

1 DAVID R. EBERHART (S.B. #195474)
 2 deberhart@omm.com
 3 RYAN J. PADDEN (S.B. #204515)
 4 rpadden@omm.com
 5 DAVID J. SEPANIK (S.B. #221527)
 6 dsepanik@omm.com
 7 O'MELVENY & MYERS LLP
 8 Two Embarcadero Center, 28th Floor
 9 San Francisco, CA 94111
 10 Telephone: (415) 984-8700
 11 Facsimile: (415) 984-8701

12 Attorneys for Plaintiff
 13 APPLE INC.

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

17 APPLE INC., a California corporation,

18 Plaintiff,

19 v.

20 AMAZON.COM, INC., a Delaware
 21 corporation, and AMAZON DIGITAL
 22 SERVICES, INC., a Delaware
 23 corporation,

24 Defendants.

Case No. CV 11-01327 PJH

**PLAINTIFF APPLE INC.'S ANSWER
 TO DEFENDANTS' COUNTERCLAIM**

Action Filed: March 18, 2011

1 Plaintiff Apple Inc. (“Apple”) hereby responds to the counterclaim filed by
2 defendants Amazon.com, Inc. and Amazon Digital Services, Inc., (collectively,
3 “Amazon”) as follows:

4 **PARTIES**

5 1. Apple admits the allegations of Paragraph 1.
6 2. Apple admits the allegations of Paragraph 2.
7 3. Apple admits that it is a corporation organized and existing under the
8 laws of the State of California, with its principal place of business in Cupertino,
9 California.

10 **JURISDICTION**

11 4. Apple denies that any acts or omissions have occurred to give rise to
12 any claim by Amazon against Apple. Apple admits that because Amazon alleges claims
13 arising under the Lanham Act of the United States, this Court has subject matter
14 jurisdiction pursuant to 28 U.S.C. § 1331 and 1338(a).

15 5. Apple admits the allegations of Paragraph 5.

16 **FACTS**

17 6. Apple admits that on or about March 22, 2011, Amazon launched a
18 service named the “Amazon Appstore for Android” on the www.amazon.com website.
19 Apple further admits that the Amazon Appstore for Android service allows a consumer to
20 view and download certain mobile software applications for their Android mobile devices.
21 Apple further admits that users may shop the Amazon Appstore for Android service either
22 by (a) using a personal computer and browser software to access certain portions of the
23 www.amazon.com website or (b) using on certain Android mobile devices a mobile
24 software download sometimes referred to as the “Amazon Appstore app.” Apple denies
25 that the mark APP STORE is generic and, on that basis, denies that the Amazon Appstore
26 for Android service is an “app store.” Apple is without information or knowledge
27 sufficient to form a belief as to the truth of the remaining allegations of Paragraph 6 and
28 on that basis denies the same.

1 7. Apple admits that in July of 2008 it launched its APP STORE
2 service, which allows users of Apple’s iPhone, iPod and, most recently, iPad mobile
3 devices, and users of computers running Apple’s iTunes software, to browse for and
4 license certain mobile software for certain Apple devices such as the iPhone, iPad, and
5 iPod touch. Apple admits that such mobile software is sometimes referred to as “apps.”
6 Apple further admits that in certain press releases Apple has claimed that the APP STORE
7 service is “the largest application store in the world.” Apple further admits that its CEO,
8 Steve Jobs, in October 2010 called the APP STORE service “the easiest-to-use largest app
9 store in the world, preloaded on every iPhone.” Apple denies the remaining allegations of
10 Paragraph 7.

11 8. Apple admits that the current edition of the Oxford English
12 Dictionary defines “app” as, in part, “[a]n application, *esp.* an application program (see
13 APPLICATION *n.* Compounds 2).” Apple further admits that the current edition of the
14 New Oxford American Dictionary defines “store” as, in part, “a retail establishment
15 selling items to the public: *a health-food store.*” Apple denies that Paragraph 8 sets forth
16 the entirety of either definition. Apple is without information or knowledge sufficient to
17 form a belief as to the truth of the remaining allegations of Paragraph 8 and on that basis
18 denies the same.

19 9. Apple denies that, based on their common meaning, the words “app
20 store” together denote a store for apps. Apple further denies that Amazon and Apple
21 operated “app stores.” Apple admits that the American Dialect Society voted “app” as the
22 “Word of the Year” for 2010. Apple further admits that in its press release announcing
23 the Word of the Year, the American Dialect Society stated: “App has been around for
24 ages, but with millions of dollars of marketing muscle behind the slogan ‘There’s an app
25 for that,’ plus the arrival of ‘app stores’ for a wide spectrum of operating systems for
26 phones and computers, app really exploded in the last 12 months.” Apple denies that the
27 words “app store” are commonly used among many businesses to describe mobile
28 software download services and further denies that the term “app store market” is used to

1 describe the market for mobile software download services. Apple is without information
2 or knowledge sufficient to form a belief as to the truth of the remaining allegations of
3 Paragraph 9 and on that basis denies the same.

4 10. Apple admits that it is the owner of the mark APP STORE and that
5 Apple has the right to exclude uses of APP STORE that are inconsistent with Apple's
6 trademark rights. Apple denies the remaining allegations of Paragraph 10.

7 11. Apple denies that the mark APP STORE is generic and, on that basis,
8 denies that the Amazon Appstore for Android service is an "app store." Apple further
9 denies that defendants have the right to use APP STORE as a trademark in connection
10 with Amazon's mobile software download service for Android devices. Apple admits the
11 remaining allegations of Paragraph 11.

12 12. Apple admits that an actual and justiciable controversy between the
13 parties with respect to Amazon's right to use APP STORE as a trademark in connection
14 with Amazon's mobile software download service for Android devices. Apple admits that
15 Amazon is seeking declaratory judgment pursuant to 28 U.S.C. §2201 and Rule 57 of the
16 Federal Rules of Civil Procedure "confirming Amazon's rights to continue to use the
17 words 'app store.'" Apple denies the remaining allegations of Paragraph 12.

18 13. Apple denies that Amazon is entitled to the relief sought in the prayer
19 to its counterclaim or to any other relief.

20 **PRAYER FOR RELIEF**

21 Apple hereby prays:

- 22 1. That Amazon's counterclaim be dismissed with prejudice;
 - 23 2. That Amazon take nothing by way of its counterclaim, and that
24 judgment be entered in favor of Apple;
 - 25 3. For costs of suit and reasonable attorneys' fees incurred herein; and
 - 26 4. For such other relief as the Court deems just and proper.
- 27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: May 19, 2011

O'MELVENY & MYERS LLP

By/s/ David R. Eberhart
David R. Eberhart
Attorneys for Plaintiff APPLE INC.

SF1:821640