someone launches a store at which masers are central to that which is offered for sale, that will be a *maser store*. The construction {NOUN + *store*}, in which the NOUN names some type of goods or services offered for sale, is a productive process in which the results are SEMANTICALLY TRANSPARENT— that is, in which the meaning of the resultant compound is immediately obvious to the hearer. The term does not merely describe the thing named, it **is** the thing named.

32.   Note in this connection the following paragraph from a February 2007 news story that Dr. Leonard found (but fails to mention) in his search of news sources prior to Apple's March 6, 2008 App Store launch:

> There are some other programs that we call **app store** checkout, which will come later this year - much later this year - where we'll actually take over the environment, where we can assist you as a developer in transacting. So we'll bill for you, we'll provision for you, we'll collect for you, and we'll pay for you because our vision of AppExchange is to create a global set of developers that can sell and share their programs throughout the world. [2]

In this article, a transcript of a symposium organized by the major financial institution, Goldman Sachs, Steve Cakebread, CFO, SALESFORCE.COM, describes a program whereby Goldman Sachs intended to sell apps by means of an online marketplace to be called an "app store." In terming their "AppExchange" marketplace an "app store," Mr. Cakebread simply used "app store" generically—over a year before Apple opened its app store with a blitz of publicity. Further evidence that *app store* was a generic term before Apple ever used it is found in two trademark applications, one for APPSTORE and filed in 1998,[3] and another for APPSTORE filed in 2006.[4]

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[2] FD (Fair Disclosure) Wire, "Salesforce.com, Inc. at Goldman Sachs Technology Investment Symposium – Final," February 28, 2007 (underlining added). See Dr. Leonard's "Exhibit 3, p19 [Document 24 of 31]."

[3] Filed by SAGE NETWORKS, INC., August 26, 1998, Serial Number 75542841 for "providing computer software application hosting services by means of a global computer information network, where such services allow multiple users to rent software applications developed by applicant or third parties."

[4] Filed by SALESFORCE.COM,INC. JUNE 14, 2006, Serial Number 78907865 as "Application service provider (ASP) featuring computer software in the field of business project management, business knowledge, information and asset management, customer relationship management, e-commerce, electronic messaging, and web site development."

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33.   This early usage of *app store* indicates that Leonard is not quite accurate in his suggestion that Apple was the first to use the compound *app store* to describe an app store. It is important also because this early usage also is clearly generic: the compound was already inherent in the English language, awaiting only the occasion to use it.

34.   One need give no thought to come to the conclusion that *app store* is "a store at which apps are offered for sale." This transparency of meaning is owing to the fact that [Noun + *store*] is a recognized, productive open paradigm that includes *shoe store, hardware store, grocery store*, and a multitude of others.

35.   Dr. Leonard attempts to shore up his contention that *app store* is not generic with a linguistic argument based on a fallacious contention that *store* is a figurative use in the compound *app store*. Dr. Leonard argues (¶¶49–51) that

> ... .. the meaning of the word "store" [is] as a physical place where things can be purchased.
>
> In the context of an *online* service, however, the composite [sic] use of "store" takes on a very different meaning from the definitions given in dictionaries, which suggest a brick and mortar physical location where customers enter a building to purchase goods. Instead, used in this context, the term 'store' is used in a metaphorical sense.
>
> Apple and other entities have transmuted the term "store" and have metaphorically morphed "store" from a physical building .... into a metaphoric non-physical store.

Dr. Leonard goes on to associate online stores with Amazon and eBay and opines that *store* has been used in this manner since the mid-1990s.

36.   The first flaw in Dr. Leonard's argument here is that, if as he suggests the term *store* has been in widespread use since the mid-1990s to mean "online store," and has been used in this way by numerous entities, then the proper linguistic conclusion is that it was no longer perceived as a metaphor in 2007, much less today.

37.   Secondly, all linguists know that words continue to be applied without anyone thinking of them as metaphorical even though fashion and/or technological

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change has altered the entities to which they apply. Artillery remained artillery after it stopped being made up of crossbows, and a microwave oven is still an oven. To say that *store* in *app store* is a metaphor because in a former state of technology stores were not accessed online is a morphing of the term *metaphor* beyond all acceptable definitions.

38.   Thirdly, if writers really thought *store* was a metaphor for 'online stores', some of them—at least early on—would have followed the familiar journalistic practice of putting the supposedly figurative word in quotation marks. I find no examples of *app store* written as *app "store"* in any of the materials that Dr. Leonard presents.

