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APPLE INC.

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

APPLE INC.,

Plaintiff,

v.

PSYSTAR CORPORATION, a Florida
corporation,

Defendant.

AND RELATED COUNTERCLAIMS.

Case No. 08-3251 WHA

**APPLE INC.'S REPLY BRIEF IN
SUPPORT OF ITS MOTION FOR
SUMMARY JUDGMENT**

Hearing Date:	November 12, 2009
Hearing Time:	2:00 p.m.
Courtroom:	9
Judge:	Hon. William Alsup
Trial Date:	January 11, 2010

**PUBLIC VERSION
[REDACTED]**

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1 **I. INTRODUCTION**

2 Without the protections afforded by copyright laws, innovative companies such as Apple
3 Inc. will not invest the decades of effort and hundreds of millions of dollars required to develop a
4 product such as Mac OS X. Psystar seeks to appropriate to its own uses Apple's proprietary work,
5 arguing that the law allows it to do so. Psystar is wrong.

6 Apple has submitted undisputed facts showing that Psystar infringes Apple's copyrights in
7 Mac OS X and circumvents Apple's technological protection measures to do so. Psystar, in
8 response, presents no evidence demonstrating a triable issue of fact and, indeed, concedes the facts
9 establishing its liability. Though Apple need only show that Psystar infringes *one* of the exclusive
10 rights protected by the Copyright Act, Psystar admits the factual bases for three separate
11 violations: (1) unauthorized copying of Mac OS X; (2) unauthorized distribution of Mac OS X;
12 and (3) the creation of unauthorized derivative works. Psystar concedes that it makes multiple
13 copies of Apple's copyrighted Mac OS X while making each Psystar computer and that it
14 distributes and sells those computers loaded with copies of Apple's software. (Response at 10-
15 12.) Psystar also "confirms" the description provided by Apple's expert of the changes to
16 Mac OS X engineered by Psystar to force that software to run on non-Apple hardware. (*Id.* at 13.)

17 Psystar advances various legal arguments intended to excuse its copying, modifying, and
18 distributing of Mac OS X. None has merit. Psystar argues that even if it violates the express
19 provisions of Apple's Software License Agreement ("SLA") prohibiting copying, modification,
20 and distribution of Mac OS X on non-Apple hardware, it still is not liable for copyright
21 infringement. (Response at 8.) Psystar contends that the SLA provisions it violates are "mere
22 covenant[s]" and not "conditions" limiting the scope of the license, so Apple has breach of
23 contract, not copyright infringement, claims against Psystar. This argument is wrong. Psystar's
24 activities violate the Copyright Act and also breach Apple's SLA.

25 Psystar's attempt to defend its unauthorized copying of Mac OS X under section 117 (the
26 "essential step" doctrine) and under section 109 (the "first sale" doctrine) of the Copyright Act
27 also is meritless. Section 117 permits only copies that are necessary for "internal use." It does not
28 authorize Psystar's mass copying of Mac OS X for the ultimate purpose of resale to end users.

1 Likewise, Psystar's claim that section 109 permits it to make unlimited copies of Mac OS X and
 2 install them onto Psystar's computers simply because Psystar allegedly "owns" the original copy
 3 is incorrect. (Response at 12-13.) Section 109 authorizes only the resale of one's particular copy
 4 of Mac OS X. Nothing in the Copyright Act condones Psystar's mass reproduction and
 5 distribution of Apple's copyrighted work.

6 Psystar concedes the facts which establish that it has violated the Digital Millenium
 7 Copyright Act ("DMCA"). Psystar admits that it developed technology to circumvent Apple's
 8 technological protection measures and distributes this technology to others; these admissions
 9 prove that Apple is entitled to judgment on its DMCA claims. Although Psystar offers pages of
 10 irrelevant discussion of open-source Apple software code called Darwin, Psystar ultimately
 11 admits, as it must, that "Mac OS X includes many things which are not released as part of
 12 Darwin" and that "Apple introduced into OS X specific technical measures not present in
 13 Darwin." (Response at 3, 6.) That others may have used Apple's software development tools for
 14 permissible purposes does not excuse Psystar's circumvention of Apple's technological protection
 15 measures. (*Id.* at 5.)

