

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1232 (TPJ)

STATE OF NEW YORK ex rel.
Attorney General DENNIS C. VACCO, et al.,

Plaintiffs,

v.

MICROSOFT CORPORATION,

Defendant.

Civil Action No. 98-1233 (TPJ)

**PLAINTIFFS' OPPOSITION TO MICROSOFT CORPORATION'S MOTION TO
STRIKE THE DIRECT TESTIMONY OF DR. AVADIS TEVANIAN RELATING TO
TECHNICAL INCOMPATIBILITIES**

Microsoft has moved under Fed. R. Evid. 602 to strike the direct testimony of Dr. Avadis Tevanian relating to the incompatibilities or interoperability problems between Apple's QuickTime software and Microsoft's software. Microsoft's Motion should be denied because Dr. Tevanian had more than sufficient knowledge to support his testimony relating to QuickTime, as well as to Microsoft's actions that caused the interoperability problems. Dr.

Tevanian's inference, that Microsoft created the interoperability problems intentionally, thereby sabotaging the operation of QuickTime on the Windows platform, is logically based on this knowledge. In addition, to the extent that Dr. Tevanian's testimony relied upon information from his subordinates (principally Apple's lead QuickTime engineer Tim Schaaff, who was deposed at length by Microsoft), such information was furnished in the ordinary course of business and has reasonable guarantees of trustworthiness.

I. Dr. Tevanian Has More Than Sufficient Knowledge and Information to Support Every Aspect of His Testimony Relating to QuickTime

Microsoft's effort to strike Dr. Tevanian's testimony is largely based on two premises: (1) no one from Microsoft told Dr. Tevanian that they intended to create incompatibilities between Windows and QuickTime; and (2) Dr. Tevanian was unable in court to interpret an incomplete document concerning software programming instructions, which was prepared by a third-party, and which Dr. Tevanian had never seen before. Neither of these points undermine Dr. Tevanian's testimony, which was based on his substantial direct knowledge; to the extent these points are even relevant, they go only to the weight, not the admissibility, of the evidence.

A. Legal Standard

Federal Rule of Evidence 602 requires that a witness have personal knowledge of the subject matter of his testimony. Federal Rule of Evidence 701 expands on this basic principle by permitting a lay witness to offer testimony "in the form of opinions or inferences . . . which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Lay witnesses are often permitted to testify to their opinions or inferences regarding a person's intent based on the witnesses' knowledge of the underlying facts. See *Winant v. Bostic*, 5 F.3d 767, 772-73 (4th Cir.

1993) (witnesses permitted to testify to their inferences about the defendant's intent because the inferences "could have been rationally drawn from the facts of which the witnesses had personal knowledge"); *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1466-67 (5th Cir. 1989) ("Courts often have permitted lay witnesses to express opinions about the motivation or intent of a particular person if the witness has an adequate opportunity to observe the underlying circumstances.")(citing cases).

When a witness testifies about mental states such as intent, knowledge, and reckless disregard, it is permissible, and frequently necessary, for the witness to rely on circumstantial evidence. "[W]here intent and knowledge are involved it is often difficult to prove those elements by direct evidence and circumstantial evidence regularly fills the void." *United States v. Coleman*, 940 F.Supp. 15, 17 (D. D.C. 1996); *see also Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667-68 (1989) (stating that in a defamation case where the plaintiff must prove actual malice, the "plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence"); *United States v. Haldeman*, 559 F.2d 31, 115-16 (D.C. Cir.), *cert. denied* 431 U.S. 933 (1977) ("Except in extraordinary circumstances, criminal intent cannot be proved by direct evidence; it is therefore not only appropriate but also necessary for the jury to look at 'all of the circumstances' in determining specific intent.").

