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APPLE INC.

9
10 UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION
13

14 APPLE INC., a California corporation,

Case No. CV 08-03251 WHA

15 Plaintiff,

**APPLE INC.'S ANSWER TO PSYSTAR
CORPORATION'S FIRST AMENDED
16 COUNTERCLAIM FOR
DECLARATORY RELIEF AS TO THE
UNENFORCEABILITY OF
17 COPYRIGHTS**

18 v.

17 PSYSTAR CORPORATION,
a Florida corporation, and DOES 1-10,
18 inclusive,

19 Defendants.

20 AND RELATED COUNTERCLAIMS
21

22 Plaintiff and counterdefendant Apple Inc. (hereinafter "Apple") hereby responds to the First
23 Amended Counterclaim For Declaratory Relief As To The Unenforceability Of Copyrights
24 (hereinafter "First Amended Counterclaim") of defendant and counterclaimant Psystar Corporation
25 (hereinafter "Psystar") as follows:

26 ///

27 ///

28 ///

1 **NATURE OF THIS ACTION**

2 1. Answering Paragraph 1 of the First Amended Counterclaim, Apple admits that Psystar
3 is seeking relief under the Declaratory Judgment Act (28 U.S.C. § 2201), but denies that such relief is
4 appropriate. Except as expressly admitted herein, Apple denies the allegations contained in
5 Paragraph 1.

6 2. Answering Paragraph 2 of the First Amended Counterclaim, Apple admits that Psystar
7 seeks a declaration as to the unenforceability of certain copyrights held and asserted by Apple in its
8 July 3, 2008 Complaint and December 2, 2008 Amended Complaint (“Amended Complaint”) against
9 Psystar, but denies that such relief is appropriate. Except as expressly admitted herein, Apple denies
10 the allegations contained in Paragraph 2.

11 3. Answering Paragraph 3 of the First Amended Counterclaim, Apple admits that it is the
12 owner and exclusive licensor of copyrights in Mac OS X® and prior versions of Apple’s Macintosh
13 operating system. Except as expressly admitted herein, Apple denies the allegations contained in
14 Paragraph 3.

15 **JURISDICTION AND VENUE**

16 4. Answering Paragraph 4 of the First Amended Counterclaim, Apple admits that this
17 Court is vested with federal question subject matter under 28 U.S.C. §§ 1331 and 1338(a). Except as
18 expressly admitted herein, Apple denies the allegations contained in Paragraph 4.

19 5. Answering Paragraph 5 of the First Amended Counterclaim, Apple denies each and
20 every allegation contained in Paragraph 5.

21 **THE PARTIES**

22 6. Answering Paragraph 6 of the First Amended Counterclaim, Apple admits that it is a
23 California Corporation with its principal place of business at 1 Infinite Loop, Cupertino, California
24 95014. Apple admits that it markets Macintosh Computers, each of which includes Mac OS X.
25 Except as expressly admitted herein, Apple denies the allegations contained in Paragraph 6.

26 7. Answering Paragraph 7 of the First Amended Counterclaim, on information and belief,
27 Apple admits the allegations contained in Paragraph 7.

1 14. Answering Paragraph 14 of the First Amended Counterclaim, Apple admits that
2 operating systems facilitate the interaction between computers and various pieces of hardware
3 including but not limited to hardware such as monitors or printers. Apple admits that operating
4 systems allow applications to run on computer hardware. Except as expressly admitted herein, Apple
5 denies the allegations contained in Paragraph 14.

6 15. Answering Paragraph 15 of the First Amended Counterclaim, Apple admits that Dell,
7 Acer, Lenovo, Sony, Hewlett-Packard and many other manufacturers make and distribute computers.
8 Except as expressly admitted herein, Apple denies the allegations contained in Paragraph 15.

9 16. Answering Paragraph 16 of the First Amended Counterclaim, Apple admits that there
10 are manufacturers who make and distribute components for computers. Apple admits that Western
11 Digital makes and distributes hard drives. Apple admits that Intel and AMD make and distribute
12 processors and other integrated circuit products. Apple admits that NVIDIA makes and distributes
13 graphics processing cards. Except as expressly admitted herein, Apple denies the allegations
14 contained in Paragraph 16.

