIS CASE THROUGH CLASS
13 CERTIFICATION THROUGH TODAY. I THINK HE SUBMITTED SOMETHING
14 LIKE SIX REPORTS. OVER AND OVER HE HAS TALKED ABOUT BOTH LOCK
15 IN AND LOCK OUT, SO APPLE'S CONTENTION THAT THIS IS A BRAND
16 NEW THEORY IS SIMPLY NOT CONSISTENT WITH THE VERY AMPLE
17 RECORD.

18 **THE COURT:** WELL, I WILL LOOK AT IT ALONG WITH MY
19 OTHER ANTITRUST CASES. I APPARENTLY HAVE MORE THAN ANYONE
20 ELSE IN THE DISTRICT. BUT THAT COULD HAVE BEEN BECAUSE OF THE
21 MDL THAT WAS HERE BEFORE YOU.

22 ALL RIGHT. WELL, I APPRECIATE IT. I WILL PROBABLY, THE
23 WAY I DO THESE THINGS, HAVING SPENT MOST OF THE DAY ON A
24 PATENT TRIAL, SO I'M NOT REALLY FOCUSED ON ANTITRUST RIGHT
25 NOW. I AM GOING TO HAVE A NUMBER OF ANTITRUST MOTIONS THAT

1 I'M DEALING WITH IN THE CONTEXT OF THE MDL, AND I WILL
2 PROBABLY DEAL WITH THIS ONE WHEN I'M DEALING WITH THOSE. I
3 TEND TO DO THINGS IN CHUNKS.

4 I HAD A COUPLE OF ANTITRUST ORDERS THAT CAME OUT IN
5 DECEMBER, ONE OF THEM WHICH DEALT WITH AN APPLE ISSUE. SO,
6 I'M NOT EXACTLY SURE WHEN I WILL GET TO IT, BUT I WILL GET TO
7 IT AS SOON AS I CAN.

8 OKAY?

9 **MR. MITTELSTAEDT:** THANK YOU, YOUR HONOR.

10 **THE COURT:** IF I NEED ADDITIONAL ARGUMENT YOU'LL HEAR
11 FROM ME. I WILL GET YOU ON THE CALENDAR. BUT I DO WANT -- I
12 DID WANT TO HAVE A SENSE BEFORE I STARTED WORKING THROUGH THE
13 PAPERS.

14 ALL RIGHT. THANK YOU VERY MUCH.

15 **MS. SWEENEY:** THANK YOU, YOUR HONOR.

16 **THE CLERK:** COUNSEL, COULD I GET CASE CARDS?
17

18 (PROCEEDINGS ADJOURNED AT 4:03 P.M.)
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CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE
UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY
CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE
RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.



DIANE E. SKILLMAN, CSR 4909, RPR, FCRR

THURSDAY, FEBRUARY 13, 2014