16 Finally, Psystar acknowledges that it is not offering "theories of antitrust violations" to
 17 support its copyright misuse defense and counterclaims, but instead offers the unsupported
 18 proposition that Apple *per se* engages in misuse by using "copyright law to enforce the tethering
 19 of OS X to Apple hardware." (Response at 20-21.) There is no support in the law for Psystar's
 20 novel proposition that copyright law prohibits licensing practices that do not restrain competition
 21 or creativity and are common throughout the software industry.

22 **II. ARGUMENT**

23 **A. The Software License Agreement Confirms That Apple Does Not Authorize** 24 **Psystar's Infringement**

25 Apple seeks summary judgment that Psystar has violated the Copyright Act and the
 26 DMCA. In its opposition, Psystar claims that Apple's summary judgment motion "focuses almost
 27 entirely on alleged breaches of the SLA" and therefore fails to establish that Psystar has "violated
 28 an exclusive right granted to Apple by the Copyright Act." (Response at 8.) Contrary to Psystar's

1 argument, Apple does not rely on the SLA to establish that Psystar infringes Apple's copyrights.
 2 Psystar engages in copyright infringement, independent of the existence of the SLA. (*See* Apple's
 3 SJ Br. at 8-9.) Apple refers to the SLA only to demonstrate that it does not otherwise permit
 4 Psystar's infringement.¹ Therefore, Psystar's assertion that certain provisions of the SLA
 5 prohibiting its conduct are "mere covenants" rather than "conditions" of the license is not only
 6 incorrect, but irrelevant.

7 Psystar does not dispute that it violates the SLA's prohibitions against the unauthorized use
 8 of Mac OS X on non-Apple hardware, as well as its prohibitions against redistributing the
 9 software, and also its limitations on transferring, modifying and copying Mac OS X. (*See* SLA §§
 10 2A, 3, 2C and 2F.) Rather, Psystar argues that it is free to ignore the SLA altogether, mistakenly
 11 citing *Sun Microsystems, Inc. v. Microsoft Corp.*, 188 F. 3d 1115 (9th Cir. 1999), for the
 12 proposition that copyright infringement and license breaches can be overlooked, so long as the
 13 terms breached are mere "covenants." (Response at 8-9.) However, neither *Sun Microsystems*,
 14 nor the cases it relies upon, support the unprecedented limitation on copyright protection that
 15 Psystar posits. *Sun* stands only for the proposition that breaching license provisions that regulate
 16 rights enumerated in the Copyright Act also constitutes infringement; but breaching license terms
 17 that do not govern rights enumerated in the Copyright Act does not constitute infringement. The
 18 *Sun* decision specifically affirmed that "[i]f ... a license is limited in scope and the licensee acts
 19 outside the scope, the licensor can bring an action for copyright infringement." *Sun Microsystems*,
 20 *Inc.*, 188 F.3d at 1121; *see also* *Graham v. James*, 144 F.3d 229, 236 (2d Cir. 1998); *S.O.S., Inc. v.*
 21 *Payday, Inc.*, 886 F.2d 1081, 1087 (9th Cir. 1989). Here, Psystar's activities were forbidden by
 22 Apple's SLA; there is neither a covenant nor a condition that provides otherwise. Moreover,
 23 Apple has shown that Psystar violates the Copyright Act, irrespective of its breach of the terms of
 24 the SLA, through its copying, distribution and modification of Mac OS X.

25
 26 ¹ Psystar correctly acknowledges that this is a proper understanding of a license's role in
 27 copyright action. "A license agreement can be relevant to determining whether a defendant has
 28 committed copyright infringement, but only if the defendant has first violated an exclusive right
 granted by the Copyright Act. This is because a license can permit what would otherwise be a
 violation." (Response at 8.)

B. Neither Section 117 Nor Section 109 Authorizes Psystar's Copying, Adapting And Reselling Of Mac OS X

Psystar admits that it makes three types of copies of Mac OS X "in the course of the imaging process by which Psystar installs copies of Mac OS X on the computers that it sells to end users" (Response at 10), but argues that sections 117 and 109 authorize this infringing conduct. Even if Psystar were an "owner of a copy" for the purpose of applying section 117 or section 109 (and it is not),² neither of these sections absolves Psystar of liability for infringing Apple's copyrights.

