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 13 APPLE INC.

14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA**
 16 **OAKLAND DIVISION**

17 APPLE INC., a California corporation,
 18
 19 Plaintiff,
 20
 21 v.
 22
 23 AMAZON.COM, INC., a Delaware
 24 corporation, and AMAZON DIGITAL
 25 SERVICES, INC., a Delaware corporation,
 26
 27 Defendants.
 28

Case No. CV 11-01327 PJH

**DECLARATION OF MATTHEW
 FISCHER IN SUPPORT OF APPLE
 INC.'S MOTION FOR PRELIMINARY
 INJUNCTION**

1 I, Matthew Fischer, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

2 1. I am currently Director for the APP STORE™ service for Apple Inc. (“Apple”). I
3 submit this declaration in support of Apple’s motion for preliminary injunction against
4 Amazon.com, Inc. (“Amazon”).

5 2. In my capacity as a Director, I am responsible for marketing and promoting
6 software available through the APP STORE service. I have personal knowledge of the
7 information provided within this declaration and if called as a witness would testify to that
8 information under oath.

9 **B. Apple Launches its Breakthrough APP STORE Software Download Service**

10 3. On March 6, 2008, Apple announced that it would launch the revolutionary APP
11 STORE service. On July 10, 2008, the APP STORE service became operational. Users of
12 Apple’s iPhone®, iPod®, and iPad® mobile devices may use the APP STORE service to browse
13 for and license a wide range of third party software programs, including games, business,
14 educational, finance, news, sports, productivity, social networking, health, reference, travel, and
15 utility software.

16 4. Prior to the introduction of the APP STORE service, almost all download services
17 were controlled by operators of mobile telephone systems, and those services offered a much
18 smaller and less diverse assortment of mobile software—largely limited to ringtones, wallpapers,
19 and games. These mobile operators did not offer anything approaching the size, diversity, or
20 user-friendliness of Apple’s APP STORE service. Nor were the services offered by mobile
21 telephone operators branded with terms that bore any similarity to APP STORE.

22 5. Software developers instantly embraced the iPhone device as a new mobile
23 computing platform and embraced the APP STORE service as a new way to distribute their
24 software directly to consumers—100,000 developers downloaded the software development kit
25 (SDK) within four days of Apple making it available. As its name would suggest, the SDK
26 includes tools that developers use to create software for the iPhone device. By June 9, 2008—a
27 month before the APP STORE service’s launch—developers had downloaded more than 250,000
28 copies of the SDK.

1 6. When it launched, the APP STORE service represented a different kind of online
2 software service and was an instant commercial and critical success. The APP STORE service
3 was a revolutionary ecosystem, unleashing unprecedented and wide scale creative development of
4 software and an easy, user-friendly system to deliver that software to consumers who may not be
5 technologically savvy. At its launch, the APP STORE service offered over 500 software
6 programs in a broader diversity of mobile software than had been available for mobile devices,
7 including enterprise productivity tools, location-based social networking software, medical
8 applications, and games. In less than two months after the launch, consumers had already
9 downloaded more than 100 million software programs through the APP STORE service.
10 Attached as Exhibit 1 is a September 9, 2008 Apple press release entitled “App Store Downloads
11 Top 100 Million Worldwide,” a copy of which is also available online at
12 <http://www.apple.com/pr/library/2008/09/09appstore.html>.

13 **C. Apple’s APP STORE Service**

14 7. The APP STORE service is the distribution center for a variety of software
15 programs, including many programs developed by third parties as well as programs developed by
16 Apple. In other words, consumers may download from the APP STORE service applications
17 developed by Apple and applications developed by third-party developers. For example, if a user
18 of an Apple mobile device wishes to obtain the popular “Angry Birds” video game, she would
19 touch the “App Store” icon on her Apple mobile device to access the APP STORE software that
20 connects her to the service, search for the “Angry Birds” program, and obtain a copy of that
21 program on her device by licensing and downloading the software through the APP STORE
22 service.

