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ORIGINAL
FILED
E-filing
JUL - 3 2008
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JL

CV 08 3251

APPLE INC., a California Corporation,

Plaintiff,

v.

PSYSTAR CORPORATION,

Defendant.

Case No.

COMPLAINT FOR COPYRIGHT INFRINGEMENT, INDUCED COPYRIGHT INFRINGEMENT, BREACH OF CONTRACT, TRADEMARK INFRINGEMENT, TRADE DRESS INFRINGEMENT AND UNFAIR COMPETITION

JURY TRIAL REQUESTED

Plaintiff Apple Inc. ("Apple") hereby alleges as follows:

BACKGROUND ALLEGATIONS

1. Apple is a California corporation with its headquarters and principal place of business at 1 Infinite Loop, Cupertino, California. Apple makes and sells well-known computer hardware, software and consumer products and services including the Macintosh® computer, the iPod® music player and the iPhone™. Founded in 1976, Apple has been consistently ranked as one of the most innovative companies in the world. Apple currently employs approximately 28,000 people worldwide, owns and operates over 200 retail stores, and sells its products online as well. In 2008, *Fortune Magazine* named Apple "America's Most Admired Company."

2. A pioneer of the personal computer revolution, Apple launched its Macintosh line of computers in 1984. Apple's Macintosh computers (or "Mac") introduced such novel innovations as the mouse, computer icons and the graphical user interface. Apple's "perennially praised" Macintosh line of computers includes the Mac®, Mac Pro®, iMac®, Mac® mini, MacBook®, MacBook Pro and MacBook Air. Since 2001, Apple has sold more than 29 million Macintosh computers.

3. Apple's Macintosh computers are famous for their reliability, ease-of-use and innovative industrial design. Apple's development teams have seamlessly integrated the hardware and software features of Macintosh computers such that the use of the computers is intuitive, efficient and pleasurable. Moreover, the unified, integrated Mac system is simpler to service, update and maintain. Indeed, for eight consecutive years *Consumer Reports* has ranked Apple's technical support for its customers best in the nation for both desktop and laptop computers, surpassing Dell, Hewlett-Packard, Sony, Toshiba, Gateway and Lenovo.

4. In 2001, Apple launched the tenth generation of its operating system - Mac OS X. Mac OS X revolutionized operating system architecture, adding extraordinary capabilities, speed and stability. Apple's most recent version of Mac OS X, version 10.5, known as "Leopard®," has been described by reviewers as "visually stunning," "powerful, polished and carefully conceived," and "elegant." Other reviewers have said the "grace of Leopard's interface elements makes productivity more pleasurable with a Mac," all the result "of years of hard, diligent work by the development teams at Apple."

5. The Mac OS X user interface combines the use of color, transparency and animation together with the overall arrangement and set up of various icons in a unique and creative manner. In addition, the Finder toolbar containing the famous Apple mark is combined with a distinctive three-dimensional applications bar (or "dock") on which various icons reside. The distinctive nonfunctional combination of elements that makes up the Mac OS X user interface is well known to consumers and has become associated with Apple and Mac OS X Leopard. This combination of elements shall be referred to hereafter as "Apple's Trade Dress."

6. Mac OS X, including the Leopard® version, has been the subject of numerous articles in general circulation newspapers, magazines and online publications, as well as radio, television and

Internet broadcasts. The product has received significant acclaim and in recent years sales of Mac computers have surged, growing at a faster pace than the personal computer market in general.

7. Apple also manufactures and sells the Xserve® rack-mount server for use in businesses needing to connect multiple computers to a single server. The Xserve uses Mac OS X Leopard Server as its operating system software. Mac OS X Leopard Server has also been the subject of numerous articles, publications and media coverage both on television and radio and on the Internet.