1. Psystar Is Not Entitled To A Section 117 Defense

Section 117, the "essential step" doctrine, only permits the making of "a copy" (*i.e.*, one copy) of a copyrighted work when "essential" for an owner's internal use. Section 117, which Psystar admits only permits "a narrow category of copying," does not authorize Psystar's conduct for several reasons. (Response at 17.)³ First, Psystar does not make only a *single* copy of Mac OS X. It makes one copy on a Mac mini, a second copy on its imaging station, and then reproduces unlimited copies onto Psystar computers using its imaging station. (Response at 10-11.) *See Wall Data, Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 786 (9th Cir. 2006) (holding that hard drive imaging done in "an effort to save time and preserve flexibility" is not permitted by section 117). All of these copies are different from the retail upgrade DVD of Mac OS X that Psystar allegedly distributes with its computers. Second, Psystar makes these copies not for its internal use, but for resale to others, thereby violating section 117's mandate that copies

² A complete discussion of why Psystar is not an "owner" of copies of Mac OS X is set forth in Apple's Motion for Summary Judgment (Docket No. 181) ("Apple's SJ Br.") at 19-22, and Apple's Opposition to Psystar's Motion for Summary Judgment (Docket No. 196) ("Apple's Opp. Br.") at 7-16. That discussion is incorporated herein by reference.

³ Psystar argues in its opposition that it did not need to plead section 117 as an affirmative defense because (1) its interrogatory responses put Apple on notice that it would assert section 117; and (2) section 117 need not be pleaded as an affirmative defense. (Response at 17.) Both arguments are incorrect. Psystar's interrogatory responses (Nos. 7, 10) say nothing about section 117's "essential step" defense. (*See* Psystar Ex. F.) *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1520-21 (9th Cir. 1992), does not address or support Psystar's argument that section 117 need not be pleaded as an affirmative defense. *Wall Data Inc. v. Los Angeles County Sheriff's Dept.*, 447 F.3d 769, 776, 784-86 (9th Cir. 2006) (section 117 pleaded as affirmative defense); *Krause v. Tileserv, Inc.*, 402 F.3d 119, 120 (2d Cir. 2005) (same). Consequently, Psystar has waived this defense and should be precluded from asserting it now.

1 made for internal use must be “used in no other manner.” 17 U.S.C. §117(a)(1).

2 Moreover, Psystar’s adaptations of Mac OS X are not permitted by section 117, which
 3 allows only “changes necessary to enable *the use for which* [the software] *was both sold and*
 4 *purchased . . .*” Final Report of the National Commission on New Technological Uses of
 5 Copyrighted Works (1978) at 13, *available at* [http://digital-law-](http://digital-law-online.info/CONTU/PDF/index.html)
 6 [online.info/CONTU/PDF/index.html](http://digital-law-online.info/CONTU/PDF/index.html) (hereinafter cited as the “CONTU Report”) (emphasis
 7 added); *see also Krause v. Titleserv, Inc.*, 402 F.3d 119, 129 (2d Cir. 2005); *Stuart Weitzman,*
 8 *LLC v. MicroComputer Res., Inc.*, 510 F. Supp. 2d 1098, 1109 (S.D. Fla. 2007), *vacated on other*
 9 *grounds*, 542 F.3d 859 (11th Cir. 2008). As the SLA expressly provides, Mac OS X is licensed
 10 exclusively for use on Apple computers. (Apple’s SJ Br. at 3.) Psystar’s copying and adaptation
 11 of Mac OS X are directly contrary to that purpose since they are done in order to permit use of
 12 Mac OS X on non-Apple computers. Consequently, Psystar’s adaptations do not fit within
 13 section 117’s requirements.

14 Trying to salvage its claim that section 117 permits it to copy Mac OS X and resell it to
 15 end users, Psystar attempts to distinguish *Apple v. Formula*. (Response at 18-19.) But its efforts
 16 are unavailing. *See Apple Computer, Inc. v. Formula Int’l, Inc.*, 562 F. Supp. 775 (C.D. Cal.
 17 1984) (“*Formula I*”), *aff’d* 725 F.2d 521 (9th Cir. 1984); *Apple Computer, Inc. v. Formula Int’l,*
 18 *Inc.*, 594 F. Supp. 617 (C.D. Cal. 1984) (“*Formula II*”). Psystar argues that defendant Formula’s
 19 copying of Apple’s software for use in its “Pineapple” computers is different than Psystar’s
 20 copying because the *Formula* court addressed “whether purchasing a lawful copy of Apple
 21 software then copying that software not onto a computer, but onto silicon chips that can be
 22 plugged into a computer by the end user, is protected by § 117.” (Response at 18.) But Psystar
 23 does not explain how, nor does it cite any case to support why, this distinction is relevant. Nor
 24 could it; making either type of copy – on to a ROM chip or on to a hard drive – is equally
 25 unlawful. Moreover, the court in *Formula II* rejected the argument that defendant’s copies were
 26 permissible under section 117 because they were made for others’ “internal use,” holding instead
 27 that the one copy “made by the owner-user *cannot be made accessible to others.*” *Formula II*,
 28 594 F. Supp. at 622 (emphasis added).

