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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

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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").

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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**

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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 28th 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.

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.

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.

19

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
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