

HowardRice

1 MARTIN R. GLICK (No. 40187)
 email: mglick@howardrice.com
 2 CLARA J. SHIN (No. 214809)
 email: cshin@howardrice.com
 3 SARAH J. GIVAN (No. 238301)
 email: sgivan@howardrice.com
 4 HOWARD RICE NEMEROVSKI CANADY
 FALK & RABKIN
 5 A Professional Corporation
 Three Embarcadero Center, 7th Floor
 6 San Francisco, California 94111-4024
 Telephone: 415/434-1600
 7 Facsimile: 415/677-6262

8 Attorneys for Defendants and Counter-Claimants
 AMAZON.COM, INC., a Delaware corporation, and
 9 AMAZON DIGITAL SERVICES, INC., a Delaware
 corporation
 10

11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13

14 APPLE INC., a California corporation,
 15
 Plaintiff and Counter-
 Defendant,
 16
 v.
 17
 18 AMAZON.COM, INC., a Delaware corporation,
 and AMAZON DIGITAL SERVICES, INC., a
 Delaware corporation,
 19
 Defendants and Counter-
 Claimants.
 20

No. 11-cv-01327 PJH

Action Filed: March 18, 2011

DECLARATION OF SARAH J. GIVAN
 IN SUPPORT OF DEFENDANTS
 AMAZON.COM, INC. AND AMAZON
 DIGITAL SERVICES, INC.'S OPPOSITION
 TO PLAINTIFF APPLE INC.'S MOTION
FOR PRELIMINARY INJUNCTION

21
 22
 23
 24
 25
 26
 27
 28

1 I, Sarah J. Givan, declare as follows:

2 1. I am admitted to practice law in the State of California, and am an attorney with the law
3 firm of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation (“Howard
4 Rice”), counsel to Defendants and Counter-Claimants Amazon.com, Inc., and Amazon Digital
5 Services, Inc. (collectively, “Amazon”) in the above-captioned case. I make this declaration in
6 support of Amazon’s Opposition to Plaintiff Apple Inc.’s Motion for Preliminary Injunction. Except
7 where otherwise indicated, this declaration is based upon my own personal knowledge, and I could
8 and would testify competently to the truth of the matters stated herein if called upon to do so.

9 2. Attached as **Exhibit 1** are true and correct copies of excerpts from dictionaries defining
10 the terms “app” and “application”, which I obtained through Exhibit 3 to the Declaration of
11 Nathaniel E. Durrance in Support of Opposer Microsoft Corporation’s Motion for Summary
12 Judgment filed on January 10, 2011 in Opposition No. 91195592 pending before the Trademark
13 Trial and Appeal Board (“TTAB”) in the United States Patent and Trademark Office (“PTO”). This
14 document is publicly available at <http://ttabvue.uspto.gov/ttabvue/v?pno=91195582&pty=OPP>.

15 3. Attached as **Exhibit 2** is a true and correct copy of a printout from the
16 WordReference.com website, showing the definitions of “application” listed by the Concise Oxford
17 English Dictionary, which I obtained and printed from the www.wordreference.com website on
18 March 27, 2011.

19 4. Attached as **Exhibit 3** are true and correct copies of excerpts from dictionaries defining
20 the term “store”, which I obtained through Exhibit 5 to the Declaration of Nathaniel E. Durrance in
21 Support of Opposer Microsoft Corporation’s Motion for Summary Judgment filed on January 10,
22 2011 in Opposition No. 91195592 pending before the Trademark Trial and Appeal Board (“TTAB”) in
23 the United States Patent and Trademark Office (“PTO”), which is publicly available at
24 <http://ttabvue.uspto.gov/ttabvue/v?pno=91195582&pty=OPP>.

25 5. Attached as **Exhibit 4** is a true and correct copy of the definition of “app store”
26 appearing in PC Magazine’s online Encyclopedia, which I obtained and printed from the
27 http://www.pcmag.com/encyclopedia_term/0,2542,t=online+app+store&i=62644,00.asp.

28 6. Attached as **Exhibit 5** are true and correct copies of the following documents I retrieved

1 on March 26, 2011 from the website for the American Dialect Society at www.americandialect.org:

2 (a) an online article dated January 8, 2011, indicating that the American Dialect Society voted “app”
3 as its Word of the Year for 2010, and (b) the first two pages of the American Dialect Society’s
4 January 7, 2011 press release announcing that selection.

5 7. Attached as **Exhibit 6** is a true and correct copy of a Salesforce.com press release dated
6 December 12, 2006, which I obtained and printed from Salesforce.com’s website on March 27,
7 2011.

