

Litigators of the Week: Bill Isaacson and Karen Dunn

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The Boies Schiller & Flexner team's tireless defence of Apple against claims it monopolised the digital music market – and its ultimate triumph before a jury this week – means William Isaacson and Karen Dunn are our final litigators of the week for 2014.

Going into a week-long trial in the San Jose federal courthouse in early December, the momentum was arguably on the plaintiffs' side. With nine years of litigation behind them, they had a certified class of eight million iPod users claiming Apple violated antitrust laws by locking them into its popular music players.

They had reports that set potential damages at \$350 million – or more than \$1 billion after trebling. They had beaten summary judgment, after presiding judge Yvonne Gonzalez Rogers said the plaintiffs' economic testimony created an issue of fact that needed to go before the jury.

"I think we have a very strong case and an excellent economist expert witness," plaintiffs' counsel Bonny Sweeney told *GCR* shortly after the decision.

Apple could have settled at this point. But as we know from the e-books litigation, the world's most valuable company does not avoid a fight when it thinks it did nothing wrong. And in this case, the company believed its updates to iTunes in 2006, iTunes 7.0, were genuine improvements even if they also disabled competing software.

They let consumers download and play feature films, play games and transfer songs from iPods to computers. The code that blocked rival tunes was also, Apple vice president Eddy Cue testified, "the

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only way to keep iTunes protected from hackers”. At trial, it fell to one of the country’s top antitrust litigators, Isaacson, and former prosecutor Dunn to convince the jury of eight that this was the case.

At the same time, Apple’s lawyers tried a few tricks to keep the lawsuit from getting that far. They asked to decertify the class, called for judgment as a matter of law, and even filed a motion to dismiss after it emerged – in an extraordinary twist – that the plaintiffs’ last class representative never paid for one of the iPods affected.

In the end, though, Apple’s strongest argument was the one it made all along: iTunes 7.0 made the iPod better and therefore can’t be illegal under antitrust law. Isaacson and Dunn – who has helped President Barack Obama with debate prep and done communications for Hillary Clinton – hammered this point in closing argument.

“All of the evidence that you have heard is that millions of people received a quality product that they liked, that had security on it, that changed music, and then in 7.0, changed movies that made your world portable,” Isaacson said on Monday. Dunn listed the vital security features of the upgrade and castigated the plaintiffs’ lawsuit as “not only ridiculous” but “irresponsible”.

And after 10 years of litigation, it took the jury just three hours to agree.

GCR hopes both lawyers have plans to relax over the holidays. A complex antitrust trial, with its chaos of courtroom theatrics and frenetic filing, is punishing by any standard. This one had the added pressure of worldwide media interest, stirred in part by a beyond-the-grave appearance from Apple founder Steve Jobs.

It will not be long, though, until Isaacson is back in the courtroom, asking the Second Circuit to uphold a jury’s \$162 million price-fixing verdict against two Chinese companies. For Dunn, meanwhile, the trial was a whirlwind first taste of antitrust litigation. It could not have gone better.