8. The Apple brand, including its registered trademarks Apple® and Mac®, is one of the most famous brands in the world. Since inception, Apple has continuously and extensively promoted, offered and sold its Mac computers, and its related goods and services, in interstate commerce under the various Apple and Mac trademarks. Since 1994, Apple has spent more than $3 billion to promote its brand, including the Apple and Mac trademarks. Apple's brand, including its various marks and distinctive trade dress, have become synonymous with high quality, innovative, elegant and user-friendly consumer electronics products. Indeed, among many other accolades over the years, for each of the past three years *BusinessWeek Magazine* named Apple the "World's Most Innovative Company." The Apple brand and trademarks consistently are ranked by independent research organizations as being among the fifty most valuable brands on earth.

9. As a result of Apple's continuous and extensive use and promotion, the consuming public nationwide understands that Apple's various marks and distinctive trade dress identify Apple's goods and services, and associates the marks with Apple exclusively. Because of the consistent quality of Apple's goods and services marketed under and in association with Apple's trademarks and distinctive trade dress, Apple has established considerable good will and reputation with respect to its goods and services.

10. Apple's use of its Apple and Mac marks has been exclusive and continuous since long prior to the date of Defendant's first infringing acts described below. Furthermore, the Apple marks and distinctive trade dress became famous among the general consuming public long before the date of Defendant's first infringing use. The various Apple marks and distinctive trade dress are well known and are among the most important assets of Apple.

11. On information and belief, Defendant Psystar Corporation ("Psystar" or "Defendant") is

a corporation organized and existing under the laws of the State of Florida with its principal places of business at 10475 NW 28th Street, Doral, Florida and/or 10645 SW 112 Street, Miami, Florida 33176.

12. In April, 2008, without authorization from Apple, and in violation of the terms of the Software License Agreement governing the use of Mac OS X software and Apple's intellectual property, Psystar began selling in commerce a computer named the OpenMac which apparently runs a modified, unauthorized, version of the Leopard operating system. Thereafter Psystar changed the name of its product to Open Computer, but continued to sell it with the Leopard operating system, without authorization from Apple. Psystar sells its computers online and ships them throughout the United States, including into the Northern District of California. Psystar's Chief Executive Officer has been quoted as saying that Psystar has sold "thousands" of these computers. In addition, without Apple's permission or consent, Psystar makes copies of, and offers to customers for download from its website, www.psystar.com, "updates" to the Leopard software that are either direct copies of Apple-generated updates and/or unauthorized modified versions of software updates from Apple.

13. In June, 2008, Psystar began selling in commerce rack-mount servers called the OpenServ 1100 and OpenServ 2400. Without authorization from Apple, and in violation of the terms of the Software License Agreement governing the use of the Mac OS X Leopard Server software and Apple's intellectual property, Psystar has offered for sale and, on information and belief, sold OpenServ 1100 and OpenServ 2400 servers utilizing the Mac OS X Leopard Server software.

14. Online commentators have reported that Psystar's computer is "missing stuff like iLife, Bluetooth, an IR receiver, DVD burning and the ability to update your computer," is "LOUD, Crazy Loud," it "breaks the OS' automatic updates," and that "video was DOA right out of the box. No signal going to monitor. Boot up is moot point as there is nothing to see." Of Psystar itself reviewers have written, "they have no quality control," "lousy tech support," and "All I want to do is return the computer and get a refund." Likewise, it has been reported that Psystar has repeatedly changed locations, that its office could not be found, and that its first on-line payment processor terminated Psystar's account.

15. As alleged more fully below, by misappropriating Apple's proprietary software and intellectual property for its own use, Psystar's actions harm consumers by selling to them a poor

product that is advertised and promoted in a manner that falsely and unfairly implies an affiliation with Apple. Psystar's actions also have caused, and are causing, harm to Apple and constitute a misuse of Apple's intellectual property. To prevent this continued unfair and unlawful exploitation of Apple's proprietary technology, and to avoid further consumer confusion and injury, Apple seeks an injunction against further misappropriation and infringement of its intellectual property, an award of actual damages, treble damages and its attorneys' fees and costs of suit.