15 17. Answering Paragraph 17 of the First Amended Counterclaim, Apple lacks sufficient
16 information to answer the allegations and on that basis denies each and every allegation contained in
17 Paragraph 17.

18 18. Answering Paragraph 18 of the First Amended Counterclaim, Apple denies that its
19 conduct in licensing Mac OS X is in any way “exclusionary” or “leveraging” or in any way amounts
20 to unfair competition. With regard to the remaining allegations in Paragraph 18, Apple lacks
21 sufficient information to answer the allegations and on that basis denies each and every allegation
22 contained in Paragraph 18.

23 19. Answering Paragraph 19 of the First Amended Counterclaim, Apple admits that it is
24 the only source of computer hardware licensed to run Mac OS X. Apple admits that its Mac Pro, Mac
25 Mini, MacBook, MacBook Air, MacBook Pro and iMac computers support Mac OS X. Apple admits
26 that in the First Amended Counterclaim, Psystar refers to “Apple-Labeled Computer Hardware
27 Systems.” Except as expressly admitted herein, Apple denies the allegations contained in
28 Paragraph 19.

1 20. Answering Paragraph 20 of the First Amended Counterclaim, Apple admits that it
2 licenses Mac OS X for use only on Apple's hardware. Except as expressly admitted herein, Apple
3 denies the allegations contained in Paragraph 20.

4 21. Answering Paragraph 21 of the First Amended Counterclaim, Apple denies each and
5 every allegation contained in Paragraph 21.

6 22. Answering Paragraph 22 of the First Amended Counterclaim, Apple denies each and
7 every allegation contained in Paragraph 22.

8 23. Answering Paragraph 23 of the First Amended Counterclaim, Apple denies each and
9 every allegation contained in Paragraph 23.

10 24. Answering Paragraph 24 of the First Amended Counterclaim, Apple admits that in or
11 around 1994, Apple announced a program to enable a limited number of pre-approved computer
12 hardware manufacturers to manufacture and distribute, under agreements with Apple, personal
13 computers that supported what was then the current version of the Mac operating system. These
14 agreements included, among other provisions, requirements to pay royalties. Except as expressly
15 admitted herein, Apple denies the allegations contained in Paragraph 24.

16 25. Answering Paragraph 25 of the First Amended Counterclaim, Apple admits that from
17 about 1995 to about 1997, it was possible to buy a PowerPC-based computer running the then-current
18 version of the Mac operating system sold by Power Computing Corporation under agreements with
19 Apple. Apple also admits that Motorola, Radius, APS Technologies, DayStar Digital and UMAX
20 held licenses from Apple. Except as expressly admitted herein, Apple denies the allegations contained
21 in Paragraph 25.

22 26. Answering Paragraph 26 of the First Amended Counterclaim, Apple denies each and
23 every allegation contained in Paragraph 26.

24 27. Answering Paragraph 27 of the First Amended Counterclaim, Apple admits that no
25 hardware manufacturer manufactured and distributed personal computers supporting Mac OS 8 under
26 agreements with Apple. Except as expressly admitted herein, Apple denies the allegations contained
27 in Paragraph 27.

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1 28. Answering Paragraph 28 of the First Amended Counterclaim, Apple admits that it
2 purchased all the assets of Power Computing Corporation. Except as expressly admitted herein, Apple
3 denies the allegations contained in Paragraph 28.

4 29. Answering Paragraph 29 of the First Amended Counterclaim, Apple admits that Mac
5 OS 9 was released in or about October 1999. Apple admits that it released updates to Mac OS 9.
6 Apple lacks sufficient information to know what Psystar means by “official licensee program” and on
7 that basis denies the remaining allegations contained in Paragraph 29.