1 Psystar again tries to distinguish the *Formula* decisions by making the baseless assertion
 2 that “it is not clear whether the defendant owned legitimate copies of Apple’s software or, instead,
 3 owned pirated copies, in which case § 117 would not apply.” (Response at 18.) But the reported
 4 opinions make clear that *Formula*, just like Psystar, started with original, authorized copies of
 5 Apple’s operating system software. *Formula II*, 594 F. Supp. at 620 (describing the “Wong
 6 diskettes” possessed by *Formula* as storage media containing Apple’s copyrighted software and
 7 produced under a license from Apple). The court squarely rejected *Formula*’s argument that since
 8 it was the “rightful owner” of the Wong diskettes it could copy that software onto computer
 9 hardware (*i.e.*, ROM sets) and resell it. *Id.* The court described the exact legal theory that Psystar
 10 posits now and rejected it. *Formula II*, 594 F. Supp. at 622-23 (finding “*Formula*’s claimed
 11 justification to be a mere pretext and to be outside the protection of Section 117” and refusing to
 12 construe section 117 “in a manner that would effectively emasculate the protections for computer
 13 programs contained in other sections of the Copyright Act”).

14 Moreover, any copy that is not an “exact copy” constitutes an “adaptation” for the purpose
 15 of section 117(b)’s prohibition against transfer without permission. 17 U.S.C §117(a)-(b).
 16 Psystar impermissibly “adapts” Mac OS X to make it run on Psystar computers and transfers the
 17 “adaptation” in violation of section 117(b)’s requirement that adaptations “may be transferred
 18 only with the authorization of the copyright owner.” 17 U.S.C §117(b). Adding “capabilities”
 19 and desired features, “conversion of a program from one higher-level language to another,” and
 20 the addition of “features to the program that were not present at the time of rightful acquisition”
 21 all constitute adaptations under section 117. *Krause*, 402 F.3d at 125; *Evolution, Inc. v. SunTrust*
 22 *Bank*, 342 F. Supp. 2d 943 (D. Kan. 2004); CONTU Report at 13. Psystar admits that it adapts
 23 Mac OS X by adding features “to increase [Mac OS X’s] functionality,” taking “steps” to make
 24 Mac OS X “work on a wider range of computers than simply Apple Macintoshes” and “porting”
 25 Mac OS X to work on Psystar’s hardware. (Psystar Br. at 10-11.)

26 Finally, section 117(b) requires that an owner who wishes to transfer any “exact copies”
 27 that it made for its internal use transfer the original “copy from which such copies were
 28 prepared.” 17 U.S.C. §117(b). Psystar does not meet this requirement because it keeps the

1 original copy of Mac OS X on its imaging station and repeatedly uses that copy to continue its
 2 mass duplication of Mac OS X onto additional Psystar computers. Psystar never addresses this
 3 explicit limitation of section 117.

4 **2. Psystar Is Not Entitled To A Section 109 Defense**

5 Even if Psystar were an owner, not a licensee, of a copy of Mac OS X, section 109's "first
 6 sale" doctrine also would not excuse Psystar's conduct because section 109 does not permit
 7 *copying* of any kind, for any purpose. 17 U.S.C. §109(a). Rather, section 109 permits the owner
 8 of a copy only to transfer possession of the one copy of software it bought; it does not allow
 9 Psystar's repeated copying or adaptation of Mac OS X in making and selling its computers.
 10 (Apple's SJ Br. at 21-22; Apple's Opp. Br. at 11-12.)

11 Rather than address the actual requirements of sections 109 or 117, Psystar simply states
 12 that it "owns" an original copy of the Mac OS X DVD, that it allegedly distributes a Mac OS X
 13 DVD with Psystar computers, and that its activities are for the "internal use" *of others*. (Response
 14 at 10-12, 18-19.) But neither section 109, nor section 117, nor any other copyright doctrine,⁴
 15 permits an "owner" to make unlimited unauthorized copies of another's copyrighted work and, in
 16 turn, sell those copies for use by others. Such an interpretation, if adopted, would vitiate the
 17 copyright laws, condone wholesale software piracy and gravely harm the entire software industry.
 18 This cannot be the correct interpretation of sections 109, 117, and the Copyright Act. Copyright
 19 law simply does not sanction the commercial reproduction of copyrighted software for others'
 20 use.