B. The Basis For Dr. Tevanian's Testimony

In this case, Dr. Tevanian has direct personal knowledge of the existence of the incompatibilities and their nature, and properly testified to the inferences he drew from all the facts known to him about Microsoft's intent. His education and experience are sufficient to enable him to understand the nature and likely causes of the interoperability or incompatibility

problems.¹ Moreover, as Senior Vice-President of Software Engineering, Dr. Tevanian is responsible for virtually all of the software products developed and sold by Apple, Direct Testimony of Avadis Tevanian ¶2 (“Tevanian Direct”), and was personally involved in Apple’s efforts to correct the technical problems, including Apple’s efforts to communicate with Microsoft about these issues.

In August 1997, Dr. Tevanian became sufficiently concerned about the interoperability problems that Internet Explorer 4.0 was causing with QuickTime that he sent Bill Gates an email requesting that Microsoft correct Internet Explorer’s disabling of QuickTime. GX 265; Trial Tr. (November 4, 1998, a.m.) at 29, 31, 54.² The basic problem was similar to some, though not all, of the later problems: Internet Explorer 4.0 and/or Windows routed “.MOV” media files to Microsoft’s Active Movie player, rather than directing them to the QuickTime player as it should have. See GX 265. Although Microsoft fixed the particular problem shortly thereafter, Microsoft was not responsive in assisting with other unsolved problems. Trial Tr. 29 (November 4, 1998, a.m.). As Dr. Tevanian testified, he concluded that if Microsoft could correct this problem without difficulty, it could correct the other problems as well. Trial Tr. 54, 56 (November 4, 1998, a.m.).

Another type of interoperability or incompatibility problem occurred when incorrect and misleading error messages appeared when QuickTime was supposed to be invoked. See

¹ Dr. Tevanian is the Senior Vice-President of Software Engineering at Apple Computer. Direct Testimony of Dr. Tevanian ¶2. Before that he was Vice-President of Engineering for NeXT Software for nine years. *Id.* ¶4. He has a Ph.D. in computer science. *Id.* ¶3.

² Dr. Tevanian was not aware that, in forwarding his email to Paul Maritz for action, Gates had directed Maritz to use Dr. Tevanian’s request to gain a “real advantage over SUN and Netscape,” asking Maritz for a “clear plan on what [Microsoft] want[ed] Apple to do to undermine Sun.” GX 265.

Tevanian Direct ¶¶108-110 & Attachment 5; Trial Tr. 27-28, 57 (November 4, 1998, a.m.) As Dr. Tevanian explained in his direct testimony, these error messages falsely suggested that there was something wrong with the computer's media file associations and prompted users to reconfigure their systems when in fact no error had occurred. Tevanian Direct ¶¶108-09 & Attachment 5; Trial Tr. 27-28 (November 4, 1998, a.m.). Because Dr. Tevanian is an experienced software engineer, he is in a position to know that such an error message is unlikely to issue *accidentally*; thus Dr. Tevanian properly inferred that such error messages were evidence of Microsoft's intent. See Trial Tr. 61-62 (November 4, 1998, a.m.).

Dr. Tevanian participated in a number of communications with Microsoft about the problems Internet Explorer was causing, and knew that others at Apple had likewise communicated with Microsoft. See, e.g., Trial Tr. 28-29; 35-38 (November 4, 1998, a.m.); GX 265; GX 272-74. He knew that Microsoft had failed to take action to resolve most of those incompatibilities. See, e.g., Trial Tr. 36-38 (November 4, 1998, a.m.). In particular, Dr. Tevanian was aware of email exchanges between Apple and Microsoft in which Microsoft's only response to Apple was to recommend that Apple incorporate Active X controls, a proprietary Microsoft technology supported only in Windows, and to discourage Apple from using QuickTime to replay certain open standard media files (MIDI files) on Windows. GX 272-274; Tevanian Direct at ¶¶ 112-14. Dr. Tevanian was also aware that Microsoft never responded to Apple's email seeking further guidance on how to fix the problem. See Tevanian Direct at ¶¶ 113-114; GX 272-274. During this time, Dr. Tevanian testified, Apple's QuickTime plug-in continued to work fine with the Netscape browser. Trial Tr. 42 (November 4, 1998, a.m.). Dr.

Tevanian's direct, personal knowledge of all these facts alone makes his testimony admissible. Tevanian Direct ¶¶ 111-114.