39.   Fourth, the use of *store* as a non-bricks-and-mortar place predates the internet. For generations, Americans bought goods from stores that advertised through catalogues or media ads and then sent the goods by mail or courier service to the customers. For example, see *New York Times*, September 26, 1973, p45 (underlining added): "… major local department stores and leading national mail-order stores were predicting a record sales volume, for the season" (ProQuest Historical Newspapers: *The New York Times* (1851–2007; downloaded March 27, 2011).

40.   Finally, Dr. Leonard's summary of the dictionary evidence for definitions of *store* is misleading. Dictionaries do not say that a store is a "physical place," as Dr. Leonard says, but merely that a store is a "place." See, for example, *The American Heritage Dictionary of the English Language*, 4th edition (2000; hereafter, "*AH4*"), which predates by several years the launch of Apple's first *app store*:

store *n*. **1**. A place where merchandise is offered for sale; a shop.

Furthermore, the *AH4* definition of *place* does not confine the word to physical space, but notes that it also may refer to an abstraction:

place *n*. **6**. A position regarded as belonging to someone or something else: *Put yourself in my place*. … .. **9**. The proper or designated role or function: *the place of the media in a free society*.

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Dictionaries are not encyclopedias; the fact that no dictionary specifically mentions that *store* may apply to mail-order stores or online stores cannot be taken to mean that such readily inferable details of the sense are specifically excluded from the definition. Note, however, that the *New Oxford English Dictionary* (2001) is even more expansive:

> **store** *n*. **1** a retail establishment selling items to the public: a health-food store.

This definition, from one of the most respected of American dictionaries, must be construed to include stores that sell their goods online.

VIII. DR. LEONARD'S METHODOLOGY AND FINDINGS: DICTIONARY DEFINITIONS OF *APP STORE*
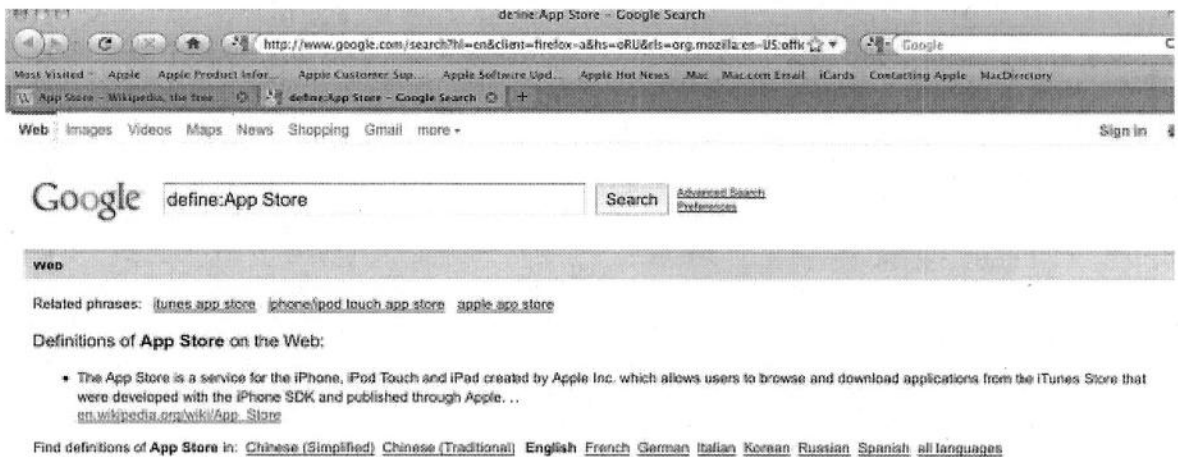
41. Dr. Leonard presents two sets of evidence that he says indicate that *app store* is not generic. Both are without foundation and counter to elementary principles of lexicography and/or other areas of linguistics.

42. First (¶36), he argues that, because *app store* is not listed in any of the standard dictionaries he looked at, "to a linguist, this fact alone is evidence that a term is not generic." Dr. Leonard's conclusion is wrong. As discussed above (¶16), it is basic understanding among linguists and lexicographers that, because of time, space, and resource limitations, standard dictionaries are unlikely to define new words and multi-word constructions. Because *app store* is relatively new and it is a two-word combination whose meaning is apparent from the individual words, I would not expect it to be explicitly defined in current standard dictionaries.

