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APPLE INC.

9 UNITED STATES DISTRICT COURT
10 NORTHERN DISTRICT OF CALIFORNIA
11 OAKLAND DIVISION

13 APPLE INC., a California corporation,

14 Plaintiff,

15 v.

16 AMAZON.COM, INC., a Delaware
corporation, and AMAZON DIGITAL
17 SERVICES, INC., a Delaware corporation,

18 Defendants.

Case No. CV 11-01327 PJH

**DECLARATION OF ROBERT A.
LEONARD, Ph.D., IN SUPPORT OF
APPLE INC.'S MOTION FOR
PRELIMINARY INJUNCTION**

28
DEC. OF R. LEONARD, PH.D., ISO
APPLE INC.'S MOTION FOR PI,
CASE NO. CV 11-01327 PJH

1 I, Robert A. Leonard, hereby declare as follows pursuant to 28 U.S.C § 1746:

2 **A. Background**

3 1. I am Professor of Linguistics, Chair of Department, and Director of the Forensic
4 Linguistics Project and of the Graduate Program in Forensic Linguistics at Hofstra
5 University in Hempstead, New York 11549.

6 2. I received my Ph.D. from Columbia University in 1982 with research
7 specialties in Semantic Theory, or theory of meaning, and Sociolinguistics. I received my
8 B.A. from Columbia College in 1970, where I was elected to Phi Beta Kappa and graduated
9 with honors, and my M.A., M.Phil., and Ph.D. from Columbia Graduate School, where I was
10 a Faculty Fellow. I was awarded a Fulbright Fellowship to conduct the research for my
11 dissertation.

12 3. At Columbia, I additionally did course work in Lexicography ("dictionary-
13 making") with one of the foremost American lexicographers, Allen Walker Read. Professor
14 Read advised me on meaning-related research projects for years after.

15 4. I have been qualified as an Expert in Linguistics in State Courts in Arizona,
16 California, Colorado, Florida, Indiana, Michigan, Montana, New York, Nevada and
17 Pennsylvania, and in Federal District Court in Newark, New Jersey. I have been admitted to
18 the Expert Panel of the 18B Assigned Counsel Plan of the City of New York.

19 5. I serve as a member of the Editorial Board of the Oxford University Press
20 series *Language and the Law*. I am also a reviewer of the Professional Staff Congress of the
21 City University of New York Research Award Program. In this capacity, I review applications
22 for research grants made to the City University of New York.

23 6. My *Curriculum Vitae* and list of cases in which I have provided expert
24 testimony in the past four years are attached hereto at Exhibits 1 and 2, respectively.

25 **B. Issue and Compensation**

26 7. I have been asked to render an opinion as to whether the primary significance
27 of the term APP STORE to a majority of the relevant public is as a brand or a generic term. I
28 have also been asked to render an opinion as to whether the term APP STORE was in general

1 use in connection with the distribution of software programs prior to Apple's adoption of the term
2 as a trademark.

3 8. My compensation for my service in this matter is at the rate of \$350 per hour
4 for services other than live testimony. I have no financial interest whatsoever in the outcome
5 of this case.

6 **C. Methodology and General Principles of Linguistics**

7 9. Linguistics is the scientific study of language. Linguists—like all scientists—
8 seek to identify discernible patterns in the empirical evidence that we study. Bullets do not
9 randomly issue from firearms; chemical concentrations do not randomly spread throughout a
10 human body. Similarly, words are not randomly found to issue from the keyboards and
11 mouths of speakers of English or any other languages. Language adheres to patterns; these
12 patterns are the subject of systematic observation of scientific linguists.

13 10. Linguists systematically observe patterns of data, patterns of linguistic behavior
14 and—like all scientists—build theories that explain and predict those patterns through the
15 construction and testing of hypotheses. The principles that emerge from linguistic analysis are
16 published in professional journals that are vetted prior to publication and are subject to peer
17 review which comments upon and tests the hypotheses contained therein. The linguistic
18 principles that I have applied in my analysis in this matter all spring from this scientific, peer-
19 reviewed process.

20 11. In conducting my linguistic analysis of the term APP STORE, I consulted a
21 broad cross-section of material including the LexisNexis database, The Corpus of
22 Contemporary American English ("COCA"), internet search results and dictionaries.

23 12. The LexisNexis databank offers the ability to conduct linguistic research utilizing
24 a vast catalog of content from thousands of global news sources, company and industry
25 intelligence providers, biographical and reference sources and a host of other material. It
26 presents a representative source of highly reliable information from which a linguist can make
27 analysis and observations regarding the use of language.