23 8. Currently, customers can access the APP STORE service in two ways. First, they
24 can do so wirelessly through the APP STORE software for use on Apple’s line of mobile
25 devices—namely the iPhone device, which combines in a single product a mobile phone, a digital
26 music and media player, and an internet communications device; the iPod touch device, which is
27 similar to the iPhone device but does not have cellular phone connectivity; and the iPad device,
28 which was introduced in January 2010 and is a multi-purpose mobile tablet computing device for

1 browsing the web, reading and sending email, viewing photos, watching videos, listening to
2 music, playing games, reading ebooks, and much more. Second, customers may access the APP
3 STORE service through either a Mac OS-based or Windows-based personal computer using
4 Apple's iTunes software. If they access the service by this latter method and download software
5 through iTunes, they may then load the software onto their mobile device by connecting it to their
6 personal computer.

7 9. The APP STORE name has a robust presence throughout the United States and the
8 90 other countries where the service is available. Apple has distributed hundreds of millions of
9 copies of its iTunes software worldwide; Apple also sold over 125 million units of its iPod touch,
10 iPhone, and iPad mobile devices through November 2010 and has sold 160 million of those
11 devices to date. In the United States alone, Apple sold to United States customers tens of millions
12 of its iPod touch, iPhone, and iPad mobile devices through September 2010. Consequently,
13 Apple's APP STORE service is accessible to tens of millions of Apple customers in the United
14 States and worldwide.

15 10. There are currently more than 350,000 software programs in 20 different
16 categories—including gaming, business, educational, finance, news, sports, productivity, social
17 networking, health, reference, travel, and utility software—available on the APP STORE service.
18 There have been more than 10 billion downloads of applications through the service worldwide.
19 In 2010, tens of millions of United States-based customers licensed and downloaded software
20 from the APP STORE service. This does not include United States-based customers who
21 downloaded only free software from the APP STORE service. An average of over 200
22 downloads take place every second worldwide.

23 **D. Apple's Efforts at Quality Assurance and Software Compatibility**

24 11. As part of its effort to make third-party software available through the APP
25 STORE, Apple reviews all software submitted by developers to ensure that software that appears
26 on the APP STORE service are compatible with Apple's systems and otherwise meet Apple's
27 guidelines.

28 12. Starting before the APP STORE service's launch and continuing to today, Apple

1 has taken rigorous steps ensure that software available from the service does not include
2 inappropriate content, viruses, or malware. Apple has invested in these screening measures
3 because it views them as essential to building and maintaining a public reputation for providing a
4 service that offers safe, secure software that protects the integrity, performance, and stability of
5 users' mobile devices.

6 **E. Apple's Branding of Its Application Download Service**

7 13. After Apple launched the APP STORE service in 2008, Apple has extensively
8 advertised, marketed, and promoted the APP STORE service and the APP STORE mark. In
9 particular, Apple spent hundreds of millions of dollars in the United States prior to 2011 on print,
10 television, and internet advertising for the APP STORE service. Apple has prominently featured
11 the APP STORE mark in print advertising sponsored both by Apple as well as by AT&T (which
12 offers wireless connectivity for certain of Apple's mobile devices). In the United States, these
13 ads have appeared in such magazines and newspapers as *The New York Times*, *The Wall Street*
14 *Journal*, *Time*, *Newsweek*, *The Economist*, *Fortune*, *The New Yorker*, *Atlanta Journal*
15 *Constitution*, *Baltimore Sun*, *Chicago Tribune*, *Dallas Morning News*, *Denver Post*, *Detroit News*
16 *and Free Press*, *Houston Chronicle*, *Los Angeles Times*, *Miami Herald*, *Washington Post*, as well
17 as numerous other regional and local newspapers. Attached hereto as Exhibit 2 are true and
18 correct copies of representative examples of print advertisements featuring the APP STORE
19 mark.

20 14. Apple also has implemented television advertising campaigns regarding the APP
21 STORE service, including commercials highlighting the different mobile software programs
22 available through the service and the variety of functions those mobile software programs serve.
23 Most recently, Apple has aired nationwide television commercials that state "If you don't have an
24 iPhone - you don't have the App Store." These commercials refer to the APP STORE mark and
25 also depict the APP STORE mark as featured on Apple's devices. Apple airs commercials
26 regarding its APP STORE service on all the major television broadcast stations in the United
27 States, including ABC, CBS, NBC, FOX, The CW, BET, Comedy Central, CNN, ESPN, MTV,
28 TBS, TNT, and VH1. As a result, millions of consumers in the United States were exposed prior

1 to 2011 to Apple's television campaigns and the programs available through the APP STORE
2 service. Attached as Exhibit 3 are screen shots of web pages where television advertisements
3 featuring Apple's APP STORE service can be viewed.