43. Dr. Leonard's citation to one dictionary ("Merriam-Webster's Collegiate"—not further identified) that defines *drug store* (¶36) does not support his conclusion. *Drugstore* is spelled all as one solid word in the online version of *Merriam-Webster's Dictionary*, thus suggesting that it is extremely commonplace. The same dictionary, however, like other dictionaries, does not define such equally commonplace

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generics as *hardware store*, *candy store*, *toy store*, *computer store* and *stationery store*—which follow the same paradigm as *app store*.

44.   Dr. Leonard also cites an online-only reference-work in support of his thesis that (¶37) "the predominate [sic] usage of the term APP STORE is as a proper noun." He identifies this as "Google's 'Definition of App Store on the Web," which is something of a misidentification, since the definition is merely Google's reporting of a portion of a *Wikipedia* entry found at <en.wikipedia.orglwikilApp Store> (information that Leonard leaves out of his citation in his report):

The entry that Google quotes and Leonard cites to from the image shown above has apparently been revised (as happens frequently to *Wikipedia* entries), so that I was unable to find the cited definition by clicking on the *Wikipedia* link that the Google quote cites. What I found instead was an updated entry that confirms that *app store* is generic. After discussing the "Apple **App Store**," it migrates to a discussion of *app store* as a generic term (underlining added; footnotes removed throughout):

> The Apple **App Store** is an app by Apple to download apps on an Apple Device the iPhone, iPad Touch, iPad And Mac) offered by Apple Inc. which allows users to browse and download applications from the iTunes Store that were developed with the iOS SDK or Mac SDK and published through Apple. Depending on the application, they are available either for free or at a cost. The applications can be downloaded directly to

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a target device, or downloaded onto a PC or Mac via iTunes. 30% of revenues from the store go instantly to Apple, and 70% go to the seller of the app. The App Store opened on July 10, 2008 …

<u>After the success of Apple's App Store, and the launch of similar services by its competitors, the term "app store" has been used to refer to any similar service for mobile devices.</u> However, Apple claims "App Store" as a trademark. The term "app" has become a popular buzzword; in January 2011, "app" was awarded the honor of being 2010's "Word of the Year" by the American Dialect Society.

On October 20, 2010, Apple announced the Mac App Store ...

Thus the first of Leonard's sources contradicts his assertion that *app store* must be a "proper noun" that refers specifically to Apple products. Further, the initial use of "App Store" associates the term with Apple in a way that indicates that Apple is the trademark and App Store is a generic part of the construction that is being defined (comparable to, say, *chocolate store* in *Godiva Chocolate Store* or *hardware store* in *Ace Hardware Store*). Moreover, the *Wikipedia* definition explicitly testifies to the genericness of *app store* in noting that "the term "app store" has been used to refer to any similar service for mobile devices."

IX.   CONCLUSION

45.   It is clear from standard linguistic semantic and lexicographical analysis that the compound noun *app store* means simply 'store at which apps are offered for sale', which is merely a definition of the thing itself—a generic characterization. Such dictionary sources as are available indicate that app store is generic.

46.   Dr. Leonard's three archival searches in fact all support the conclusion that *app store* is generic, indicating as they do a very large number of generic usages. To the extent that Dr. Leonard's searches could have been properly conducted and the results properly tallied, they would have supported this conclusion even further. Microsoft's Westlaw US ALLNEWS search, which looked for uses of "app store" in lower case letters and is therefore freed from the presence of all branded uses of "App Store,"

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likewise strongly supports the conclusion that *app store* is generic, again in that the Westlaw study indicated a very large number of generic usages.

46. Dr. Leonard's assertion that *app store* is figurative or metaphorical is simply wrong. It is generally accepted that *app* is not figurative or metaphorical, but simply a clipped form of *application*. Standard linguistic semantic and lexicographical analysis clearly indicates that store as used in *app store* is not figurative.

47. In sum, all linguistic facts indicate that *app store* is a generic term.

I declare under penalty of perjury that the foregoing is true and correct.