8 30. Answering Paragraph 30 of the First Amended Counterclaim, Apple admits that at the
9 2005 Worldwide Developer Conference, Steve Jobs announced the planned release of Mac OS X
10 Leopard in late 2006 or early 2007. Apple also admits that on June 6, 2005, a CNET article reported
11 that Apple Senior Vice President Phil Schiller stated that Apple had no plans to sell or support
12 Windows on an Intel-based Mac at the 2005 Worldwide Developer Conference. Apple admits that the
13 CNET article attributed the following statements to Mr. Schiller: “‘That doesn’t preclude someone
14 from running it on a Mac. They probably will.’ [Schiller] said, ‘We won’t do anything to preclude
15 that.’” Except as expressly admitted herein, Apple denies the allegations contained in Paragraph 30.

16 31. Answering Paragraph 31 of the First Amended Counterclaim, Apple admits that on
17 June 6, 2005, a CNET article reported that at the 2005 Worldwide Developer Conference, Apple
18 Senior Vice President Phil Schiller stated that “[w]e will not allow running Mac OS X on anything
19 other than an Apple Mac.” Except as expressly admitted herein, Apple denies the allegations
20 contained in Paragraph 31.

21 32. Answering Paragraph 32 of the First Amended Counterclaim, Apple admits that
22 Paragraph 21 of Apple’s Amended Complaint states: “[u]pgrades to the Mac OS may be licensed
23 separately, but the terms of the license prohibit use of the Mac OS or its upgrades on non-Apple
24 hardware.” Except as expressly admitted herein, Apple denies the allegations contained in
25 Paragraph 32.

26 33. Answering Paragraph 33 of the First Amended Counterclaim, Apple admits that it
27 utilizes technological protection measures that prevent unauthorized access to its copyrighted works in
28

1 Mac OS X. Except as expressly admitted herein, Apple denies the allegations contained in
2 Paragraph 33.

3 34. Answering Paragraph 34 of the First Amended Counterclaim, Apple admits that kernel
4 panic occurs when an operating system detects an error of the type that causes the operating system to
5 stop accepting user input and to discontinue operation. Except as expressly admitted herein, Apple
6 denies the allegations contained in Paragraph 34.

7 35. Answering Paragraph 35 of the First Amended Counterclaim, Apple admits that Mac
8 OS X is built on a UNIX foundation. Apple also admits generally that attempts by operating systems
9 to read invalid or non-permitted memory addresses could be a common source of kernel panic. Apple
10 further admits that kernel panic may occur in some operating systems as a result of hardware failure or
11 bugs in the operating systems. Apple also admits that operating systems can discontinue operation in
12 some instances of memory violations in order to, among other reasons, prevent damage and allow for
13 error diagnosis. Except as expressly admitted herein, Apple denies the allegations contained in
14 Paragraph 35.

15 36. Answering Paragraph 36 of the First Amended Counterclaim, Apple admits that Mac
16 OS X Leopard checks for the identification of processors (including the Intel Core/Dual Core/Core 2
17 series of processors) which have been tested, encoded for and designed to work with Mac OS X
18 Leopard and detects when they are not present. Except as expressly admitted herein, Apple denies the
19 allegations contained in Paragraph 36.

20 37. Answering Paragraph 37 of the First Amended Counterclaim, Apple admits that Mac
21 OS X Leopard checks for the identification of processors which have been tested, encoded for and
22 designed to work with Mac OS X Leopard and detects when they are not present. Apple lacks
23 sufficient information to know what Psystar means by “capable of booting” and “can easy (*sic*) be
24 booted” and on that basis denies the remaining allegations contained in Paragraph 37.

25 38. Answering Paragraph 38 of the First Amended Counterclaim, Apple admits that it
26 utilizes technological protection measures that prevent unauthorized access to its copyrighted works in
27 Mac OS X. Except as expressly admitted herein, Apple denies the allegations contained in
28 Paragraph 38.

1 39. Answering Paragraph 39 of the First Amended Counterclaim, Apple admits endless
2 loops in computer programs are commonly referred to as infinite loops. Apple admits that infinite
3 loops can be due to the loop having no terminating condition or having one that can never be met.
4 Except as expressly admitted herein, Apple denies the allegations contained in Paragraph 39.

5 40. Answering Paragraph 40 of the First Amended Counterclaim, Apple denies each and
6 every allegation contained in Paragraph 40.

7 41. Answering Paragraph 41 of the First Amended Counterclaim, Apple denies each and
8 every allegation contained in Paragraph 41.