JURISDICTION AND VENUE

16. This Court has subject matter jurisdiction pursuant to 28 U.S.C. sections 1331, 1332, and 1338 because this action arises under the copyright and trademark laws of the United States, there is complete diversity of citizenship between the parties, and the amount in controversy exceeds $75,000.

17. Venue is proper in this judicial district pursuant to 28 U.S.C. section 1391 because Psystar has done business in this judicial district, has committed acts of copyright and trademark infringement in this district, has breached a contract with a substantial impact in this district, has engaged in unfair competition in this district, and continues to commit such acts in this district. Because this is an Intellectual Property case, it is not subject to the intra-District venue provisions of Northern District of California Local Rule 3-2(c).

GENERAL ALLEGATIONS

18. Apple licenses the use of its Macintosh operating system ("Mac OS") software for use only on Apple-labeled hardware. Indeed, an original version of the Mac OS is available only with the purchase of a Macintosh computer. Upgrades to the Mac OS may be licensed separately, but the terms of the license prohibit use of the Mac OS or its upgrades on non-Apple hardware.

19. The Software License Agreement for Mac OS X Leopard (and Mac OS X Leopard Server) ("License Agreement") provided with each version of Mac OS X Leopard and Mac OS X Leopard Server are attached hereto as Exhibits 1 and 2, and are incorporated herein by reference. The Mac OS X Leopard License Agreement specifies, in relevant part:

> "1. **General**. The software (including Boot ROM Code)... accompanying this License whether preinstalled on Apple-labeled hardware, on disk, in read only memory, or any other media or in any other form (collectively,

> the "Apple Software") are licensed, not sold, to you by Apple Inc. ("Apple") for use only under the terms of this License, and Apple reserves all rights not expressly granted to you....
>
> 2. **Permitted License Uses and Restrictions.**
>
> A. Single Use. This license allows you to install, use and run one (1) copy of the Apple Software on a single Apple-labeled computer at a time. You agree not to install, use, or run the Apple Software on any non-Apple-labeled computer or enable another to do so....
>
> * * * *
>
> "5. **Termination**. This license is effective until terminated. Your rights under this License will terminate automatically from Apple if you fail to comply with any term(s) of this License...."

The Mac OS X Leopard Server License Agreement includes the same terms.

20. Psystar claims the "Open Computer is a PC that works just like a Mac with Apple's latest operating system OS X 10.5 a.k.a. Leopard." Psystar claims its product "is ready to run out of the box when you purchase it with Leopard included. If you buy Leopard with your Open Computer we'll install it for free." Psystar also says "The Open Computer can now be purchased with Leopard included and pre-installed," (emphasis in original) and that OpenServ computers also run "Mac OS X Leopard Server."

21. Apple has never authorized Psystar to install, use, or sell the Mac OS software on any non-Apple-labeled hardware.

FIRST CLAIM FOR RELIEF
(Copyright Infringement)
(17 U.S.C. Sections 501 *et seq.*)

22. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

23. Mac OS, Mac OS X, Mac OS X version 10.5, and Mac OS X Server all are original works of authorship created by Apple constituting copyrightable subject matter (hereafter, "the Copyrighted Works").

24. Apple is the owner of, among others, United States copyright registrations TX4-669-971 (Mac OS); TX5-401-457 (Mac OS X); TX6-849-489 (Mac OS X Leopard Version 10.5); TX4-991-736 (Mac OS X Server); and TX6-849-684 (Mac OS X Server Version 10.5 Leopard). The

effective date of Apple's copyright registrations predates the commencement of infringement by Psystar.

25. Defendant has reproduced, distributed and/or displayed the Copyrighted Works in violation of Apple's exclusive rights under the Copyright Act. Apple has not licensed or otherwise authorized Defendant's reproduction, distribution or display of the Copyrighted Works.