8 8. Attached as **Exhibit 7** is an copy of a printout from Apple’s iPhone website, taken on
9 March 27, 2011 from www.apple.com/iphone/apps-for-iphone/.

10 9. Attached as **Exhibit 8** a true and correct copy of the first page of Apple’s iOS Developer
11 Program License Agreement, which is available on Apple’s website.

12 10. Attached as **Exhibit 9** are true and correct copies of Apple press releases dated April 24,
13 July 14, September 28, November 4, 2009, and October 18, 2010, which I retrieved from Apple's
14 website on March 27, 2011, and May 25, 2011.

15 11. Attached as **Exhibit 10** is a true and correct copy of Apple’s Amendment to Alleged
16 Use under 15 U.S.C. Section 1051(c), filed by Apple with the USPTO on November 20, 2009, to
17 prove use of APP STORE in connection with Application No. 77/525,433. I obtained Exhibit 9 via
18 publicly accessible records on the www.uspto.gov website on March 28, 2011. The three attached
19 specimens are screen shots showing what a user sees when accessing Apple's App Store via its
20 iTunes Store on a personal computer. The first specimen filed by Apple is to prove use of APP
21 STORE in Class 35, showing that a user selects “iTunes Store” from the “STORE” options, that
22 “App Store” is an option within the iTunes Store selections, and a “Search Store” tool is available to
23 search for apps. The second specimen filed by Apple is to prove use of APP STORE in Class 38,
24 showing that downloading service is part of an app purchase on the App Store and a “Get App”
25 function is used to purchase apps via download on iTunes. The third specimen, filed by Apple to
26 prove use of APP STORE in Class 42, is identical to the Class 35 specimen.

27 12. Attached as **Exhibit 11** is a true and correct copy of a publicly available transcript of
28 Apple Incorporated’s October 18, 2010 earnings call, which I printed from the website

1 www.seekingalpha.com on March 26, 2011.

2 13. Attached as **Exhibit 12** is a true and correct copy of a October 19, 2010 NPR Morning
3 Edition article concerning Apple's October 18, 2010 earnings call and comments made by Apple's
4 CEO, Steve Jobs, which I obtained and printed from Westlaw.com.

5 14. Attached as **Exhibit 13** are true and correct copies of printouts of online general and
6 trade press articles and blog postings discussing “app stores.” Each article has a URL and date on
7 the bottom or side of the page indicating from what website the article was printed and the date on
8 which I printed it. For ease of review, the printouts have been underlined where “app store” is used
9 generically.

10 15. Attached as **Exhibit 14** are true and correct copies of printouts of additional general
11 press articles discussing “app stores.” I obtained and printed these articles on March 28, 2011 from
12 Westlaw at the referenced addresses on each page of **Exhibit 14**. For ease of review, the printouts
13 have been underlined where “app store” is used generically.

14 16. Attached as **Exhibit 15** are true and correct copies of printouts of 27 press articles with
15 the plural term “app stores” in their title. I obtained and printed these articles on March 27, 2011,
16 via a search of the USNEWS database at Westlaw.com for “app stores” in article headlines.
17 Expanding that search to include “app stores” in lead paragraphs of articles increased the results hits
18 to 753 articles.

19 17. Attached as **Exhibit 16** is a true and correct copy of the Wikipedia entry for “App
20 Store”, which I located and printed from www.wikipedia.com on March 26, 2011.

21 18. Attached as **Exhibit 17** is an printout from DirectTV’s website advertising its DirectTV
22 App Store for television applications, which I located, obtained, and printed from DirectTV’s
23 website at <http://tvapps.directv.com/index.do> and
24 <http://www.directv.com/DTVAPP/global/article.jsp?assetId=P6220088>, on March 27, 2011.

25 19. Attached as **Exhibit 18** are true and correct copies of printouts from websites showing
26 third parties’ use of the term “app store” to refer to their own services. Each website printed has a
27 URL and date on the bottom or side of the page indicating where the website was printed from and
28 the date I printed it. As shown in **Exhibit 18**, the following third parties have used “app store” to

1 refer to their services: metroPCS (“@metro App Store”); Sprint (“Sprint Partner App Stores”);
2 Appia (“White Label App Store”); Shopify (“Shopify App Store”); Palm App Store; Appstore for
3 Symbian; Mobile2Day Appstore for Blackberry; Handango Mobile App Store; AndAppStore;
4 Handmark Mobile App Store for Android; Sentrion App Store; DC App Store; MobiHand (“Get the
5 MobiHand App Store Launcher); DNAappstore; The PC App Store; iPAQ Appstore; GetJar
6 (“GetJar is the world’s largest open app store”); Mini App Stores; Tristit App Store; MiKandi App
7 Store; and Android App Store.

