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 PSYSTAR CORPORATION

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UNITED STATES DISTRICT COURT

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NORTHERN DISTRICT OF CALIFORNIA

11

SAN FRANCISCO DIVISION

12

APPLE INC., a California corporation,

CASE NO. CV-08-03251-WHA

13

Plaintiff,

14

v.

**PSYSTAR CORPORATION'S  
 FIRST AMENDED  
 COUNTERCLAIM FOR  
 DECLARATORY RELIEF AS TO  
 THE UNENFORCEABILITY OF  
 COPYRIGHTS**

15

PSYSTAR CORPORATION, a Florida  
 corporation,

16

Defendant.

**JURY TRIAL REQUESTED**

17

18

AND RELATED COUNTERCLAIMS

19

20

**Nature of this Action**

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1. This is an action for declaratory relief under the Declaratory Judgment Act (28 U.S.C. §  
 23 2201) (hereinafter referred to as the "First Amended Counterclaim").

24

25

2. PsyStar Corporation ("PSYSTAR") seeks a declaration as to the unenforceability of certain  
 26 copyrights held and asserted by Apple Inc. ("APPLE") in its July 3, 2008 Complaint ("Complaint")  
 27 and December 2, 2008 Amended Complaint ("First Amended Complaint"). PSYSTAR's request  
 28 for declaratory relief as to unenforceability of these copyrights is predicated upon APPLE having

1 leveraged (and APPLE continuing to leverage) the limited monopoly granted by the U.S. Copyright  
2 Office under the U.S. Copyright Act to areas outside that statutory grant. APPLE’s leveraging  
3 conduct therefore constitutes copyright misuse, which renders the corresponding copyrights  
4 unenforceable.

5 3. APPLE leverages its asserted copyrights in the Macintosh OS X Operating System (the  
6 “Mac OS”) to secure exclusive rights not granted by the U.S. Copyright Office. APPLE has  
7 secured—and continues to seek to secure—exclusive rights in certain hardware components  
8 referred to herein as Apple-Labeled Computer Hardware Systems vis-à-vis the Mac OS. APPLE  
9 illicitly and improperly secured and continues to secure these rights to the exclusion of Mac OS  
10 Capable Computer Hardware Systems. APPLE leverages its asserted copyrights through its End  
11 User License Agreement (“EULA”) and the misapplication of the Digital Millennium Copyright  
12 Act (“DMCA”).

13  
14 **Jurisdiction and Venue**

15  
16 4. The First and Second counterclaims set forth in this First Amended Counterclaim are  
17 brought pursuant to 28 U.S.C. § 2201. This Court is thereby vested with subject matter jurisdiction  
18 pursuant to 28 U.S.C. §§ 1331 and 1338(a) because this case presents a federal question under the  
19 United States Copyright Act.

20 5. This First Amended Counterclaim is a compulsory counterclaim brought in accordance with  
21 Federal Rule of Civil Procedure 13(a)(1). The aforementioned causes of action arise out of the  
22 transactions or occurrences that are the subject matter of APPLE’s Complaint and First Amended  
23 Complaint and do not require adding another party over which the Court cannot acquire  
24 jurisdiction.

1 **The Parties**

2  
3 6. APPLE is a California Corporation with its principal place of business at 1 Infinite Loop,  
4 Cupertino, California 95014. APPLE markets the Macintosh Computer and the OS X Operating  
5 System.

6 7. Counterclaimant PSYSTAR is a Florida Corporation with its principal place of business at  
7 10475 NW 28<sup>th</sup> Street, Doral, Florida, 33172.

8 8. PSYSTAR manufactures and distributes computers tailored to customer choosing. As a part  
9 of its devotion to supporting customer choice, PSYSTAR supports a wide range of operating  
10 systems including Microsoft Windows XP and XP 64-bit, Windows Vista and Vista 64-bit, Linux  
11 (32 and 64-bit kernels), and the Mac OS. PSYSTAR generally refers to this custom tailored line of  
12 computers as Open Computers.

13 9. Open Computers are personal computers that, in the case of the Mac OS, work like a  
14 Macintosh including the latest Macintosh operation system—OS X.5 (a.k.a. Leopard). PSYSTAR  
15 Open Computers, again in the case of the Mac OS, run the OS X like that of a Macintosh from  
16 APPLE albeit on a computer hardware system offered at a considerably lower price and with  
17 considerably higher performance. For example, one of the least expensive Macintosh machines on  
18 the market is for the Mac Mini, which costs more than that of an Open Computer from PSYSTAR.  
19 PSYSTAR is informed and believes, and thereon alleges, that the Mac Mini offers poorer  
20 performance, smaller storage space, and RAM. Furthermore, the Mac Mini does not have the  
21 option for an alternative video card such as an NVIDIA GeForce 8600, which is supported by the  
22 PSYSTAR Open Computer.