28 13. COCA is an online collection of over 410 million words of popular texts from

1 such publications as *The New York Times*, *Popular Mechanics*, *Newsweek*, *The Chicago*
2 *Tribune*, and *PCWorld* published during the years 1990-2010. COCA is a “balanced” corpus,
3 meaning that it includes an equal number of texts and words from a wide variety of popular
4 publications each year. It is accepted among experts in the field of linguistics as representative
5 of current language use.

6 14. The Google search engine can add to linguistic analyses. It can serve as an
7 aggregating tool and presents linguists with an additional corpus against which analysis may
8 be run.

9 15. In my research in connection with this matter, my focus was on analyzing uses of
10 the term APP STORE in order to determine whether the predominant usage of the term is as
11 a proper noun referring to Apple’s online application marketplace or as a generic term for *any*
12 online application marketplace.

13 16. In making this determination, I paid close attention to the capitalization (or lack
14 thereof) of that term in common usage. This is because, in standard English, names
15 considered to represent specific entities (*e.g.*, New York, Randy Johnson, The Container
16 Store) are denoted by the use of initial capital letters, as opposed to common names (*e.g.*, city,
17 baseball pitcher, business), which are not denoted by the use of initial capital letters. Writers
18 use initial capital letters with names they associate with a particular entity, demonstrating that
19 the name directly refers to or is proprietary to that entity. (*See The Cambridge Grammar of the*
20 *English Language*, Rodney Huddleston and Geoffrey K. Pullum, Cambridge University Press,
21 2002, pages 1757-1759).

22 17. In addition, the definite article “the” presupposes a specific or previously defined
23 reference (*e.g.*, “the dog is on my chair,” indicating one particular dog). In contrast,
24 indefinite articles such as “a” or “an” do not indicate a specific or previously defined
25 referent. Indefinite articles refer to something belonging to a group or a class (*e.g.*, “a dog is
26 a friendly animal,” indicating that dogs, as a class of animals, are friendly). (*See The*
27 *Cambridge Grammar of the English Language*, Rodney Huddleston and Geoffrey K. Pullum,
28 Cambridge University Press, 2002, pages 369-371).

1 18. In conducting my assessment, I was also sensitive to the use of metaphor in
2 language. An understanding of metaphor is essential to understanding linguistic cognition.
3 (See George Lakoff and Mark Johnson, *Metaphors We Live By*, Univ. of Chicago Press 1980).

4 19. A metaphor is a figure of speech based on a comparison which is implied
5 rather than directly expressed. For example, the phrase "He was a lion in the battle" is a
6 metaphor, where the comparison is implied, while "He fought like a lion," where the comparison is
7 directly expressed, is called a simile. Language change is often metaphorical, moving from the
8 directly expressed to the implied comparison. Abstract terms often grow out of physical
9 objects. For example, the phrase "right on target" presumably referred to hitting a physical target
10 but became metaphorical and now is widely used to refer generally to a point that is well made.
11 Metaphor is a constant process, dynamic, readily available and ever-changing and just
12 because a term is generic in one context does not mean that through metaphor that same term is
13 generic in another.

14 20. In evaluating how consumers use the term APP STORE it is essential, from a
15 linguistics standpoint, to evaluate uses of the term as a whole. Brands are the product of
16 their totality and must be seen as such. Human beings process information in integral
17 meaningful units. (Ferdinand de Saussure, *Cours de Linguistique Generale* (1916)). For
18 example, when a person hears the term "New York," ordinarily he or she immediately
19 comprehends that the term refers to a specific place in the United States; the listener would not
20 ordinarily comprehend that term by thinking of the word "new" and the word "York" separately.

21 21. The brand "The Container Store" illustrates this point. There can be no
22 question that the term "container" is generic for a type of product that "contains or can
23 contain something, as a carton, box, crate, can, etc." (*The Random House College Dictionary*,
24 1988: 289). Similarly, there can be no question that the term "store" is generic for a physical
25 place or location where goods and services can be obtained by immediately present consumers.

26 22. It would be incorrect linguistically to assume that the term "The Container Store"
27 is generic for any physical place or location offering for sale and selling container type products.
28 This is because the critical question from a linguistics standpoint is the empirical question of

1 how consumers use the term The Container Store *as a whole*. While I have not conducted an
2 exhaustive examination of how consumers use this particular term, it is likely on its face that
3 speakers conceive of the term "The Container Store" to refer not to just any store offering
4 container type products, but rather a specific one or specific group of ones. The concept of a
5 store dealing solely in containers may well have been novel when The Container Store was
6 launched and, since that time, consumers can come to associate the compound term "The
7 Container Store" to refer to services or goods offered by that particular store or brand owner
8 even though the terms "container" and "store" are commonplace terms. In other words, the term
9 The Container Store can function as a brand even though each of its constituent parts is
10 unquestionably generic when they are removed from their contextual whole.

