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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 Defendant.  
 28

Case No. CV 11-01327 PJH

**DECLARATION OF THOMAS R. LA  
 PERLE IN SUPPORT OF APPLE INC.'S  
 REPLY IN SUPPORT OF MOTION FOR  
 PRELIMINARY INJUNCTION**

Date: June 22, 2011  
 Time: 9:00 A.M.  
 Courtroom: 3, 3<sup>rd</sup> Floor  
 Judge: Hon. Phyllis J. Hamilton

1 I, Thomas R. La Perle, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

2 1. I am currently a Director in Apple Inc.'s Legal Department, managing the  
3 Trademark, Copyright and Enforcement Group. I submit this declaration in support of Apple  
4 Inc.'s ("Apple") reply in support of its motion for a preliminary injunction against Amazon.com,  
5 Inc. and Amazon Digital Services, Inc. (collectively, "Amazon") on the basis that Amazon is  
6 infringing Apple's trademark APP STORE. All information provided within this declaration is  
7 personally known to me or is information that has been provided to me, which I believe to be  
8 true, and if called as a witness I would testify to all information herein under oath.

9 2. I have previously submitted a declaration in this matter, which is filed as Docket  
10 No. 21 with the Court. That declaration discusses, among other things, the launch of Apple's  
11 revolutionary APP STORE service and how that service allows users of Apple's iPhone, iPod,  
12 and iPad mobile devices to browse, search for, and license a wide range of third-party software  
13 programs. As I stated in that declaration, Apple "licenses" software applications. Apple does not  
14 "sell" applications.

15 3. Nor do software developers "sell" applications through Apple's APP STORE  
16 service. Instead, Apple acts as the agent for software developers who make their applications  
17 available for customers to license and download through the APP STORE service.

18 4. Consumers are made aware that they are licensing—not buying—software made  
19 available through the APP STORE service, because each user must accept Apple's Licensed  
20 Application End User License Agreement. The first line of that agreement states that "[t]he  
21 Products transacted through the Service are licensed, not sold, to You for use only under the  
22 terms of this license." A true and correct copy of this agreement is attached hereto as Exhibit 1.

23 5. My earlier declaration also discussed that, to the best of my knowledge, the term  
24 "App Store" was not in use in the United States, or elsewhere, in connection with the type of  
25 services offered by Apple under the APP STORE mark. As I discussed, prior to its launch of its  
26 APP STORE service, Apple became aware of the fact that a company named Salesforce.com, Inc.  
27 filed an intent to use the mark APPSTORE for "[a]pplication service provider (ASP) featuring  
28 computer software in the field of business project management, business knowledge, information

1 and asset management, customer relationship management, sales, marketing, e-commerce,  
2 electronic messaging, and web site development.” Apple expressed its opposition to Salesforce’s  
3 intent to use that mark due to the similarity to the APPLE STORE trademark, a federally  
4 registered, incontestable mark that Apple has used for many years for online retail services,  
5 including software retail services . Salesforce.com abandoned its plans to use the term and never  
6 commenced such use.

7           6. I understand that Amazon has identified a handful of entities that, according to  
8 Amazon, have referred to their services as “app stores.” To the extent Apple was aware of  
9 entities using Apple’s APP STORE mark, Apple has contacted them to request they cease their  
10 use of the mark. Those efforts have often been successful in obtaining the voluntary cessation of  
11 the use of Apple’s mark.

12           7. Apple is also enforcing its rights to the APP STORE mark against Amazon’s  
13 misuse of that mark in other jurisdictions. The District Court in Hamburg, Germany has recently  
14 granted a preliminary injunction ordering Amazon to cease use of APP STORE in connection  
15 with Amazon’s developer program in Germany. Amazon has not yet launched its mobile  
16 software download service in Germany. A true and correct copy of that court’s order, and an  
17 English translation, are attached hereto as Exhibit 2.

18           8. My prior declaration—and that of Apple’s Matthew Fischer filed as Docket No.  
19 23—also discussed Apple’s phenomenal success with its APP STORE service, which has become  
20 well-known among the consuming public. For consumers who do not yet have a smartphone  
21 (such as an iPhone, iPad or Android-based device), or do not yet have a similar device that can  
22 access and make use of downloadable mobile software, a comparison of the number, quality, and  
23 interoperability of software applications available for use on such devices is likely to be a  
24 significant factor in their device purchasing decision. I am aware of several articles discussing  
25 how the software ecosystem available for various smart phones or other devices affect  
26 consumers’ decisions *whether* to buy a smartphone and *which* smartphone to buy. A true and  
27 correct copy of various articles discussing those purchasing decisions is attached hereto as Exhibit  
28 3. Those consumers are likely to see the Appstore service available on the Android device and

1 mistakenly believe it is related to the well-known APP STORE service provided by Apple.  
2 Consumers who intend to gain access to the large library of applications Apple makes available  
3 through its APP STORE service—and who believe that the “Appstore” offered by a well-known  
4 reseller such as Amazon will provide such access for Android devices—may mistakenly purchase  
5 a device that will not work with Apple’s APP STORE service. Those consumers would then be  
6 foreclosed from accessing Apple’s APP STORE service until they purchased a different device.

7 9. I am aware that Amazon has asserted that Amazon “cannot expand into sales of  
8 apps for Apple devices without Apple’s permission.” That is not correct with respect to all types  
9 of applications for Apple devices. In particular, it may be possible that Amazon would expand  
10 into sales of applications for jailbroken iOS-based Apple devices. Although Apple does not offer  
11 applications for jailbroken iOS-based devices, such applications are available from other sources.  
12 For instance, the Cydia Store—located at <http://cydia.saurik.com/store/>—offers such applications.  
13 The Cydia Store does not have any permission or authorization from Apple. Nor has Apple  
14 authorized any other person or entity to provide applications for jailbroken iOS devices.

15 10. On June 2, 2011, it was reported that Google removed from its Android Market 30  
16 malware-infected software applications for Android devices. A true and correct copy of an article  
17 reporting that event is attached hereto as Exhibit 4.

18 11. I am also aware of news articles reporting complaints regarding Amazon’s process  
19 for purchasing from its mobile software download service, namely that under certain  
20 circumstances a single click can result in an accidental purchase for which Amazon will not  
21 provide a refund. I am also aware of recent reports that Amazon has taken steps to fix this  
22 problem by requiring two clicks for all purchases from Amazon’s service. True and correct  
23 copies of articles reporting this concern are attached hereto as Exhibit 5.

24 12. I am aware that on approximately May 26, 2011, Amazon launched a service that  
25 allows consumers to download from Amazon software for MAC personal computers  
26 manufactured by Apple. Amazon has branded that service the “Mac Software Downloads” area  
27 or department of the [www.amazon.com](http://www.amazon.com) website.

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

3 Dated: June 8, 2011

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5 Thomas R. La Perle  
6 Director, Legal  
7 Apple Inc.

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