23  
24 **General Allegations**

25  
26 10. For the purposes of this First Amended Counterclaim, PSYSTAR refers to the following  
27 products: the Mac OS, Mac OS Capable Computer Hardware Systems, and Apple-Labeled  
28 Computer Hardware Systems. The Mac OS has been briefly referenced above with respect to the

1 Mac OS X Operating System. Computer hardware capable of executing the Mac OS is referred to  
2 herein as Mac OS Capable Computer Hardware Systems such as the Open Computer from  
3 PSYSTAR. Apple-Labeled Computer Hardware Systems are those hardware systems  
4 manufactured exclusively by APPLE and belonging to a subsidiary market of Mac OS Capable  
5 Computer Hardware Systems. That subsidiary market—the Apple-Labeled Computer Hardware  
6 Systems market—is artificially created, dominated, and maintained by APPLE. All of the  
7 aforementioned products are sold in the United States of America.

8  
9 **The Mac OS**

10 11. More specifically, the Mac OS is a graphical user interface-based operating system that  
11 (prior to the emergence of PSYSTAR) was operable exclusively on the Macintosh line of computer  
12 hardware and other computer hardware made by and available only from APPLE—Apple-Labeled  
13 Computer Hardware Systems. Operating systems like the Mac OS control and direct the interaction  
14 between software applications such as word processors, Internet browsers, and applications and the  
15 central processing unit of the computer and its various hardware components.

16 12. APPLE is the exclusive manufacturer and/or master licensor of the Mac OS.

17 13. PSYSTAR is informed and believes, and thereon alleges, that there are substantial barriers  
18 to entry in the market for operating systems, including the Mac OS market. It is prohibitively  
19 difficult, time-consuming, and expensive to create any operating system much less one that would  
20 offer substantially identical functionality, security, stability, and other aspects offered by the Mac  
21 OS. In general, a new operating system manufacturer faces an almost insurmountable barrier to  
22 successful entry to the operating system market. Those barriers would be raised even higher with  
23 respect to an operating system that would directly compete with the Mac OS.

24  
25 **Mac OS Capable Computer Hardware Systems**

26 14. Computer hardware systems, in general, perform central processing unit functions.  
27 Operating systems—like the Mac OS—manage the interaction between various pieces of hardware  
28

1 such as a monitor or printer. The operating system also manages various software applications  
2 running on a computing device.

3 15. A seemingly infinite list of manufacturers may be found in the computer hardware system  
4 marketplace. These manufacturers construct entire hardware systems (*i.e.*, computers) marketed  
5 and sold to the consumer either directly or via an authorized re-seller. The participants in the  
6 computer hardware system marketplace include Dell, Acer, Lenovo, Sony, and Hewlett-Packard to  
7 name but a few.

8 16. Any number of companies dedicated to manufacturing and sourcing various components  
9 used by the aforementioned manufacturers (*e.g.*, hard drives (Western Digital), processors (Intel  
10 and AMD), and graphics processing cards (NVIDIA)) also exist.

11 17. PSYSTAR is informed and believes, and thereon alleges, that one or more of these  
12 manufacturers of computer hardware systems are capable and desirous of manufacturing computer  
13 hardware systems that host, execute, and run the Mac OS. There is no compelling technological  
14 reason that any one of the aforementioned computer hardware system manufacturers could not  
15 accumulate and assemble the hardware components in an Apple-Labeled Computer Hardware  
16 System such that said system would be capable of hosting, executing, and running the Mac OS. As  
17 noted above, PSYSTAR refers to the computer systems that could and would be manufactured by  
18 these entities as Mac OS Capable Computer Hardware Systems.

19 18. As there is no technical reason that a third-party could not accumulate and assemble the  
20 hardware components in an Apple-Labeled Computer Hardware System such that said system  
21 would be capable of running the Mac OS, on information and belief PSYSTAR alleges that but for  
22 the exclusionary and leveraging conduct of APPLE—said conduct amounting to unfair  
23 competition—a third-party (as evidenced by the activities of PSYSTAR) could and would  
24 accumulate, assemble, and market the hardware components capable of running the Mac OS.

25

### 26 **Apple-Labeled Computer Hardware Systems**

27 19. Notwithstanding the various computer hardware manufacturers in the marketplace, none of  
28 the aforementioned companies currently manufacture computer hardware systems that support the

1 Mac OS. APPLE is the only manufacturer of systems operating the Mac OS. APPLE's exclusive  
2 line of hardware systems that support the Mac OS include the Mac Pro, the Mac Mini, the  
3 MacBook, the MacBook Air, MacBook Pro, and iMac. PSYSTAR, as noted above, refers to the  
4 exclusive line of APPLE hardware systems that support the Mac OS as Apple-Labeled Computer  
5 Hardware Systems. PSYSTAR is informed and believes, and thereon alleges, that but for the  
6 anticompetitive conduct of APPLE as outlined herein, Apple-Labeled Computer Hardware Systems  
7 would be a competing member of the otherwise diverse Mac OS Capable Computer Hardware  
8 Systems market.