21 **C. Psystar Seeks To Unduly Limit The Exclusive Right To Create Derivative** 22 **Works From Copyrighted Software**

23 Apple also is entitled to prevail on its alternative ground for copyright infringement that
 24 Psystar creates an infringing derivative work. Psystar does not dispute the facts underlying this

25 ⁴ Psystar briefly mentions "fair use" but makes no argument, and submits no evidence,
 26 purporting to justify its conduct under fair use principles. *See* 17 U.S.C. §107. If it were seriously
 27 attempting to prove fair use then Psystar would have been required to submit evidence regarding:
 28 (1) "the purpose and character" of its use of Mac OS X, including whether its use was "of a
 commercial nature"; (2) "the nature of the copyrighted work"; (3) "the amount and substantiality
 of the portion used in relation to the copyrighted work as a whole"; and (4) "the effect of the use
 upon the potential market for or value of" Mac OS X. *Id.* It submitted no such evidence.

1 claim. Psystar agrees with Apple's technical expert, Dr. John Kelly, [REDACTED]
 2 [REDACTED]

3 (Response at 7.)⁵

4 Case law establishes that modifications, such as those Psystar concedes, create a derivative
 5 work. *Dun & Bradstreet Software Services, Inc. v. Grace Consulting, Inc.*, 307 F.3d 197 (3rd Cir.
 6 2002) (finding derivative work where the defendant Grace modified the plaintiff's software);
 7 *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741, 762 (N.D. Ill. 1983) (defendant's addition to the
 8 ROM code and replacement of a small fraction of the existing programming instructions created a
 9 derivative work);⁶ *SAS Institute, Inc. v. S & H Computer Systems, Inc.*, 605 F. Supp. 816, 819-20,
 10 831 (D. Tenn. 1985) (the "conversion" of a piece of software from a program that would run on an
 11 IBM computer, to one that would run on a VAX computer is "well within the statutory definition
 12 of a derivative work").

13 Psystar argues, however, that "adding to or replacing parts of OS X without modifying the
 14 OS X source or object code" is insufficient to create a derivative work because it is like the

15 ⁵ [REDACTED]
 16 [REDACTED]
 17 [REDACTED]
 18 [REDACTED]
 19 [REDACTED]
 20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 ⁶ That the altered code in *Strohon* was functional – altering the appearance and sequence of
 25 game events – did not, as Psystar suggests it should, prevent the court from holding that a
 26 derivative work had been created. Psystar cites to *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d
 27 77 (2d Cir. 2004), and *Torah Soft Ltd. v. Drosnin*, 136 F. Supp. 2d 276 (S.D.N.Y. 2001), for the
 28 premise that functional changes do not result in a derivative work. *Silverstein*, however, held only
 that an author was estopped from copyright *protection* based merely on copyediting. 368 F.3d at
 83 (questioning but not deciding whether copyediting created an original work). *Torah Soft* held
 that where a program must read bible text by one of two methods, selection of one did not satisfy
 the originality requirement for copyright *protection* of a compilation of non-original works. 136
 F. Supp. 2d at 289-90. Neither case pertains here.

1 programming activities of developers who write code to enable various software applications to
 2 interoperate with Mac OS X. (Response at 13-16.) Psystar's argument is without merit. Contrary
 3 to Psystar's assertion, *Dun & Bradstreet* does not hold that only changes to a program's source
 4 code constitute a derivative work. In *Dun & Bradstreet*, the defendant created a new software
 5 program that incorporated the plaintiff's copyrighted code and added the defendant's command
 6 codes. The Third Circuit held that this new program was an infringing derivative work: "the
 7 inclusion of the Copy and Call command makes [defendant's] W-2 programs infringing,
 8 derivative works of [plaintiff's] copyrighted software." *Dun & Bradstreet*, 307 F.3d. at 212.
 9 Similarly, Psystar's modification of Mac OS X can and does form the basis for a finding that
 10 Psystar has infringed Apple's right to create derivative works of Mac OS X. See 17 U.S.C. §§101,
 11 106.