4 15. The APP STORE service is also promoted on Apple's websites, including the site
5 focused on serving consumers in the United States: www.apple.com. That website features the
6 APP STORE mark on numerous web pages. For example, visitors can browse the hundreds of
7 thousands of applications available for download from the APP STORE service on the web page
8 at the following link: <http://itunes.apple.com/us/genre/ios/id36?mt=8>. A true and correct copy of
9 this web page featuring the APP STORE mark is attached as Exhibit 4.

10 16. Apple also offers promotions for its APP STORE service on its websites. For
11 example, Apple celebrated the 10 billionth download of applications in connection with its "10
12 Billion Apps Countdown Promotion" on its www.apple.com website at
13 <http://www.apple.com/itunes/10-billion-app-countdown/> and prominently featured the APP
14 STORE mark. Apple awarded the consumer who made the 10 billionth download a \$10,000 U.S.
15 gift card for the iTunes Store service. True and correct copies of relevant print outs and screen
16 shots from Apple's website featuring the APP STORE mark are attached as Exhibit 5.

17 17. Advertising for Apple's APP STORE service has also been prominently featured
18 on third-party websites, including nytimes.com, cnn.com, foxnews.com, wsj.com, and others. A
19 true and correct screen shot from washingtonpost.com featuring an advertisement for Apple's
20 APP STORE service is attached as Exhibit 6. Each of these websites serves United States
21 consumers substantially, if not primarily.

22 18. Apple also extensively advertises its APP STORE service in promotional emails.
23 For example, in January 2011 alone, two emails were sent to tens of millions of users registered
24 with iTunes promoting Apple's APP STORE service. A true and correct copy of a representative
25 example of Apple's email advertisements is attached as Exhibit 7.

26 19. Apple also promotes and uses the APP STORE mark in its "brick and mortar"
27 retail stores (the "Apple Retail Stores"), of which there are over 230 in the United States and over
28 300 worldwide. In addition to selling Apple's own hardware and software products, Apple Retail

1 Stores also carry a variety of third-party hardware and software and provide hardware support
2 services for Apple products, including in connection with the APP STORE mark. Since the first
3 Apple Retail Stores were opened, Apple has continuously expanded its retail store operations—
4 both nationally and internationally—and intends to continue doing so in the future. True and
5 correct copies of representative examples of Apple’s advertising and promotion of the APP
6 STORE service in the Apple Retail Stores, as used in the United States and in other countries, is
7 attached as Exhibit 8.

8 20. The APP STORE service also has been the subject of an overwhelming amount of
9 high-profile, positive, unsolicited media coverage in the United States and worldwide. These
10 articles frequently recognize the APP STORE mark as referring to Apple’s service. Attached
11 hereto as Exhibit 9 are true and correct copies of articles and images concerning such positive
12 media coverage.

13 21. In addition to extensively using the APP STORE mark in advertising, Apple’s
14 APP STORE mark is displayed as part of the iTunes Store service, which is a feature of the
15 iTunes software. A screen shot of the APP STORE mark as used in connection with the iTunes
16 Store service in the United States from earlier this year is depicted below.



27 22. Over one hundred million consumers have iTunes Store accounts in the United
28

1 States. Consequently, these users are exposed to the APP STORE mark each time they use the
2 iTunes Store service.

3 **F. Amazon's Marketplace**

4 23. I am aware that Amazon has recently launched its own download service under the
5 name APPSTORE. Amazon's press release announced the launch and directed users to
6 www.amazon.com/appstore. Attached hereto as Exhibit 10 is a true and correct copy of that press
7 release.

8 24. I have personally visited Amazon's mobile software download service. Amazon's
9 service purports to make available nearly 4,000 applications, many of which are the same titles as
10 some of the most popular applications available on Apple's APP STORE service. I have
11 reviewed information on Amazon's website regarding the 200 applications that Amazon has
12 characterized as its "bestsellers." The vast majority of those applications cost less than \$5.00.
13 Similarly the vast majority of the applications available on Apple's APP STORE service cost less
14 than \$5.00.