9 20. PSYSTAR alleges that by virtue of APPLE's leveraging of copyrights in the context of  
10 APPLE's EULA, spurious litigation via the DMCA, and various other anti- and unfair competitive  
11 conduct, there is no viable alternative to the purchase and use of Apple-Labeled Computer  
12 Hardware Systems for users who wish to use the Mac OS, for a prospective buyer of the Mac OS,  
13 or for a user of an older version of the Mac OS. Without an operating system, a computer hardware  
14 system can perform virtually no useful tasks thus making the installation of the Mac OS a necessity.  
15 The Mac OS—at least according to APPLE—can only be installed on Apple-Labeled-Computer  
16 Hardware Systems, a restriction that APPLE enforces through the aforementioned misuse of its  
17 copyrights. Mac OS users are—through APPLE's copyright misuse—thereby locked in to a  
18 component not otherwise covered by any APPLE copyright—an Apple-Labeled Computer  
19 Hardware System.

20

### 21 **Apple's Anticompetitive Conduct**

22 21. PSYSTAR, on information and belief, alleges that APPLE is content with the knowledge  
23 that it has exclusive rights to the Mac OS and that nearly insurmountable barriers exist with respect  
24 to any other entity introducing a Mac OS-like operating system. PSYSTAR is informed and  
25 believes, and thereon alleges, that the most significant competitive threat to APPLE is not from a  
26 new operating system but from computer hardware system manufacturers that may offer a  
27 competing hardware platform upon which to run the Mac OS—Mac OS Capable Computer  
28 Hardware Systems. Any such hardware platform would compete directly with Apple-Labeled

1 Computer Hardware Systems, which are manufactured by APPLE and available for purchase only  
2 from APPLE and/or its authorized resellers.

3 22. PSYSTAR is informed and believes, and thereon alleges, that in order to protect itself from  
4 potential competitive threats, APPLE has engaged in a series of anticompetitive activities  
5 involving, *inter alia*, its copyrights. PSYSTAR is further informed and believes, and thereon  
6 alleges, that APPLE's conduct includes contractual agreements tying the Mac OS to—and only to—  
7 Apple-Labeled Hardware Systems, exclusionary agreements precluding customers or would be  
8 competitors from installing, running, or using the Mac OS on any computer hardware system that is  
9 not an Apple-Labeled Computer Hardware System, that is, Mac OS Capable Computer Hardware  
10 Systems. These contractual ties are backed with the threat of litigation for infringement of one or  
11 more APPLE copyrights.

12 23. PSYSTAR is informed and believes, and thereon alleges, that manufacturers of Mac OS  
13 Capable Computer Hardware Systems that could run the Mac OS and that are not Apple-Labeled  
14 Computer Hardware Systems pose a significant competitive threat to APPLE with respect to the  
15 quality of such hardware systems and the pricing of such systems. If Mac OS Capable Computer  
16 Hardware Systems that are not Apple-Labeled Systems were introduced into the overall  
17 marketplace, APPLE would be forced to engage in significant research, development, and quality  
18 improvement in computer hardware; APPLE would, further, be forced into price competition with  
19 other Mac OS Capable Computer Hardware System manufacturers.

#### 20 21 **The Demise of the Clone Program**

22 24. On information and belief, PSYSTAR alleges that in or around 1995, APPLE launched an  
23 official clone program (the “Clone Program”). On information and belief, PSYSTAR alleges that  
24 as a part of APPLE’s Clone Program, Macintosh ROMs and system software were licensed to other  
25 computer hardware manufacturers who agreed to pay a royalty for each ‘cloned’ computer sold.

26 25. On information and belief, PSYSTAR alleges that from 1995 to 1997, it was possible to buy  
27 a PowerPC-based computer running the Mac OS from, at the least, Power Computing Corporation.

28



1 On information and belief PSYSTAR alleges that other licensees and members of the Clone  
2 Program included Motorola, Radius, APS Technologies, DayStar Digital, and UMAX.

3 26. PSYSTAR, on information and belief, alleges that in what was to be the start of a trend of  
4 increasingly anticompetitive conduct with respect to excluding others in the marketplace from  
5 selling computer hardware systems capable of operating the Mac OS and otherwise evidencing  
6 APPLE's distaste for legitimate competition in the hardware marketplace, APPLE elected to end  
7 the Clone Program in or about 1997. APPLE's election to end the Clone Program accelerated at  
8 about the same time as the return of Steve Jobs to APPLE as its Chief Executive Officer.

9 27. On information and belief, PSYSTAR alleges that the APPLE Clone Program came to a *de*  
10 *facto* end with the release of Mac OS 8, which, unlike certain prior iterations of the Mac OS, had no  
11 official licensee program.

12 28. On information and belief, PSYSTAR alleges that APPLE further sought to discontinue the  
13 Clone Program through the purchase of Power Computing Corporation, a very successful and  
14 viable manufacturer of a computer hardware system capable of running the Mac OS.

15 29. On information and belief, PSYSTAR alleges that the Mac OS 9 was released on or about  
16 October 23, 1999 without any official licensee program. On information and belief, PSYSTAR  
17 alleges that updates to the Mac OS 9—up to and including Mac OS 9.2.2 on December 6, 2001—  
18 were also released without any official licensee program.