11 **D. Findings**

12 23. Based upon my review of the empirical evidence, the predominant usage of the
13 term APP STORE is as a proper noun to refer to Apple's online application marketplace.
14 My conclusions in this respect are based upon my analysis of the usage of "app store" in
15 databases such as LexisNexis, COCA, and the internet, as well as my review of dictionaries.

16 24. As discussed above, Brands are the cumulative sum of their parts, not their parts
17 in isolation. "App Store" is a noun phrase in which "App" is the adjective modifier of the
18 noun "Store," in the same way that "Chap" is the adjective modifier of the noun "Stick" in the
19 brand "Chap Stick" and "Little" is the adjective modifier of the noun "Tavern" in the brand
20 "Little Tavern." Although "app" also refers to a class or group of things, when it is placed
21 before another class or group of things, it is used adjectivally, not nominally, in the same way
22 that "container" is used adjectively in the brand "The Container Store."

23 25. I understand that Apple publicly announced its launch of its APP STORE
24 branded online application marketplace on March 6, 2008. Under my supervision, a search
25 was conducted of the LexisNexis data bank for appearances of the term "app store" appearing
26 in the All News-US News database *prior* to March 7, 2008. The point of this research was
27 to determine whether the term APP STORE was in use in connection with the distribution of
28 software programs prior to Apple's launch of its service. Attached as Exhibit 3 is a true and

1 correct copy of the relatively few articles returned by this search.

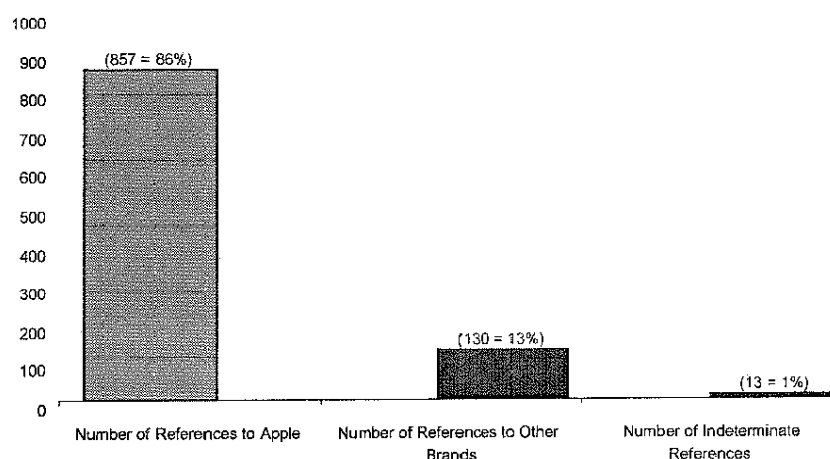
2 26. The fact that this search returned so few hits (the vast majority of which
3 involve merely the coincidental appearance of the word "app" and the word "store" or use
4 the term "store" as a verb) establishes that the term APP STORE was not in fact in general
5 use in connection with the distribution of software programs prior to Apple's adoption of the term
6 as a trademark. In other words, this research shows that Apple did not appropriate a term that
7 was already a generic term for services associated with the distribution of software programs.

8 27. As indicated above, I also reviewed the LexisNexis data bank with respect to
9 references to APP STORE appearing *after* Apple's launch of its APP STORE service. Not
10 surprisingly, Apple's launch of its APP STORE service engendered a multitude of published
11 materials using the term APP STORE. As explained in more detail below, my analysis of these
12 results establishes that the vast majority of uses of the term APP STORE refer exclusively to
13 Apple's online application marketplace.

