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 13 APPLE INC.

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

18 APPLE INC.,

19 Plaintiff,

20 v.

21 PSYSTAR CORPORATION, a Florida  
 22 corporation,

23 Defendant.

24 AND RELATED COUNTERCLAIMS.

Case No. 08-3251 WHA

**DECLARATION OF JOHN P. J. KELLY  
 IN SUPPORT OF APPLE INC.'S  
 MOTION FOR A PERMANENT  
 INJUNCTION, STATUTORY DAMAGES  
 AND REASONABLE ATTORNEYS'  
 FEES AND COSTS**

Date: December 14, 2009  
 Time: 8:00 a.m.  
 Courtroom: 9  
 Judge: Hon. William Alsup  
 Trial Date: January 11, 2010

1 I, JOHN P. J. KELLY, declare as follows:

2 1. I make this declaration on personal knowledge and if called as a witness, could and  
3 would competently testify with respect to the matters stated herein. I am the principal of Kelly  
4 Computing Incorporated in Santa Barbara, California. I have been retained by the law firm of  
5 Townsend and Townsend and Crew LLP on behalf of Apple Inc. (“Apple”) to provide testimony  
6 and expert opinion in the above-captioned matter. I have submitted an expert report in this matter  
7 as well as a Declaration in Support of Apple’s Motion for Summary Judgment dated October 8,  
8 2009 (the “October 8 Declaration”). My background and credentials are set forth in that  
9 declaration.

10 2. As part of my analysis, I studied several Psystar computers, which are listed in my  
11 expert report, my October 8 Declaration, and set forth in Table 1 below:

12  
13 **Table 1. Psystar computers examined and the dates that the computers were either ordered by Apple or  
14 produced in discovery by Psystar.**

	<b>Computer</b>	<b>Date ordered by Apple</b>	<b>Date produced by Psystar</b>	
15	A	Open	5/6/2008	—
16	B	OpenPro	7/21/2008	—
17	C	OpenPro	9/26/2008	—
18	D	Open	3/5/2009	—
19	E	OpenPro	3/5/2009	—
20	F	Open	—	4/21/2009
21	G	OpenPro	—	4/21/2009
22	H	Open(3)	—	4/21/2009
23	I	Open(7)	—	8/17/2009

24 3. As shown in Table 1, Psystar Computers A-E were purchased from Psystar by  
25 Apple or its agents. Psystar Computers F-H were made available for inspection at the offices of  
26 Psystar’s former counsel, and Computer I was produced by Psystar during discovery.

27 4. Psystar Computers A-I all have a hard drive installed with a modified version of  
28 Mac OS X. In my report, I included Table 2 (reproduced below) to show the version and build of  
Mac OS X installed on each Psystar computer I studied and the version and build of the Mac OS X  
DVD shipped with that computer. Table 2 was also included in my October 8 Declaration.

Table 2. Version of Mac OS X installed on each Psystar Computer.

	Computer	Mac OS X version & build installed on hard drive	Mac OS X version & build on Mac OS X DVD shipped
A	Open	10.5.2 (9C7010)	10.5.0 (9A581)
B	OpenPro	10.5.4 (9E17)	10.5.1 (9B21)
C	OpenPro	10.5.5 (9F33)	10.5.4 (9E25)
D	Open	10.5.6 (9G55)	10.5.6 (9G66)
E	OpenPro	10.5.6 (9G55)	10.5.6 (9G66)
F	Open	10.5.6 (9G55)	—
G	OpenPro	10.5.6 (9G55)	—
H	Open(3)	10.5.6 (9G55)	—
I	Open(7)	10.5.6 (9G66)	10.5.6 (9G66)

5. As can be seen from Table 2 above, Psystar has copied and installed at least five (5) different versions or builds of Mac OS X onto its computers' hard drives between May, 2008 and August, 2009: (i) version 10.5.2 (Computer A); (ii) version 10.5.4 (Computer B); (iii) version 10.5.5 (Computer C); (iv) version 10.5.6, build 9G55 (Computers D-H); and (v) version 10.5.6, build 9G66 (Computer I). I have been informed that Apple first released version 10.5.2 on February 11, 2008, version 10.5.4 on June 30, 2008, version 10.5.5 on September 15, 2008, and version 10.5.6 on December 15, 2008. As can be discerned from this data, Psystar repeatedly created modified versions of Mac OS X and shipped them to customers shortly after Apple released each new version of Mac OS X.

6. Following the release of Apple's Mac OS X version 10.6 Snow Leopard ("Snow Leopard"), I examined a Psystar computer installed with Snow Leopard. I also examined Psystar's newest product, called Rebel EFI, which is software that Psystar distributes to enable

1 third parties to run Snow Leopard on non-Apple computers even if the computers were not  
2 purchased from Psystar. In both instances, I found that to force Snow Leopard to run on non-  
3 Apple computers, Psystar does not use the bootloader in Mac OS X. Instead, Psystar substitutes  
4 its own bootloader. (A bootloader is the initial set of code used to start the operation of Mac OS  
5 X. Further details regarding bootloaders are set forth at paragraphs 16-17 of my October 8  
6 Declaration.) And, as with the circumvention software used by Psystar to run Mac OS X version  
7 10.5 Leopard on Psystar computers, the circumvention software used by Psystar to run Snow  
8 Leopard (or enable others to do so) generates Apple's decryption key and uses it to access the  
9 encrypted files in Snow Leopard.

10           7.       In sum, Psystar takes the following steps to enable Mac OS X to run on non-Apple  
11 hardware: (a) Psystar uses Apple's decryption key to circumvent Apple's technological protection  
12 measures and gain access to the encrypted files in Mac OS X; and (b) Psystar modifies Mac OS X  
13 by, at a minimum, using a different bootloader. Psystar took both of these steps with respect to  
14 every Psystar computer that I inspected, whether that computer was running Leopard or Snow  
15 Leopard. In my opinion, Psystar must take both of those steps to enable any retail DVD version of  
16 Mac OS X Leopard or Snow Leopard to run on non-Apple hardware.

17           8.       The key used by Apple to decrypt the encrypted files in Mac OS X version 10.6  
18 Snow Leopard is the same key used by Apple to protect the encrypted files within Mac OS X  
19 version 10.5 Leopard and is stored in the hardware of a genuine Apple computer. Because of the  
20 importance of compatibility between new versions of Mac OS X and existing Apple hardware, it  
21 is not surprising that Apple uses the same key. If Apple had required use of a different hardware-  
22 stored key to decrypt and access the encrypted files in Snow Leopard, owners of existing Apple  
23 computers with Intel processors would have had to purchase new computers or modify their  
24 existing hardware in order to upgrade to Snow Leopard. Apple has never released a version of  
25 Snow Leopard that runs on anything other than an Intel processor.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 23rd day of November, 2009 at Santa Barbara, California.



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John F.J. Kelly, Ph.D.