### 19 **Mac OS X Tied to Apple-Labeled Computer Hardware Systems**

20 30. PSYSTAR is informed and believes, and thereon alleges, that APPLE's trend of releasing  
21 subsequent iterations of the Mac OS without an official licensee program continued with respect to  
22 the Mac OS X. In June 2005 at the 2005 Worldwide Developer Conference, APPLE CEO Steve  
23 Jobs announced the planned release of the aforementioned Mac OS X for late 2006 or early 2007.  
24 At the same conference, APPLE Senior Vice President Phil Schiller noted that APPLE had no plans  
25 of running the Windows OS on a Macintosh but noted "[t]hat doesn't preclude someone from  
26 running it" and that APPLE "won't do anything to preclude that."

27 31. In contrast to allowing (and all but inviting) others to run a competing OS on a Macintosh  
28 and, further, openly stating that APPLE would not do anything to preclude the same, Schiller stated



1 that APPLE did not plan to let people run the Mac OS X on other computer makers' hardware; said  
2 Schiller: "[w]e will not allow running Mac OS X on anything other than an Apple Mac."

3 32. True to its word, and by its own admission in paragraph 21 of APPLE's First Amended  
4 Complaint, APPLE "prohibit[s] use of the Mac OS or its upgrades on non-Apple hardware."

### 5 6 **Kernel Panic and Infinite Loops**

7 33. On information and belief, PSYSTAR alleges that APPLE intentionally embeds code in the  
8 Mac OS that causes the Mac OS to malfunction on any computer hardware system that is not an  
9 Apple-Labeled Computer Hardware System. Upon recognizing that a computer hardware system is  
10 not an Apple-Labeled Computer Hardware System, the Mac OS will not operate properly, if at all,  
11 and will go into what is colloquially known as 'kernel panic.'

12 34. In kernel panic, the operating system believes that it has detected an internal and fatal error  
13 from which the operating system cannot safely recover. As a result, the operating system  
14 discontinues operation. As noted above, without a functioning operating system, functionality of  
15 the corresponding computer is reduced to near zero.

16 35. In Unix style operating systems like that of the Mac OS, the kernel routines that handle  
17 panics are generally known as panic(). Panic() routines are generally designed to output an error  
18 message to the display device of the computer, dump an image of kernel memory to disk for  
19 post-mortem debugging, and then await either manual reboot of the system or automatically initiate  
20 the same. Attempts by the operating system to read an invalid or non-permitted memory address  
21 are a common source of kernel panic. Panic may also occur as a result of a hardware failure or a  
22 bug in the operating system. While the operating system, in some instances, could continue  
23 operation after occurrence of a memory violation, the system is in an unstable state and often  
24 discontinues operation to prevent further damage and to allow for diagnosis of the error rather than  
25 risk security breaches and data corruption.

26 36. As of the release of Mac OS 10.5, PSYSTAR is informed and believes and thereon alleges  
27 that APPLE has continued to cause interoperability issues in its xnu kernel on generic Intel  
28 hardware including kernel panics. A sample kernel panic situation in the 10.5.5 xnu kernel

1 artificially arises during the initialization process if the Mac OS detects that the processor of the  
2 corresponding computing device is not in a certain family. PSYSTAR is informed and believes and  
3 thereon alleges that that ‘certain family’ is the Intel Dual Core/Core/Core2 series of processors,  
4 which is inclusive of Apple-Labeled Computer Hardware Systems.

5 37. PSYSTAR is informed and believes and thereon alleges that there is no specific reason as to  
6 why this “check” should be present in the code as the kernel is capable of booting on a much  
7 broader range of hardware, specifically Mac OS Capable Computer Hardware Systems. PSYSTAR  
8 is informed and believes and thereon alleges that when the check is patched out, either by binary  
9 patching the kernel or source patching and then compiling, the kernel can easy be booted on a  
10 Pentium 4 processor. This is something that is currently restricted by the “check” in current  
11 versions of the xnu kernel and for no functional reason. This “check” stops the execution of the  
12 Mac OS on any x86 processor not sold by Apple—that is, the “check” stops the execution of the  
13 Mac OS on any computer that is not an Apple-Labeled Computer Hardware System.

14 38. PSYSTAR is informed and believes and thereon alleges that APPLE embeds further code in  
15 the Mac OS that causes the Mac OS to malfunction on any computer hardware system that is not an  
16 Apple-Labeled Computer Hardware System. PSYSTAR is informed and believes and thereon  
17 alleges that upon recognizing that a computer hardware system is not an Apple-Labeled Computer  
18 Hardware System, the Mac OS will not operate properly, if at all, and will enter into what is  
19 colloquially known as an ‘infinite loop.’

20 39. An infinite loop is a sequence of instructions in a computer program that endlessly loops.  
21 This infinite loop is due either to the loop having no terminating condition or having one that can  
22 never be met. Infinite loops cause a program to consume all available processor time.

23 40. As of the release of Mac OS 10.5, PSYSTAR is informed and believes and thereon alleges  
24 that APPLE has continued to cause interoperability issues in its xnu kernel on generic Intel  
25 hardware including infinite loops. PSYSTAR is informed and believes and thereon alleges that a  
26 sample infinite loop arises during restart/reboot after calling modular restart functions. PSYSTAR  
27 is informed and believes and thereon alleges that most x86 hardware (*i.e.*, non-Apple-Labeled  
28 Computer Hardware Systems) fail to reboot with the stock xnu kernel due to this infinite loop.