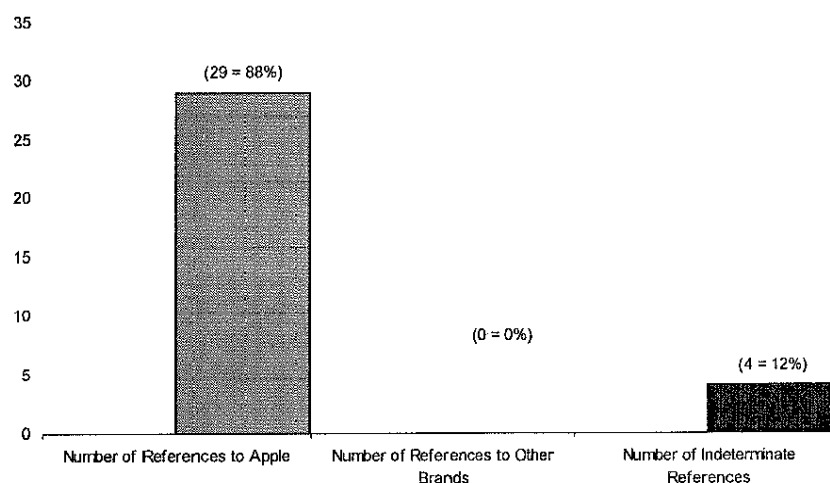
14 28. Specifically, under my direction a search was conducted within LexisNexis's
15 "MegaNews/US News" database. I understand from LexisNexis that the "MegaNews/US
16 News" database offers access to the broadest set of media publications in LexisNexis's U.S.
17 database. A true and correct copy of LexisNexis' summary of the materials included within this
18 database is attached as Exhibit 4.

19 29. The search was conducted on February 17, 2011, using the search term "app
20 store" without any limitations such as capitalization (or lack thereof). The search was run on
21 references appearing in the database within the three months immediately prior to the date the
22 search was run.

23 30. This LexisNexis search yielded 2,537 hits. An analysis of the first 1,000 of
24 these hits revealed that 857 uses of the term APP STORE explicitly related to Apple's App
25 Store service, while only 130 instances related to companies other than Apple, and 13 were not
26 clearly decipherable as to brand usage. A true and correct copy of the first 1,000 hits from this
27 search is attached as Exhibit 5. Thus, according to these findings, 86% of usage associates
28 "App Store" with Apple. These results are summarized graphically as follows:

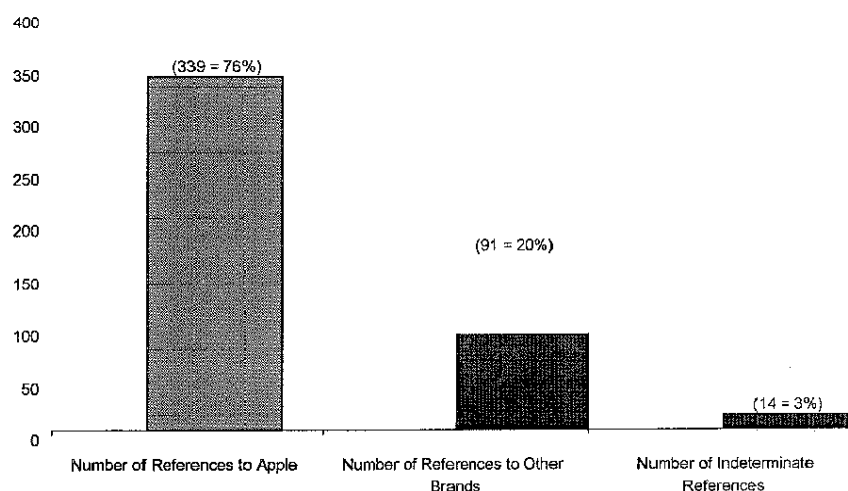


31. Likewise, a review of the COCA database on February 24, 2011, revealed that there were 33 instances of use of the term "app store." The search was run against the COCA database that collects materials from the date range 1990-2010. Significantly, all of the references to "app store" returned in this search postdated Apple's announced launch of the service. A true and correct copy of these references is attached as Exhibit 6. My analysis of these references revealed that 29 of these are properly classified as references to Apple's APP STORE service. The remaining four references constituted generic use of the term "app store." Thus, 88% of the total uses of the term "app store" found in COCA constitute use of the term as a proper noun. These results are summarized graphically as follows:



32. Also, a Google search was conducted under my direction in order to further

1 test the reliability of the results from the LexisNexis and COCA searches. For the term “App
2 Store,” from the first 45 pages (the point at which Google ended its display with: “In order to
3 show you the most relevant results, we have omitted some entries very similar to the 444
4 already displayed”), 339 uses of “App Store” explicitly referred to Apple, while 91 referred to
5 other online marketplaces and 14 results were not clearly decipherable as either brand usage or
6 generic use. Thus, based upon this analysis, 76% of usage primarily associated “App Store” with
7 Apple. These results are summarized graphically as follows:



17 33. Thus, my analysis of three separate databases—LexisNexis, COCA, and the
18 internet—all establish that *the vast majority of uses of the term APP STORE in those*
19 *databases refer specifically to Apple’s service.* From this, the data indicate, with a high degree
20 of certainty, that the predominant usage of APP STORE is as a proper noun to refer to
21 Apple’s online application marketplace.