12 Deleting and replacing the component software of Mac OS X is not, as Psystar argues,
 13 analogous to the loading of separate applications software to run on top of an operating system.
 14 Psystar does not cite any case holding that one can replace entire files within a piece of software
 15 without creating a derivative work.⁷ Psystar's actions are akin to ripping several chapters out of a
 16 book, inserting new pages in the place of those removed, and then reselling that altered book.
 17 Psystar would have the Court accept that it is merely reselling Apple's book in its entirety along
 18 with a set of separate Psystar booklets.⁸ But Psystar's false analogy fails. In the normal course
 19 one can add word processing software to a computer, and then uninstall that software without
 20 impairing the operating system on which it was installed. [REDACTED]

21
 22 ⁷ *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 769 (E.D. Mich. 2003), does
 23 not support Psystar's claim that its modifications to Mac OS X do not create a derivative work.
 24 *Wells Fargo* considered whether a pop-up advertising window created a derivative work of an
 25 underlying web-browser window. Unlike the pop-up ads in *Wells Fargo*, which were merely
 temporary alterations to the screen displays seen by the user, Psystar alters the code needed to boot
 the operating system and execute the user interface components of Mac OS X. (Kelly Decl. at ¶¶
 16-17, 29, 31.)

26 ⁸ While Psystar's Response expounds at some length about open source software including, for
 27 example, Darwin and the "Mach" micro-kernel, none of that discussion matters to this case.
 Psystar does not contend, or try to prove – because it cannot do so – that Apple's bootloader code,
 which Psystar replaces, is not proprietary to Apple. [REDACTED]

28 [REDACTED] Thus, Psystar's "open source" discussion is nothing more than a red herring.

(Kelly Decl. at ¶¶ 16-17, 31.)

D. Psystar Has Not Opposed Apple's Motion For Summary Judgment For Contributory Copyright Infringement Claim

Apple has moved for summary judgment on its claim for contributory infringement, and included with its motion evidence and argument supporting this claim. (*See* Apple SJ Br. at 15-16 and evidence cited therein.) Psystar has neither introduced any admissible evidence nor made any argument to rebut this claim. Accordingly, Apple is entitled to judgment on its claim for contributory copyright infringement.

E. Apple Is Entitled To Judgment On Psystar's Copyright Misuse Defense And Counterclaims

Psystar repeatedly has changed the alleged basis for its copyright misuse defense and counterclaims, but at no point has it presented any evidence or legal support for its allegations. Psystar does not contest Apple's evidence that it lacks market power in a relevant market and confirms that its copyright misuse contention is not based on "recycled theories of antitrust violations." (Response at 20.) But Psystar offers no other basis for its misuse claim. Nor can it. Psystar presents no evidence and does not even argue that Apple undermines the policy of the Copyright Act by suppressing others' creativity. Nor does Psystar present any evidence or argument to show that Apple has stopped Psystar or anyone else from developing operating system software.

What remains of Psystar's misuse claim, as reflected in its Response, is Psystar's insistence that simply because Apple seeks to "enforce the tethering of OS X to Apple hardware," Apple *per se* is engaged in copyright misuse. For the many reasons discussed in Apple's opposition to Psystar's summary judgment motion, this argument fails. (Apple's Opp. Br. at 17-18.) This Court already has stated that Apple "is certainly entitled" "to ask its customers to purchase Mac OS knowing that it is to be used only with Apple computers." *Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1201 (N.D. Cal. 2008) (also Docket No. 33 at 14). Furthermore,

Apple has a constitutional right to enforce its copyrights in federal court unless the lawsuit is both objectively baseless and filed for an improper purpose, and this suit most certainly is not. *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61, 113 S. Ct. 1920, 1928 (1993); *Freeman v. Lasky, Haas & Cohler*, 410 F.3d 1180, 1183-85 (9th Cir. 2005). Psystar provides no legal support for the view that seeking to enforce a restriction on the use of licensed software is *per se* copyright misuse. Nor can it; that notion is contradicted by the many cases that have upheld licensing arrangements that prohibit running software on unauthorized platforms. *See, e.g., Sony Computer Entm't Am. Inc. v. Gamemasters*, 87 F. Supp. 2d 976, 987 (N.D. Cal. 1999); *Microsoft Corp. v. BEC Computer Co., Inc.*, 818 F. Supp. 1313, 1316-17 (C.D. Cal. 1992).⁹

The facts are uncontested. Apple integrates its software with its hardware to provide its customers with high quality products that are easy to use, reliable, and operate optimally. (*See* Apple SJ Br. at 2-6.) Apple ensures this customer experience by conducting extensive testing and customization of its software to its hardware and vice versa. This approach and effort has yielded great success and customer satisfaction. (*See* Apple SJ Br. at 2-3.) Apple has done nothing to suppress creativity or preclude Psystar or other competitors from creating their own operating systems. (*See* Apple SJ Br. at 18-19.) That Apple protects its integrated products through technical and legal means does not constitute copyright misuse.