9 42. Answering Paragraph 42 of the First Amended Counterclaim, Apple denies each and
10 every allegation contained in Paragraph 42.

11 43. Answering Paragraph 43 of the First Amended Counterclaim, Apple denies each and
12 every allegation contained in Paragraph 43.

13 44. Answering Paragraph 44 of the First Amended Counterclaim, Apple admits that it
14 utilizes technological protection measures to prevent unauthorized access to copyrighted works in Mac
15 OS X. Apple further admits that, as stated in Paragraph 22 of Apple's Amended Complaint, Apple's
16 Software License Agreement for Mac OS X states:

17 1. General. The software (including Boot ROM Code) . . . accompanying
18 this License whether preinstalled on Apple-labeled hardware, on disks, in
19 read only memory, or any other media or in any other form (collectively
20 the 'Apple Software') are licensed, not sold, to you by Apple Inc.
21 ('Apple') **for use only under the terms of this License**

22 2. Permitted License Uses and Restrictions.

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

27 (emphasis added). Except as expressly admitted herein, Apple denies the allegations contained in
28 Paragraph 44.

 45. Answering Paragraph 45 of the First Amended Counterclaim, Apple admits that it
licenses Mac OS X for use only on Apple's hardware. Except as expressly admitted herein, Apple
denies the allegations contained in Paragraph 45.

1 46. Answering Paragraph 46 of the First Amended Counterclaim, Apple denies each and
2 every allegation contained in Paragraph 46.

3 47. Answering Paragraph 47 of the First Amended Counterclaim, Apple denies each and
4 every allegation contained in Paragraph 47.

5 48. Answering Paragraph 48 of the First Amended Counterclaim, Apple denies each and
6 every allegation contained in Paragraph 48.

7 49. Apple admits that it employs technological protection measures that effectively control
8 access to Apple’s copyrighted works in Mac OS X. Apple further admits that it has alleged “that
9 Defendant has manufactured, imported, offered to the public, provided or otherwise trafficked a
10 product, device, component, technology, software, or “code” (“the Circumvention Devices”) that are
11 primarily designed or produced for the purpose of either circumventing Apple’s technological
12 protection measures that effectively control access to Copyrighted Works, or allowing third parties to
13 access Apple’s Copyrighted Works without authorization.” Apple admits that it has made these
14 allegations under 17 U.S.C. § 1201 *et seq.* Except as expressly admitted herein, Apple denies the
15 allegations contained in Paragraph 49.

16 50. Answering Paragraph 50 of the First Amended Counterclaim, Apple denies each and
17 every allegation contained in Paragraph 50.

18 51. Answering Paragraph 51 of the First Amended Counterclaim, Apple admits that it has
19 alleged claims against Psystar under 17 U.S.C. § 1201 *et seq.*, which is part of the Digital Millennium
20 Copyright Act or “DMCA.” Except as expressly admitted herein, Apple denies the allegations
21 contained in Paragraph 51.

22 52. Answering Paragraph 52 of the First Amended Counterclaim, Apple denies each and
23 every allegation contained in Paragraph 52.

24 53. Answering Paragraph 53 of the First Amended Counterclaim, Apple denies each and
25 every allegation contained in Paragraph 53.

26 54. Answering Paragraph 54 of the First Amended Counterclaim, Apple denies each and
27 every allegation contained in Paragraph 54.

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1 55. Answering Paragraph 55 of the First Amended Counterclaim, Apple denies each and
2 every allegation contained in Paragraph 55.

3 56. Answering Paragraph 56 of the First Amended Counterclaim, Apple admits that it
4 licenses Mac OS X for use only on Apple's hardware. Except as expressly admitted herein, Apple
5 denies the allegations contained in Paragraph 56.

6 57. Answering Paragraph 57 of the First Amended Counterclaim, Apple denies each and
7 every allegation contained in Paragraph 57.

8 58. Answering Paragraph 58 of the First Amended Counterclaim, Apple denies each and
9 every allegation contained in Paragraph 58.

10 59. Answering Paragraph 59 of the First Amended Counterclaim, Apple denies each and
11 every allegation contained in Paragraph 59.