22 34. Further, I have been provided with a copy of a declaration of Thomas La Perle at
23 Apple and I note that in his declaration Mr. La Perle identifies how Apple’s principal
24 competitors brand and describe their competing online application marketplaces. I understand
25 from this testimony that these competitors have found ways of branding and describing their own
26 online application marketplace without using the term APP STORE.

27 35. The fact that Apple’s principal competitors do not brand or describe their
28 services by using the term APP STORE corroborates my analysis of the LexisNexis, COCA

1 and Google databases. While Apple's principal competitors may use the words "app" or "store"
2 individually, the fact that they avoid using the combined phase "App Store" is further
3 recognition that APP STORE has achieved brand significance with consumers. If APP STORE
4 were in general use in describing *any* online marketplace, I would expect Apple's principal
5 competitors to have used the term as such. That this is not the case further reinforces my
6 finding that the predominant usage of the term APP STORE is as a proper noun to refer to
7 Apple's online application marketplace.

8 36. My review of dictionaries further confirms my opinion that the predominant
9 usage of the term APP STORE is as a proper noun to refer to Apple's online application
10 marketplace. First, a search of conventional dictionaries (reference works that are traditionally
11 accepted among linguists) returns no listing for "app store." To a linguist, this fact alone is
12 evidence that a term is not generic; for if it were generic, like the entry "drug store" (in, *e.g.*,
13 Merriam-Webster's Collegiate), one would expect it to appear as such in a traditional dictionary.

14 37. Even a broader search of additional resource material found on the Internet
15 supports the conclusion that the *predominant* usage of the term APP STORE is as a proper noun.
16 For example, a search on Google's "Definitions of **App Store** on the Web" returns the following
17 Apple-specific result:

18 "The App Store is a service for the iPhone, iPod Touch and iPad created by Apple
19 Inc. which allows users to browse and download applications from the iTunes Store
that were developed with the iPhone SDK and published through Apple."

20 (http://www.google.com/search?hl=en&client=firefox-a&hs=ORU&rls=org.mozilla:en-US:official&defl=en&q=define:App+Store&sa=X&ei=RctZTbCkEtCctweF48y_Cw&ved=0CBYQkAE)

22 A true and correct copy of the print-out showing the above search result is attached as
23 Exhibit 7.

24 38. Similarly, according to YourDictionary.com's "Computer Definitions," "App
25 Store" is:

26 "An extension to Apple's iTunes online store that offers free and paid applications
27 for the iPhone and iPod touch. Launched with the iPhone 3G in July 2008, the App
Store is an additional menu option on the iTunes Store Web page. See mobile app
28 stores, iPhone and jailbreak."

1 (http://computer.yourdictionary.com/app-store)

2 A true and correct copy of the above definition is attached as Exhibit 8.

3 39. The "FreeDictionary By Farlex" website offers the following definition of
4 APP STORE:

5 "An extension to Apple's iTunes online store that offers free and paid applications
6 for the iPhone and iPod touch. Launched with the iPhone 3G in July 2008, the App
7 Store is an additional menu option on the iTunes Store Web page. See iPhone, iPod
8 touch and jailbreak."

8 (http://encyclopedia2.thefreedictionary.com/App+Store)

9 A true and correct copy of the above definition is attached as Exhibit 9.

10 40. PC Magazine's online Encyclopedia includes the following:

11 (1) An online store for downloading applications. See online app store.

12 (2) Apple's online store for downloading free and paid iPhone, iPod touch and iPad
13 applications from third-party developers. Launched along with the iPhone 3G in
14 the summer of 2008, the App Store is integrated into Apple's iTunes software,
15 and downloads and updates are activated through iTunes.

15 (http://www.pcmag.com/encyclopedia_term/0%2C2542%2Ct%3DApp+Store&i%3D59366
16 %2C00.asp)


17 A true and correct copy of the above definition is attached as Exhibit 10.

18 41. The manner in which online dictionaries treat the term APP STORE is
19 therefore reflective of the usage of the term revealed through my other analyses. Specifically,
20 these results show that while there exist isolated examples of generic use of the term APP
21 STORE, the *majority* of the definitions define APP STORE as a service offered exclusively
22 by Apple. In sum, my review of online dictionary definitions for the term APP STORE
23 reinforces my conclusion that the *predominant* usage of the term APP STORE is as a proper noun
24 referring to Apple's online application marketplace.

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

27 Dated: March 28, 2011

28


Robert A. Leonard