F. Apple Is Entitled To Judgment On Its DMCA Claims

Psystar concedes there are no factual disputes concerning Apple's DMCA claims. Psystar admits that Mac OS X contains technological protection mechanisms that prevent its use on non-Apple hardware and that Psystar circumvents these protections, again adopting the description of Psystar's circumvention contained in the report of Apple's expert, Dr. Kelly. (Response at 6-7.)

⁹ To support its misuse claim, Psystar relies on the portion of *Triad Systems Corp. v. Southeastern Express Co.*, 64 F.3d 1330, 1333 (9th Cir. 1995), in which Triad conceded that under its first contract (Regime 1, covering 1976-1985), it "sold" rather than licensed software to consumers. In that context, the Ninth Circuit never addressed misuse. Moreover, when Triad licensed and restricted use of its software, the Ninth Circuit affirmed the district court's finding of no copyright misuse. *Id.* at 1337 ("Triad did not attempt to prohibit [anyone] from developing its own service software to compete with Triad."). The Ninth Circuit's decision in *Triad* supports Apple's position here. Mac OS X is licensed, not sold, to consumers and Apple's choice to limit the software to its hardware does not limit competitors from creating their own operating systems or selling their own computers.

1 In its opposition Psystar introduces no new argument to contest its liability under the DMCA and,
2 instead, simply incorporates the arguments set forth in its motion for summary judgment.

3 Psystar's argument that its circumvention does not "facilitate infringement" both misstates
4 the law and ignores the undisputed facts. Apple need not prove copyright infringement to succeed
5 on its DMCA claims. The DMCA "targets the *circumvention* of digital walls guarding
6 copyrighted material (and trafficking in circumvention tools), but does not concern itself with the
7 use of those materials after circumvention has occurred." *Universal City Studios, Inc. v. Corley*,
8 273 F.3d 429, 443 (2nd Cir. 2001) (emphasis in original). At most Apple need only show – which
9 it has done – that its protection measures bear a "reasonable relation" to the interests of the
10 Copyright Act because they protect access to, and copying of, a copyrighted work, Mac OS X. *Cf.*
11 *Storage Tech. Corp. v. Custom Hardware Eng'g & Consulting, Inc.*, 421 F.3d 1307, 1318 (Fed.
12 Cir. 2005) (denying preliminary injunction under DMCA when plaintiff's "rights under copyright
13 law are not at risk"). Moreover, even if proof of copyright infringement were required, Psystar's
14 conceded unauthorized copying of Mac OS X amply shows that infringement.

15 Psystar repeatedly has conceded that Apple's encryption mechanism is "effective" by
16 acknowledging that it prevents use of Mac OS X on non-Apple hardware.¹⁰ Moreover, as a matter
17 of law, the alleged availability of decryption code on the Internet does not undermine the
18 effectiveness of Apple's technological protection measures. *Sony Computer Entm't Am., Inc. v.*
19 *Divineo, Inc.*, 457 F. Supp. 2d 957, 965 (N.D. Cal. 2006); *Universal City Studios, Inc. v.*
20 *Reimerdes*, 111 F. Supp. 2d 294, 317-318 (S.D.N.Y. 2000). (See Apple's Opp. Br. at 18-21.)

21 For these reasons, as well as the additional reasons set forth in Apple's motion for
22 summary judgment, and in Apple's opposition to Psystar's motion for summary judgment, Apple
23 is entitled to judgment that Psystar has violated the DMCA.¹¹

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26 ¹⁰ Chung Decl. Ex. 9 at 21:24-22:12, Ex. 24 at No. 25, Ex. 41 at PS009264.

27 ¹¹ Psystar apparently has decided not pursue a 1201(f) "reverse engineering" defense under the
28 DMCA either because Psystar has waived the defense or for the un rebutted reasons stated in pages
25-27 of Apple's SJ Brief. Consequently, Apple is entitled to summary judgment on that defense
as well.