Ronald R. Butters, Ph.D.
March 28, 2011
Durham, North Carolina

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2011, the foregoing REBUTTAL REPORT: DECLARATION OF DR. RONALD R. BUTTERS IN SUPPORT OF OPPOSER MICROSOFT CORPORATION'S MOTION FOR SUMMARY JUDGMENT was served upon Applicant's attorneys of record by depositing same with the U.S. Postal Service, first-class postage prepaid, addressed as follows:

> Joseph Petersen, Esq.
> Jason Vogel, Esq.
> KILPATRICK TOWNSEND & STOCKTON LLP
> 14th Floor
> 31 West 52nd Street
> New York NY 10019
>
> Alicia Grahn Jones, Esq.
> KILPATRICK TOWNSEND & STOCKTON LLP
> 1100 Peachtree Street, Suite 2800
> Atlanta, Georgia 30309

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Annette Baca

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DECLARATION OF
DR. RONALD R. BUTTERS

EXHIBIT 1

CURRICULUM VITAE

Dr. Ronald R. Butters, Ph.D.
Professor Emeritus, English and Cultural Anthropology,
   Duke University
•Former chair, Duke Linguistics Program
•Former chair, Duke Department of English

•Phone: (919) 423-8866
•Fax: (919) 287-2616
•e-mail: RonButters@aol.com
•web site: http://trademarklinguistics.com/
  mailing address: 1612 Bivins Street
                Durham, NC 27707

March 29, 2011

Education

The University of Iowa, Iowa City, 1958–1962, degree: B.A. with Honors and Highest Distinction in English, June 1962. Phi Beta Kappa, 1961.

The University of Iowa, Iowa City, 1962–1967, degree: Ph.D. in English (with concentration in linguistics), August 1967.

Teaching and Administrative Experience

1967–1974, Assistant Professor of English, Duke University; 1974–90, Associate Professor of English, Duke University; 1990–2007, Professor of English, Duke University; 2000–2007, Professor of Cultural Anthropology, Duke University (secondary appointment). As of September 1, 2007, Professor Emeritus, Duke University.

Summer 1986, Visiting Professor of English Linguistics, University of Bamberg, (West) Germany (Fulbright award).

February 1989, Visiting Professor of English Linguistics, Cadi Ayyad University, Marrakech (Duke-in-Morocco Program).

September 2005, Visiting Professor, International Summer School in Forensic Linguistic Analysis, Lodz, Poland ("Linguistic and Semiotic Evidence in a Death Penalty Case" and "Linguist Issues in American Trademark Law").

September 2006, Visiting Professor, International Summer School in Forensic Linguistic Analysis, Birmingham, England ("Linguist Issues in American Trademark Law: 2006" and "Linguistic and Semiotic Evidence in American Death Penalty Cases").

1975–80, 1986–88, 1997–99, Director of Undergraduate Studies in English; 1981–84, Supervisor of Freshman Instruction in English; Spring 1992 and Fall 2000, Acting Chair, Department of English; 1992–95, Associate Chair, Department of English; July 1999–December 1999 and July 2005–July 2006, Interim Chair, Department of English.

1970–72, 1976–77, 1982–96, 1999–2003, 2005–2006, Chair, Duke University Linguistics Program.

1999–2007, Co-Director, North Carolina State University–Duke University Doctoral Program in English Sociolinguistics.

2010, Universitat Pompeu Fabra, Barcelona, Spain, May 10– 12, 2010. ["Trademarks": 9 hours of invited lectures.]

2011, Visiting Professor, International Summer School in Forensic Linguistic Analysis, Aston University, Birmingham, England, July.

Teaching Areas

The structure of modern English and present-day usage; the history of the English language; sociolinguistics, including American dialects, languages in contact, and Caribbean linguistics; language and law, linguistics of trademarks; discourse analysis, pragmatics, and semiotics; introduction to literature.

Editorial Experience

1969–76, Member of the Associate Editorial Board, *Papers in Linguistics*; 1979, editorial referee, *American Speech*; 1980–81, member of the Editorial Advisory Committee, *American Speech*; 1983–90, member of the Editorial Advisory Board, *Jewish Language Review*; 1985–90, member of Editorial Board, *Journal of Metaphor and Symbolic Activity*; 1981–95, editor, *American Speech*; 1996–2007, General Editor, American Dialect Society Publications and Editor of Publication of the American Dialect Society (PADS, the monograph series); 1999–, Editorial Advisory Board member, *New Oxford American Dictionary*; 2007–10, co-editor, *The International Journal of Speech, Language and the Law*.

Publications and Presentations

1. <u>Articles and Chapters of Books</u> (those marked * were also presented at the indicated scholarly gatherings)

*"Lexical Selection and Linguistic Deviance," *Papers in Linguistics* 1.1 (1969), 170–81. [revision of paper read at the Southeastern Conference on Linguistics meeting in Gainesville, FL, 1969]

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