8 20. Attached as **Exhibit 19** are true and correct copies of U.S. Patent Application Nos.
9 20100009702, 20100257059 20110045816, which I obtained from the United States Patent and
10 Trademark Office’s website at www.uspto.gov on June 1, 2011.

11 21. I am familiar with and frequently use the DomainTools service available at
12 www.domaintools.com. DomainTools is a well-known company that provides domain name
13 research and monitoring services. DomainTools allows a user to search the number of registered
14 domain names that contain a particular word. On March 29, I performed a search for “appstore” in
15 currently active domain names in which the generic top-level domain (gTLD) was “.com”, “.net”,
16 “.org”, “.info”, “.biz”, or “.us”, and in which the second-level domain was 25 characters or less. On
17 March 29, there were **2122** active registered domain names that contain the term “appstore” with a
18 common gTLD. Attached as **Exhibit 20** is a true and correct copy of these results, which I printed
19 from DomainTools’s website.

20 22. Attached as **Exhibit 21** are true and correct copies of printouts from websites in which
21 the second level domain name includes the term “appstore.” Each website printed has a URL and
22 date on the bottom or side of the page indicating where the website was printed from and the date I
23 printed it. As shown in **Exhibit 21**, these websites include: www.appstoreinsider.com,
24 www.appstores.com, www.theappstore.com, www.appstorelist.com, www.blackberryappstore.com,
25 and www.smartphone-appstore.com. As shown in Exhibit 18, other companies using domain names
26 containing “appstore” include www.andappstore.com, www.dnaappstore.com,
27 www.pcapppstore.com, and www.miniappstores.com.

28 23. Attached hereto as **Exhibit 22** are true and correct copies of news articles, blog entries,

1 and radio stories regarding Apple's lawsuit, which I located, obtained and printed from the Internet.
2 Each article has a URL and date on the bottom or side of the page indicating where the article was
3 printed from and the date I printed it. These articles include:

- 4 • "Apple Says Other App Stores Can't Be Called App Stores, Sues Amazon",
5 *ReadWriteWeb* (March 21, 2011), at
6 [http://www.readwriteweb.com/archives/apple_says_other_app_stores_cant_be_called_app](http://www.readwriteweb.com/archives/apple_says_other_app_stores_cant_be_called_app_stores_sues_amazon.php)
7 [_stores_sues_amazon.php](http://www.readwriteweb.com/archives/apple_says_other_app_stores_cant_be_called_app_stores_sues_amazon.php);
- 8 • "Apple Sues Amazon Over "App Store" Name Right Before Amazon's Is Supposed To
9 Launch," *Business Insider* (March 21, 2001, at [http://www.businessinsider.com/apple-](http://www.businessinsider.com/apple-amazon-app-store-2011-3)
10 [amazon-app-store-2011-3](http://www.businessinsider.com/apple-amazon-app-store-2011-3);
- 11 • "Appsolutely Ridiculous Lawsuit", *MediaPost MoBlog* (March 22, 2011), at
12 http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=147200
- 13 • "Apple Sues Amazon Over App Store", *NPR* (March 22, 2011), at
14 <http://www.npr.org/2011/03/22/134755626/Business-News>;
- 15 • "Apple Sues Amazon Over Term 'App Store'", *The Wall Street Journal* (March 22, 2011),
16 at <http://online.wsj.com/article/SB10001424052748704139004576215392658777706>
- 17 • "Apple's App Store and a little trademark history," *Tech Republic* (March 22, 2011), at
18 [http://www.techrepublic.com/blog/mac/apples-app-store-and-a-little-trademark-](http://www.techrepublic.com/blog/mac/apples-app-store-and-a-little-trademark-history/1063)
19 [history/1063](http://www.techrepublic.com/blog/mac/apples-app-store-and-a-little-trademark-history/1063);
- 20 • "Amazon Launches Appstore for Android," *The Slatest* blog (March 22, 2011), at
21 <http://slatest.slate.com/id/2289054>;
- 22 • "Amazon App Store draws Apple lawsuit," *Mobile Computing News* (March 24, 2011), at
23 [http://www.mobile-computing-news.co.uk/industry-news/10788/amazon-app-store-draws-](http://www.mobile-computing-news.co.uk/industry-news/10788/amazon-app-store-draws-apple-lawsuit.html)
24 [apple-lawsuit.html](http://www.mobile-computing-news.co.uk/industry-news/10788/amazon-app-store-draws-apple-lawsuit.html);
- 25 • "Amazon to Open Android App Store as Apple Sues," *New York Times Bits* blog
26 (March 24, 2011), at [http://bits.blogs.nytimes.com/2011/03/22/amazon-opens-an-android-](http://bits.blogs.nytimes.com/2011/03/22/amazon-opens-an-android-app-store/)
27 [app-store/](http://bits.blogs.nytimes.com/2011/03/22/amazon-opens-an-android-app-store/);
- 28 • "The Great Language Land Grab", *The New York Times* (March 26, 2011), at