1 41. There is no specific reason as to why this infinite loop is present in the code as the kernel  
2 is capable of restating/rebooting on a much broader range of hardware, specifically Mac OS  
3 Capable Computer Hardware Systems. Thus, the restart/reboot infinite loop exists for no functional  
4 reason. This loop stops the execution of the Mac OS on any x86 processor not sold by Apple—that  
5 is, an Apple-Labeled Computer Hardware System.

6 42. PSYSTAR is informed and believes and thereon alleges that the Mac OS need not go into  
7 kernel panic or an infinite loop. The Mac OS is capable of operating on any number of computer  
8 hardware systems that are not Apple-Labeled Computer Hardware Systems (*i.e.*, Mac OS Capable  
9 Computer Hardware Systems). PSYSTAR is informed and believes, and thereon alleges, that the  
10 instances of kernel panic and infinite loop as described above are self-induced by APPLE's  
11 embedding of code to induce kernel panic and infinite loops to thereby prevent interoperability on  
12 computer hardware systems that are not Apple-Labeled Computer Hardware Systems (*i.e.*, Mac OS  
13 Capable Computer Hardware Systems).

14 43. PSYSTAR is informed and believes, and thereon alleges, that APPLE is engaged in  
15 anticompetitive conduct that prevents the proper operation of the Mac OS on any computer  
16 hardware system that is not an Apple-Labeled Computer Hardware System—a Mac OS Capable  
17 Computer Hardware System—thereby forcing customers of the Mac OS to purchase—and only  
18 purchase—an Apple-Labeled Computer Hardware System if they wish to have the Mac OS operate  
19 sans kernel panic or an infinite loop.

20  
21 **APPLE's Misuse of Copyrights via the EULA**

22 44. In addition to technically preventing the Mac OS from operating on any Mac OS Capable  
23 Computer Hardware System and that is not an Apple-Labeled Computer Hardware System, the  
24 EULA for the Mac OS X Leopard and MAC OS X Leopard Server (collectively referenced herein  
25 as the aforementioned Mac OS), specifically—and, again, by APPLE's own admission in paragraph  
26 22 of its First Amended Complaint—states:

27 "1. General. The software (including Boot ROM Code) . . . accompanying this  
28 License whether preinstalled on Apple-labeled hardware, on disks, in read only

1 memory, or any other media or in any other form (collectively the ‘Apple Software’)  
2 are licensed, not sold, to you by Apple Inc. (‘Apple’) for use **only under the terms**  
3 **of this License . . . .”**

4 2. Permitted License Uses and Restrictions.

5 A. Single Use. This license allows you to install, use and run (1) copy of the Apple  
6 Software on a single **Apple-labeled computer** at a time. **You agree not to install,**  
7 **use, or run the Apple Software on any non-Apple-Labeled computer or enable**  
8 **another to do so.**

8 (emphasis added).

9 45. Thus, as a pre-condition of a license to the Mac OS, APPLE leverages its copyrights in the  
10 Mac OS to require customers to agree to install, use, or run the Mac OS on—and only on—Apple-  
11 Labeled Computer Hardware Systems. As such, a customer is prohibited from seeking out and  
12 choosing any other computer hardware system that is not an Apple-Labeled Computer Hardware  
13 System—including but not limited to a Mac OS Capable Computer Hardware System—on which to  
14 install, use, and run the Mac OS.

15 46. PSYSTAR is informed and believes, and thereon alleges, that APPLE misuses its copyrights  
16 in the Mac OS to force purchases of Apple-Labeled Computer Hardware Systems for use in  
17 conjunction with the Mac OS. APPLE, therefore, has attempted to (and continues to) leverage the  
18 rights granted under any valid copyright to areas outside the exclusive rights granted by the  
19 Copyright Act (*i.e.*, forcing purchases of Apple-Labeled Computer Hardware Systems). APPLE  
20 has thus engaged in certain anticompetitive behavior and/or other actions that are in violation of the  
21 public policy underlying the federal copyright laws including, but not limited to, a failure to abide  
22 by the fair use and first sale doctrines.

23 47. APPLE has leveraged and thereby misused its copyrights through the use of its EULA and  
24 the requirement that the Mac OS be used exclusively on Apple-Labeled Computer Hardware  
25 Systems notwithstanding the lack of any copyright interest in that hardware. By enforcing this  
26 provision in its EULA, APPLE is attempting to obtain, maintain, and/or enjoy rights not granted by  
27 the Copyright Act including, but not limited to, destroying competition in the Mac OS Capable  
28 Computer Hardware Systems market, which is wholly unrelated to any valid copyright.

1 48. APPLE has further engaged in copyright misuse by utilizing any valid copyright in the Mac  
2 OS to maintain exclusive control of the Apple-Labeled Computer Hardware System market. By  
3 enforcing its EULA as it pertains to any valid copyright, APPLE is attempting to obtain, maintain,  
4 and/or enjoy rights not granted by the Copyright Act including, but limited to, maintaining its  
5 control of the Apple-Labeled Computer Hardware Systems market to the exclusion of Mac OS  
6 Capable Computer Hardware Systems, which is wholly unrelated to any valid copyright.