1 **G. Apple Seeks Only to Enforce Its Intellectual Property And Protect The Fruits**
2 **Of Its Labor**

3 Psystar argues that its blatant pirating of Apple's Mac OS X software, and its
4 circumvention of the technological protection measures that Apple created to maintain the quality
5 and reputation of its integrated computer products, should be overlooked because Psystar is a
6 "family business" that Apple supposedly is "trying to destroy." (Response at 22.) This rhetoric
7 should be ignored. Apple is not trying to harm a legitimate business. Rather, Apple seeks only to
8 stop Psystar from mis-appropriating the enormous investment of time, talent and resources made
9 by Apple and its engineers in Mac OS X and to stop Psystar from harming Apple's hard-won
10 reputation for excellence by selling an inferior, infringing product. *Cadence Design Sys., Inc. v.*
11 *Avant! Corp.*, 125 F.3d 824, 829-30 (9th Cir. 1997) ("a defendant who knowingly infringes
12 another's copyright 'cannot complain of the harm that will befall it when properly forced to desist
13 from its infringing activities'"); *Concrete Machinery Co. v. Classic Lawn Ornaments, Inc.*, 843
14 F.2d 600, 612 (1st Cir. 1988) ("We see little reason why an entity should be allowed to establish
15 and continue an enterprise based solely on what is in all likelihood copyright infringement, simply
16 because that is its only business."); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F.
17 Supp. 2d 1197, 1221 (C.D. Cal. 2007) (proper to issue an injunction, despite hardship caused to
18 defendants when its business model, like Psystar's, was set up to induce infringement).

19 Psystar argues that it is trying to "embody the spirit of innovation and hard work of which
20 all of us, as Americans, are so justly proud." (Response at 22.) But Psystar's pirating of Apple's
21 software does not constitute hard work or promote innovation. Psystar infringes Apple's
22 copyrights and violates the DMCA. It should be precluded from continuing to do so.

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1 **II. CONCLUSION**

2 Apple respectfully requests that for the foregoing reasons and those set forth in Apple's
3 motion, the Court grant summary judgment for Apple and enter an order finding that Psystar has
4 both infringed Apple's copyrights and violated the DMCA.

5 DATED: October 29, 2009

Respectfully submitted,

6 TOWNSEND AND TOWNSEND AND CREW LLP

7
8 By: /s/ James G. Gilliland, Jr.

9 JAMES G. GILLILAND, JR.

10 Attorneys for Plaintiff and Counterdefendant
11 APPLE INC.

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CERTIFICATE OF SERVICE

I, **Victoria Hopper**, declare I am employed in the City and County of San Francisco, California in the office of a member of the bar of this court at whose direction this service was made. I am over the age of eighteen and not a party to this action. My business address is Townsend and Townsend and Crew LLP, Two Embarcadero Center, Eighth Floor, San Francisco, California, 94111.

I served the following documents exactly entitled: **REPLY BRIEF TO PSYSTAR CORPORATION'S OPPOSITION TO APPLE INC.'S MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action following the ordinary business practice of Townsend and Townsend and Crew LLP, as follows:

K.A.D. Camara Kent Radford Camara & Sibley LLP 2339 University Boulevard Houston, TX 77005 Phone: 713-893-7973 Fax: 713-583-1131 Email: camara@camarasibley.com	Eugene Action 1780 E. Barstow Avenue, #5 Fresno, CA 93710 Email: eugeneaction@hotmail.com
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☒ [By First Class Mail] I am readily familiar with my employer's practice for collecting and processing documents for mailing with the United States Postal Service. On the date listed herein, following ordinary business practice, I served the within document(s) at my place of business, by placing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, for collection and mailing with the United States Postal Service where it would be deposited with the United States Postal Service that same day in the ordinary course of business.

☐ [By Overnight Courier] I caused each envelope to be delivered by a commercial carrier service for overnight delivery to the offices of the addressee(s).

☐ [By Hand] I directed each envelope to the party(ies) so designated on the service list to be delivered by courier this date.

☐ [By Facsimile Transmission] I caused said document to be sent by facsimile transmission to the fax number indicated for the party(ies) listed above.

☒ [By Electronic Transmission] I caused said document to be sent by electronic transmission to the e-mail address indicated for the party(ies) listed above via the court's ECF notification system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on October 29, 2009, at San Francisco, California.

/s/ Victoria Hopper

Victoria Hopper