In addition, Dr. Tevanian was aware of Microsoft's repeated attempts to pressure Apple to abandon multimedia playback on Windows. Dr. Tevanian's QuickTime engineers kept him informed of these attempts and Dr. Tevanian personally participated in two conversations with Microsoft personnel in which they attempted to convince Apple to withdraw from multimedia playback on Windows. See Tevanian Direct ¶¶ 78-92. Microsoft's Don Bradford told Dr. Tevanian that Bill Gates wanted Apple to abandon the playback segment of its multimedia business on Windows. See Tevanian Direct ¶¶ 88-89. Dr. Tevanian was also present at a June 15, 1998 meeting in which Microsoft's Eric Engstrom proposed that Apple abandon the playback business for Windows. See Tevanian Direct ¶¶ 93-96; GX 912. Thus, Dr. Tevanian knew first-hand that it was Microsoft's goal to have Apple cease competing in the playback market for Windows. Creating and maintaining incompatibilities with QuickTime on the Windows platform was one way Microsoft could accomplish this goal, and most of the incompatibilities arose or continued during the time when Microsoft was pressuring Apple to cede the multimedia playback market on Windows.

Finally, Dr. Tevanian's conclusions regarding Microsoft's intent are also based on his knowledge that QuickTime posed a threat to Microsoft because QuickTime provided a new platform which was designed to work regardless of the underlying software.³ As Dr. Tevanian testified, the introduction of incompatibilities could undermine the establishment of this type of

³ Dr. Tevanian testified that "one of the goals for QuickTime was to be cross-platform, so you could develop content and run it on either Windows, or Macintosh, or any other operating system." Trial Tr. 27 (November 5, 1998 a.m.); see also Trial Tr. 45-46 (November 4, 1998 a.m.); Tevanian Direct ¶¶ 113-114.

platform. Trial Tr. 45-46 (November 4, 1998 a.m.). Furthermore, as Dr. Tevanian testified, if Apple adopted Microsoft's suggestion that Apple incorporate Microsoft's proprietary Active X controls, rather than continue with the standard Netscape plug-in (even if such a suggestion would work), that change in QuickTime software could undermine Apple's goal of creating a platform that works equally well on all operating systems. See Tevanian Direct ¶¶ 113-14; Trial Tr. 76-77, 82-83 (November 5, 1998 p.m.). Dr. Tevanian's conclusion, that Microsoft's insistence that Apple alter QuickTime to incorporate Active X controls was not a viable resolution of the interoperability problems caused by Internet Explorer 4.0, is well supported.

Dr. Tevanian's testimony that Microsoft sabotaged QuickTime is based on his own perceptions. It is ironic that Microsoft has challenged the basis for Dr. Tevanian's allegation of sabotage when Microsoft's own internal documents support the charge. Internal Microsoft email acknowledges that Microsoft corrected the problem with the MOV and QuickTime files, as described by Dr. Tevanian, but confirms that Microsoft "really do[es] not want to provide a similar mechanism to enable [Apple] to do this to file types that [Microsoft] own[s]," listing file types that Microsoft has elsewhere claimed as open standards. GX 911. The email thread also acknowledges that there is a problem with several media types that Microsoft knows about but has not disclosed to Apple. GX 911. Given all of the evidence, Dr. Tevanian's testimony regarding Microsoft's intent, evidence which is based on his own perceptions, was properly admitted.

II. To The Extent That Dr. Tevanian Relied On Information He Learned From Others At Apple, This Testimony Is Admissible Because He Is A Summary Witness

To the extent that Dr. Tevanian relied on information he received from his engineers at Apple, this evidence is admissible because Dr. Tevanian is a summary witness, which is appropriate under the procedures the Court has established in this case. *See* Transcript of June 9, 1998 Pretrial Hearing at 2. As Microsoft has acknowledged, a legitimate function of summary witnesses is to convey information from colleagues or subordinates within their companies. *See* Microsoft's October 19, 1998 Motion in Limine to Exclude Hearsay Statements in the Direct Examination of Jim Barksdale at 5. That is precisely what Dr. Tevanian did. Indeed, Microsoft has frequently questioned witnesses in this trial to elicit testimony about what their colleagues said or wrote.