7  
8 **APPLE's Misuse of Copyrights via the DMCA**

9 49. APPLE purports to use "technological protection measures" to "control access to Apple's  
10 copyrighted works." APPLE has accused PSYSTAR of having engaged in the manufacture,  
11 importation, offering to the public, provisioning, or trafficking of an as yet unidentified  
12 "Circumvention Device" primarily designed or produced for the purpose of circumventing  
13 APPLE's technological protection measures and/or allowing third parties to access APPLE  
14 copyrights without authorization. APPLE makes these assertions in the context of 17 U.S.C. §  
15 1201 *et seq.* (the DMCA).

16 50. PSYSTAR is informed and believes and thereon alleges that APPLE is leveraging rights  
17 granted under any valid copyright to areas outside the exclusive rights granted by the Copyright  
18 Act (*i.e.*, forcing purchases of Apple-Labeled Computer Hardware Systems). APPLE has thus  
19 engaged in certain anticompetitive behavior and/or other actions that are in violation of the public  
20 policy underlying the federal copyright laws including, but not limited to, a failure to abide by the  
21 fair use and first sale doctrines.

22 51. APPLE accomplishes this leveraging through the assertion of claims under the DMCA.  
23 Through the use of the DMCA, APPLE attempts to leverage its copyright-granted limited  
24 monopoly in the Mac OS into a broad monopoly in the independent manufacture of Mac OS  
25 Capable Computer Hardware Systems by forcing purchases of Apple-Labeled Computer Hardware  
26 Systems. Specifically, APPLE alleges that any party utilizing the Mac OS on any computer system  
27 that is not an Apple-Labeled Computer Hardware System has engaged in a violation of the DMCA.  
28 By attempting to apply the DMCA in this manner, APPLE is attempting to obtain, maintain, and/or

1 enjoy rights not granted by the Copyright Act including, but not limited to, destroying competition  
2 in the Mac OS Capable Computer Hardware Systems market, which is wholly unrelated to any  
3 valid copyright.

4 52. PSYSTAR is further informed and believes and thereon alleges that APPLE does not  
5 actually employ a technological copyright protection measure that controls access to the Mac OS.  
6 PSYSTAR is also informed and believes and thereon alleges that any purported technological  
7 copyright protection measure does not necessarily control access to a copyrighted work.  
8 PSYSTAR further alleges that any PSYSTAR product or technology has a commercially significant  
9 purpose or use other than to circumvent a technological measure that effectively controls access to  
10 a copyrighted work.

11 53. PSYSTAR is informed and believes and thereon alleges that APPLE is aware of one or  
12 more of the foregoing allegations set forth in paragraph 55. PSYSTAR alleges that notwithstanding  
13 such knowledge, APPLE brought the foregoing DMCA claim in an attempt to chill innovation  
14 whereby third-parties such as PSYSTAR would not engage in legal and legitimate development of  
15 products that compete with Apple-Labeled Computer Hardware Systems. PSYSTAR is informed  
16 and believes and thereon alleges that APPLE made the foregoing DMCA claims solely to prevent  
17 and/or stymie the continued development of a competitive threat to Apple-Labeled Computer  
18 Hardware Systems—that is, Mac OS Capable Computer Hardware Systems.

#### 20 **Apple Benefits from Misuse of its Copyrights**

21 54. On information and belief, PSYSTAR alleges that as a result of the aforementioned  
22 conduct, competition in the Mac OS Capable Computer Hardware System market with respect to  
23 the contractually tied Mac OS and Apple-Labeled Computer Hardware Systems is, notwithstanding  
24 PSYSTAR, essentially non-existent. PSYSTAR is informed and believes, and thereon alleges, that  
25 APPLE has eliminated all but a few competitors (*e.g.*, PSYSTAR) and continues to ensure that no  
26 competition arises in the Mac OS Capable Computer Hardware System market with respect to the  
27 Mac OS and Apple-Labeled Computer Hardware Systems. APPLE ensures this lack of competition  
28 vis-à-vis illicit contractual and licensing practices and the misuse of its intellectual property,

1 including its copyrights and spurious litigation under the DMCA, both of which include attempts to  
2 obtain, maintain, and/or enjoy rights not granted by the Copyright Act including, extension and/or  
3 maintenance of monopoly power in certain of the defined markets.

4 55. PSYSTAR is informed and believes, and thereon alleges, that with competition all but  
5 eliminated in the Mac OS Capable Computer Hardware System market as it pertains to the Mac OS  
6 and Apple-Labeled Computer Hardware Systems, APPLE is free to control and charge customers  
7 supra-competitive prices. For example, APPLE CEO Steve Jobs announced in an October 2008  
8 investor's conference call that "[w]e don't know how to make a \$500 computer that's not a piece of  
9 junk, and our DNA will not let us ship that."