1 <http://www.nytimes.com/2011/03/27/weekinreview/27zimmer.html>;

- 2 • “Techman: What’s good for AT&T could be bad for consumers,” *Pittsburg Post-Gazette*
3 (March 27, 2011), at <http://www.post-gazette.com/pg/11086/1134737-96.stm>;
- 4 • “Apple Claim Over ‘App Store’ Gets More Appsurd”, *MediaPost* MoBlog (May 20,
5 2011), at
6 http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=150917.

7 24. Attached as **Exhibit 23** are true and correct copies of consumer blogs discussing “app
8 stores.” Each printout has a URL and date on the bottom of the page indicating where the consumer
9 blog was printed from and the date it was printed. For ease of review, the printouts have been
10 underlined where “app store” is used generically.

11 25. Attached as **Exhibit 24** is a true and correct copy of a printout of the March 16, 2011
12 Congressional testimony of Ashkan Soltani, in which he states “Mobile phones, televisions, set top
13 boxes . . . are now equipped with Internet connectivity and can leverage Web services which include
14 online advertisement. Some of these platforms also allow applications written by third parties, the
15 most prominent example being **app stores** on mobile smartphones” (emphasis added). I obtained
16 and printed this document on June 1, 2011, from
17 http://ashkansoltani.org/docs/soltani_senate.written.testimony_20111116.pdf.

18 26. From review of publicly-available TTAB records, I am aware that Apple’s Application
19 No. 77/525,433 to register the mark APP STORE is the subject of Opposition No. 91195592. The
20 Opposer in that case, Microsoft Corporation, has asserted that “app store” is generic, and on January
21 10, 2011, filed a motion for summary judgment on that ground. That motion is currently pending.
22 Attached as **Exhibit 25** is a true and correct copy of that motion.

23 27. Attached as **Exhibit 26** is a true and correct copy of the Declaration of Robert A.
24 Leonard filed on February 28, 2011 by Apple in Opposition No. 91195592, which I obtained
25 through publicly-available TTAB records.

26 28. Attached as **Exhibit 27** is a true and correct copy of the Declaration of Dr. Ronald R.
27 Butters filed on March 29, 2011 by Microsoft in Opposition No. 91195592, which I obtained
28 through publicly-available TTAB records.

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

29. Attached as **Exhibit 28** is a true and correct copy of printouts from Apple’s online store at www.apple.com, reflecting the prices at which an iPhone 4 are offered.

30. Attached as **Exhibit 29** is a true and correct copy of printouts from Amazon’s online store at www.amazon.com, reflecting the prices at which various Android-based phones are offered.

31. Attached as **Exhibit 30** is a true and correct copy of a survey titled “Wireless Shoppers 2.0: How Consumers Shop for Wireless Phones / Google Compete / Clickstream and Survey Based Study / U.S., Feb. 2010”, which my office obtained and printed on May 25, 2011, from http://www.gstatic.com/ads/research/en/2010_WirelessShoppers2.0.pdf.

32. Attached as **Exhibit 31** is a true and correct copy of a printouts of an article titled “Android outshines Apple in 4th quarter”, dated February 8, 2011, which I obtained and printed on May 27, 2011 from CNET’s website at http://reviews.cnet.com/8301-19736_7-20030974-251.html.

33. Attached as **Exhibit 32** is a true and correct copy of records regarding Apple’s Community Trade Mark Registration No. 007078314 for APP STORE, which I obtained and printed from the Office for Harmonization in the Internet Market’s (OHIM) website at www.oami.europa.eu, and which reflect that Amazon, Microsoft Corporation, Sony Erickson Mobile Communications, HTC Corporation, and Nokia Corporation have all filed applications to cancel Apple’s registration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge. Executed this 1st day of June, 2011, at San Francisco, California.

/s/ Sarah J. Givan
SARAH J. GIVAN