15 25. The downloadable mobile software available from Amazon's APPSTORE
16 marketplace is not compatible with Apple's mobile devices. Apple's mobile devices are based on
17 an operating system called iOS; Android-based mobile devices run the Android operating system
18 developed by Google. Consumers who mistakenly attempt to download software from Amazon's
19 marketplace for use on their Apple brand devices will not be able to download or use the
20 software.

21 26. I have personally observed that in order to access the Amazon APPSTORE, users
22 enter either their mobile device phone number or email address through the Amazon.com website.
23 Amazon then sends either a text message or email to the device with a link that allows users to
24 download the Amazon Appstore application to their mobile device. When attempting to
25 download the Amazon Appstore application to an Apple device, the device responds that "Safari
26 cannot download this file."

27 27. As noted above, Amazon currently licenses software that is compatible only with
28 Android operating systems. Android-based software has been fraught with highly-publicized

1 viruses and malicious code, creating significant device stability and data security issues for
2 Android device users. Attached hereto as Exhibit 11 are true and correct copies of articles
3 obtained from <http://www.pcworld.com/printable/article/id,221510/printable.html>;
4 [http://latimesblogs.latimes.com/technology/2011/03/google-removing-virus-infected-android-](http://latimesblogs.latimes.com/technology/2011/03/google-removing-virus-infected-android-apps-from-phones-tablets-promises-better-secutiry.html)
5 [apps-from-phones-tablets-promises-better-secutiry.html](http://latimesblogs.latimes.com/technology/2011/03/google-removing-virus-infected-android-apps-from-phones-tablets-promises-better-secutiry.html);
6 [http://www.dailymail.co.uk/sciencetech/article-1364554/Google-Android-hacking-alert-260k-](http://www.dailymail.co.uk/sciencetech/article-1364554/Google-Android-hacking-alert-260k-smartphone-users-downloaded-app-virus.html?ito=feeds-newsxml)
7 [smartphone-users-downloaded-app-virus.html?ito=feeds-newsxml](http://www.dailymail.co.uk/sciencetech/article-1364554/Google-Android-hacking-alert-260k-smartphone-users-downloaded-app-virus.html?ito=feeds-newsxml); and
8 <http://www.bbc.co.uk/news/technology-12633923>, discussing a recent outbreak of malware.
9 According to these articles, 50 applications were infected, and Google was forced to send notices
10 to 260,000 Android-device users who had downloaded infected applications.

11 28. Although Amazon only launched its APPSTORE service on March 22, 2011, I
12 understand that at least one consumer was confused and believed the service was associated with
13 Apple's APP STORE service. That consumer posted on Amazon's website (on a discussion
14 board about this lawsuit): "I think Apple has a case. A big factor is consumer's perception. When
15 I first saw it on the Amazon page I thought it had an affiliation with the Apple App Store, it took
16 me a moment to see that it was Android." Another blog entry on that site reads: "Anytime you
17 hear the words 'App Store' you think of Apple." Attached hereto as Exhibit 12 are a true and
18 correct copies of those blog entries downloaded on March 23, 2011 from the following url:
19 [http://www.amazon.com/gp/forum/cd/discussion.html/ref=cm_cd_pg_pg1?ie=UTF8&cdForum=](http://www.amazon.com/gp/forum/cd/discussion.html/ref=cm_cd_pg_pg1?ie=UTF8&cdForum=Fx20DX5GEB7TUX8&cdPage=1&cdSort=oldest&cdThread=Tx11RK7IN59LJSK)
20 [Fx20DX5GEB7TUX8&cdPage=1&cdSort=oldest&cdThread=Tx11RK7IN59LJSK.](http://www.amazon.com/gp/forum/cd/discussion.html/ref=cm_cd_pg_pg1?ie=UTF8&cdForum=Fx20DX5GEB7TUX8&cdPage=1&cdSort=oldest&cdThread=Tx11RK7IN59LJSK)

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

23 Dated: April 12, 2011

24 
25 Matthew Fischer
26 Apple Inc.