10 56. PSYSTAR is informed and believes, and thereon alleges, that APPLE's conduct with  
11 respect to the Mac OS requires its end users, therefore, to deal exclusively with APPLE through the  
12 purchase and use of only Apple-Labeled Computer Hardware Systems.

13 57. Through APPLE's requirement that end users exclusively utilize Apple-Labeled Computer  
14 Hardware Systems to the exclusion of all other Mac OS Capable Computer Hardware Systems in  
15 the marketplace, PSYSTAR is informed and believes, and thereon alleges, that APPLE has, at the  
16 least, substantially lessened competition in the Mac OS Capable Computer Hardware Systems  
17 marketplace if not eliminated it in its entirety.

18 58. PSYSTAR is informed and believes, and thereon alleges, that APPLE's pattern of conduct  
19 makes it clear that unless restrained, APPLE will continue to misuse the EULA for the Mac OS and  
20 various intellectual properties including copyrights related to the Mac OS and spurious litigation  
21 under the DMCA to artificially exclude competition from Mac OS Computer Hardware System  
22 manufacturers thereby depriving customers of a free choice between Mac OS Capable Computer  
23 Hardware Systems that would otherwise be capable of running the Mac OS.

24 59. On information and belief, PSYSTAR alleges that APPLE would enjoy significant  
25 advantages with respect to maintaining its exclusivity in the contractually tied Mac OS Apple-  
26 Labeled Computer Hardware Systems markets. On information and belief, PSYSTAR alleges that  
27 APPLE would further enjoy a benefit by preventing competition from the Mac OS Capable  
28 Computer Hardware Systems market by contractually tying the Mac OS to Apple-Labeled



1 Computer Hardware Systems and otherwise misusing its intellectual property including copyrights  
2 with respect to the same. On information and belief, PSYSTAR alleges that APPLE would further  
3 enjoy a benefit by technically and/or contractually excluding other manufacturers from  
4 manufacturing Mac OS Capable Computer Hardware Systems market rather than having to  
5 compete on the merits with Apple-Labeled Computer Hardware Systems. APPLE would enjoy a  
6 similar benefit through the spurious threat of litigation under the DMCA.

7 60. PSYSTAR is informed and believes, and thereon alleges, that the anticompetitive  
8 technological and contractual conduct of APPLE in conjunction with the misuse of its intellectual  
9 properties reduce the incentives and abilities of Mac OS Capable Computer Hardware System  
10 manufacturers that would otherwise compete with Apple-Labeled Computer Hardware Systems on  
11 the merits from innovating and differentiating their products in ways that would further facilitate  
12 competition in the Mac OS Capable Computer Hardware System market.

13 61. The present Counterclaim does not seek to inhibit APPLE from competing on the merits by  
14 innovation, but does challenge APPLE's concerted attempts to unfairly achieve dominance in other  
15 markets, not by innovation and other competition on the merits, but by tie-ins, exclusive dealing  
16 contracts, copyright misuse, spurious litigation under the DMCA, and other anticompetitive  
17 agreements that deter innovation, exclude competition, and deny customers of their right to choose  
18 among competing alternatives

19 62. PSYSTAR is informed and believes, and thereon alleges, that APPLE's conduct adversely  
20 affects innovation, including by impairing the incentive of APPLE's would-be competitors in the  
21 Mac OS Capable Computer Hardware Systems market and potential competitors to undertake  
22 research and development, because they know that APPLE can limit and has in the past limited the  
23 rewards from any resulting innovation; impairing the ability of APPLE's competitors and potential  
24 competitors to obtain financing for research and development; inhibiting APPLE's competitors that  
25 nevertheless succeed in developing promising innovations from effectively marketing their  
26 improved products to customers of the Mac OS; reducing the incentive and ability of Computer  
27 Hardware Systems manufacturers to innovate and differentiate their products in ways that would  
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1 appeal to customers; and reducing competition and the spur to innovation by APPLE and others  
2 that only competition can provide.

3 63. PSYSTAR is informed and believes, and thereon alleges, that the purpose and effect of  
4 APPLE's conduct with respect to the Mac OS and Mac OS Capable Computer Hardware Systems  
5 that are not Apple-Labeled Computer Hardware Systems have been and, if not restrained, will be to  
6 preclude competition on the merits between Apple-Labeled Computer Hardware Systems and other  
7 Mac OS Capable Computer Hardware System manufacturers and to maintain APPLE's Mac OS  
8 exclusivity in the Apple-Labeled Computer Hardware System market. PSYSTAR, at the very least,  
9 has been harmed through such anticompetitive conduct.

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**Claims for Relief**

**First Claim for Relief**

**(Declaration of Unenforceability for Copyright Misuse (EULA))**

64. PSYSTAR hereby incorporates by reference all of the allegations of paragraphs 1-66 of this First Amended Counterclaim as if fully set forth herein.

65. APPLE possesses one or more copyrights related to the Mac OS.

66. APPLE licenses the Mac OS and any copyrights corresponding to the Mac OS through APPLE’s EULA.

67. As a part of APPLE’s EULA, APPLE requires the end-user to “agree not to install, use, or run the Apple Software on any non-Apple-Labeled Computer.”