Dr. Tevanian's trial testimony included Apple's unsuccessful efforts to establish its Rhapsody operating system, the circumstances leading to the Apple-Microsoft agreement and the effect of the agreement on browser competition, Microsoft's efforts to dissuade Apple from competing for multimedia playback on Windows, and the incompatibilities between QuickTime and Microsoft's software. No single witness at Apple could possibly have complete, first-hand knowledge about each of these subjects. Plaintiffs subpoenaed the person at Apple who is most knowledgeable about these issues. As demonstrated in his direct testimony, his cross-examination, and his re-direct testimony, Dr. Tevanian was already personally aware of most of the facts relating to these issues, including the incompatibilities, and he spent a great deal of time familiarizing himself with many other documents and facts relating to these issues. He properly testified regarding the facts he knew personally and the facts conveyed to him by others within Apple. It is also important to note that Apple's lead QuickTime engineer Tim Schaaff was

subjected to a vigorous and lengthy deposition by Microsoft, which is free to designate any testimony it believes is favorable on the incompatibilities or any other issue.

III. Dr. Tevanian's Inability To Explain Third-Party Programming Instructions He Had Never Seen Before Affects Neither The Admissibility Nor The Weight Of His Testimony

Microsoft contends that Dr. Tevanian “insulated himself from meaningful cross-examination” because he was not prepared to answer questions regarding DX 1801. As Dr. Tevanian explained, DX 1801 is a technical document containing software programming instructions, apparently downloaded from the Netscape Web site, prepared by a third party, that is both complex and incomplete. Microsoft knew that the incompatibilities were an issue in this case and questioned some of the Apple witnesses about the incompatibilities during depositions, but chose never to ask any witness about DX 1801. Indeed, the suggested relevance of this document as proffered in Microsoft’s brief (that Apple allegedly had not properly followed the Netscape plug-in instructions) is totally contrary to Microsoft’s contemporaneous explanations to Apple (that the problem was the absence of an Active X control).⁴ If Microsoft wanted to ask questions regarding DX 1801, it had ample opportunity to do so during the course of discovery, but did not do so. Microsoft’s counsel apparently made a tactical decision to surprise this witness with a technical document he had never seen before. Microsoft must bear the consequences of this failed ambush -- that failure does not affect the weight of Dr. Tevanian’s testimony, much less render it inadmissible.

⁴ Compare Microsoft’s November 10, 1998 Motion to Strike the Direct Testimony of Avadis Tevanian at 9 with GX 272.

IV. If Microsoft Disputes Dr. Tevanian's Testimony, It Is Free To Present Evidence To Rebut His Testimony

Microsoft will suffer no prejudice if the court does not strike Dr. Tevanian's testimony, because Microsoft is free to present whatever evidence that it wants on these issues in its own case. Eric Engstrom, the Microsoft executive who was in charge of Microsoft's multimedia technology and the person most deeply involved in the efforts to convince Apple to exit the Windows multimedia playback market, has already been designated as a witness by Microsoft. Engstrom was centrally involved in both the communications with Apple about the incompatibilities problems and the internal Microsoft discussions about whether to fix, or assist Apple in fixing, the problems, and should be sufficiently knowledgeable to present whatever evidence, if any, Microsoft has to rebut Dr. Tevanian's testimony.

V. Conclusion

For the foregoing reasons, the plaintiffs respectfully request that the court deny Microsoft's motion to strike Dr. Tevanian's testimony regarding the incompatibilities between Apple's QuickTime software and Microsoft's software.

DATED: November 23, 1998

Respectfully submitted,.

_____/s/_____
Christopher S Crook
Phillip R. Malone
John F. Cove, Jr.
Sandy L. Roth
Attorneys
David Boies
Special Trial Counsel

U.S. Department of Justice
Antitrust Division
325 Seventh St., NW, Rm. 615
Washington, DC 20530
(202) 514-8276