12 60. Answering Paragraph 60 of the First Amended Counterclaim, Apple denies each and
13 every allegation contained in Paragraph 60.

14 61. Answering Paragraph 61 of the First Amended Counterclaim, Apple denies each and
15 every allegation contained in Paragraph 61.

16 62. Answering Paragraph 62 of the First Amended Counterclaim, Apple denies each and
17 every allegation contained in Paragraph 62.

18 63. Answering Paragraph 63 of the First Amended Counterclaim, Apple denies each and
19 every allegation contained in Paragraph 63.

20 **CLAIMS FOR RELIEF**

21 **FIRST CLAIM FOR RELIEF**
22 **(Declaration of Unenforceability for Copyright Misuse (EULA))**

23 64. Answering Paragraph 64 of the First Amended Counterclaim, Apple hereby realleges
24 and incorporates by reference its responses to paragraphs 1 through 63, above.

25 65. Answering Paragraph 65 of the First Amended Counterclaim, Apple admits that it is
26 the owner and exclusive licensor of copyrights in Mac OS X and prior versions of the Mac operating
27 system. Except as expressly admitted herein, Apple denies the allegations contained in
28 Paragraph 65.

1 76. Answering Paragraph 76 of the First Amended Counterclaim, Apple admits that it is
2 the owner and exclusive licensor of copyrights in Mac OS X and prior versions of the Mac operating
3 system. Except as expressly admitted herein, Apple denies the allegations contained in
4 Paragraph 76.

5 77. Answering Paragraph 77 of the First Amended Counterclaim, Apple denies each and
6 every allegation contained in Paragraph 77.

7 78. Answering Paragraph 78 of the First Amended Counterclaim, Apple denies each and
8 every allegation contained in Paragraph 78.

9 79. Answering Paragraph 79 of the First Amended Counterclaim, Apple denies each and
10 every allegation contained in Paragraph 79.

11 80. Answering Paragraph 80 of the First Amended Counterclaim, Apple lacks sufficient
12 information to know what Psystar means by “Psystar products” and on that basis Apple denies each
13 and every allegation contained in Paragraph 80.

14 81. Answering Paragraph 81 of the First Amended Counterclaim, Apple denies each and
15 every allegation contained in Paragraph 81.

16 82. Answering Paragraph 82 of the First Amended Counterclaim, Apple admits that it
17 owns copyrights in, among other things, its operating system and other copyrighted works in its
18 hardware. Apple lacks sufficient information to understand what Psystar means by “covered by any
19 copyright corresponding to the Mac OS” and on that basis denies the allegations contained in
20 Paragraph 82.

21 83. Answering Paragraph 83 of the First Amended Counterclaim, Apple denies each and
22 every allegation contained in Paragraph 83.

23 84. Answering Paragraph 84 of the First Amended Counterclaim, Apple denies each and
24 every allegation contained in Paragraph 84.

25 85. Answering Paragraph 85 of the First Amended Counterclaim, Apple denies each and
26 every allegation contained in Paragraph 85.

27 86. Answering Paragraph 86 of the First Amended Counterclaim, Apple denies each and
28 every allegation contained in Paragraph 86.

1 87. Answering Paragraph 87 of the First Amended Counterclaim, Apple denies each and
2 every allegation contained in Paragraph 87.

3 **APPLE’S AFFIRMATIVE DEFENSE**
4 **(Failure To State A Claim Upon Which Relief Can Be Granted Under F.R.C.P. 12(b)(6))**

5 88. Psystar has failed to state a claim for declaratory relief based on copyright misuse
6 resulting from Apple’s licensing practices.

7 89. Psystar has failed to state a claim for declaratory relief based on copyright misuse
8 resulting from Apple’s assertion of the Digital Millennium Copyright Act.

9
10 DATED: March 4, 2009

Respectfully submitted,
TOWNSEND AND TOWNSEND AND CREW LLP

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12
13 By: /s/ James G. Gilliland, Jr.
14 JAMES G. GILLILAND, JR.

15 Attorneys for Plaintiff and Counterdefendant
16 APPLE INC.

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