68. Apple-Labeled Computer Hardware Systems are not covered by any copyright corresponding to the Mac OS.

69. APPLE has leveraged and continues to leverage the limited monopoly granted by the Copyright Act through the copyrights corresponding to the Mac OS to areas outside the copyright monopoly or otherwise granted by the Copyright Act including the requirement that end-users only install the Mac OS on Apple-Labeled Computer Hardware Systems.

70. APPLE’s use of the EULA in conjunction with its copyrights in this manner is anticompetitive.

71. APPLE’s use of the EULA in conjunction with its copyrights in this manner violates the underlying public policy of the federal copyright laws.

72. APPLE’s use of the EULA in conjunction with its copyrights to expand its monopoly to areas outside the copyright grant in a manner that is anticompetitive and contrary to public policy constitutes a misuse of APPLE’s copyrights.

73. PSYSTAR has been directly harmed by APPLE’s use of the EULA in conjunction with APPLE’s misuse of its copyrights.

1 74. PSYSTAR is therefore entitled to a declaratory judgment finding APPLE's copyrights to be  
2 unenforceable until that time that APPLE discontinues the use of the EULA in conjunction with the  
3 misuse of its copyrights.

4  
5 **Second Claim for Relief**

6 **(Declaration of Unenforceability for Copyright Misuse (DMCA))**

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8 75. PSYSTAR hereby incorporates by reference all of the allegations of paragraphs 1-77 of this  
9 First Amended Counterclaim as if fully set forth herein.

10 76. APPLE possesses one or more copyrights related to the Mac OS.

11 77. APPLE causes the Mac OS to malfunction on non-Apple-Labeled Computer Hardware  
12 Systems by embedding code that cause kernel panic and/or infinite loop.

13 78. The code that causes kernel panic and/or infinite loop does not constitute a technological  
14 copyright protection measure.

15 79. The code that causes kernel panic and/or infinite loop does not effectively control access to  
16 a copyrighted work.

17 80. PSYSTAR products have a commercially significant purpose or use other than to  
18 circumvent a technological measure that effectively controls access to a copyrighted work.

19 81. Notwithstanding the foregoing, APPLE has asserted the DMCA against PSYSTAR in an  
20 attempt to leverage the limited monopoly granted by the Copyright Act through the copyrights  
21 corresponding to the Mac OS to areas outside the copyright monopoly or otherwise granted by the  
22 Copyright Act including the installation and/or operation of the Mac OS on Apple-Labeled  
23 Computer Hardware Systems.

24 82. Apple-Labeled Computer Hardware Systems are not covered by any copyright  
25 corresponding to the Mac OS.

26 83. APPLE's use of the DMCA in conjunction with its copyrights in this manner is  
27 anticompetitive.

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1 84. APPLE's use of the DMCA in conjunction with its copyrights in this manner violates the  
2 underlying public policy of the federal copyright laws.

3 85. APPLE's use of the DMCA in conjunction with its copyrights to expand its monopoly to  
4 areas outside the copyright grant in a manner that is anticompetitive and contrary to public policy  
5 constitutes a misuse of APPLE's copyrights.

6 86. PSYSTAR has been directly harmed by APPLE's use of the DMCA in conjunction with  
7 APPLE's misuse of its copyrights.

8 87. PSYSTAR is therefore entitled to a declaratory judgment finding APPLE's copyrights to be  
9 unenforceable until that time that APPLE discontinues the use of the DMCA in conjunction with  
10 the misuse of its copyrights.

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**Prayer for Relief**

**WHEREFORE, PSYSTAR PRAYS FOR RELIEF AS FOLLOWS:**

- 1. Entering judgment for PSYSTAR against APPLE on all counts;
- 2. Declare APPLE’s actions with respect to its EULA to be a misuse of copyrights thereby making said copyrights unenforceable so long as the misuse of those copyrights with respect to its EULA continues;
- 3. Declare APPLE’s actions with respect to its claims under the DMCA to be a misuse of copyrights thereby making any copyright purportedly protected through enforcement of the DMCA unenforceable so long as to the misuse of those copyrights continues;
- 4. Enter such other preliminary and permanent injunctive relief as is necessary and appropriate to prohibit attempts to enforce otherwise unenforceable copyrights as those copyrights concern APPLE’s misuse of the same;
- 5. That the Court enter such additional relief as it may find just and proper.

Dated: February 12, 2009

CARR & FERRELL *LLP*

By: /s/ Colby B. Springer  
 ROBERT J. YORIO  
 COLBY B. SPRINGER  
 CHRISTOPHER P. GREWE  
 Attorneys for Defendant/Counterclaimant  
 PSYSTAR CORPORATION

**DEMAND FOR JURY TRIAL**

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Defendant and Counterclaimant PSYSTAR hereby demands a jury trial of all issues in the above-captioned action that are triable to a jury.

Dated: February 12, 2009

CARR & FERRELL *LLP*

By: /s/ Colby B. Springer  
ROBERT J. YORIO  
COLBY B. SPRINGER  
CHRISTOPHER P. GREWE  
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PSYSTAR CORPORATION