26. Apple is informed and believes, and on that basis alleges, that Defendant's infringement of Apple's copyrights in the Copyrighted Works is, and continues to be, intentional, willful and in conscious disregard of Apple's rights.

27. Apple is informed and believes, and on that basis alleges, that Defendant has realized profit by virtue of its infringement of Apple's copyrights.

28. Apple has sustained economic damage as a result of Defendant's infringement of Apple's copyrights in an amount to be proven at trial.

29. Apple is entitled to recover the actual damages it has suffered and/or any profits gained by Defendant that are attributable to its acts of copyright infringement pursuant to 17 U.S.C. § 504(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 17 U.S.C. § 504(c) based on Defendant's willful acts of copyright infringement. Apple will make its election at the appropriate time before final judgment is rendered.

30. Pursuant to 17 U.S.C. § 502, Apple is entitled to an injunction against Defendant's continuing reproduction, distribution and display of Apple's copyrighted materials.

31. Apple is further entitled to recover its full costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

SECOND CLAIM FOR RELIEF
(Contributory and Induced Copyright Infringement)
(17 U.S.C. § 501, *et seq.*)

32. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

33. Defendant is aware that its actions as described above infringed and continue to infringe Apple's copyrights and exclusive rights to reproduce, display and distribute Apple's copyrighted materials.

34. By offering for sale copies of Apple software to actual and potential purchasers for use on non-Apple-labeled computers, and by providing services to install Apple software to cause it to operate on non-Apple-labeled computers, Defendant has induced, caused or materially contributed to the infringing conduct of purchasers.

35. Apple is informed and believes, and on that basis alleges, that Defendant's inducement of infringement of Apple's copyrights in the Copyrighted Works is, and continues to be, intentional, willful and in conscious disregard of Apple's rights.

36. Apple is informed and believes, and on that basis alleges, that Defendant has realized profit by virtue of its inducement of infringement of Apple's copyrights.

37. Apple has sustained economic damage as a result of Defendant's inducement of infringement of Apple's copyrights in an amount to be proven at trial.

38. Apple is entitled to recover the actual damages it has suffered and/or any profits gained by Defendant that are attributable to its acts of copyright infringement pursuant to 17 U.S.C. § 504(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 17 U.S.C. § 504(c) based on Defendant's willful acts of copyright infringement. Apple will make its election at the appropriate time before final judgment is rendered.

39. Pursuant to 17 U.S.C. § 502, Apple is entitled to an injunction against Defendant's continuing reproduction, distribution and display of Apple's copyrighted materials.

40. Apple is further entitled to recover its full costs and reasonable attorneys' fees pursuant to 17 U.S.C. § 505.

THIRD CLAIM FOR RELIEF
(Breach of Contract)

41. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

42. Apple is informed and believes, and on that basis alleges, that Psystar has acquired Mac OS X version 10.5 software, that Psystar opened the box in which the software disk and license were packaged, opened the seal on the shrink-wrapped software disk, and thereafter installed the Leopard operating system and/or Leopard Server software on computers. By so doing Psystar

accepted the terms and conditions of the applicable License Agreement.

43. Psystar breached the License Agreement(s) by:

A. Installing, using and running Mac OS X software on non-Apple-labeled computers;

B. Enabling others to install, use or run Mac OS X software on non-Apple-labeled computers;

C. Selling and/or distributing Mac OS X software without requiring that the transferees agree to the terms of the License Agreement;

D. Selling and/or distributing Mac OS X software that has been modified; and

E. Copying and installing a single copy of Mac OS X on more than a single computer at a time.

44. On information and belief, Apple alleges that Psystar has engaged in other and further actions that violate the License Agreement.

45. As a direct and proximate cause of Psystar's breach of the License Agreement Apple has suffered economic injury and damages in an amount to be proven at trial in excess of $75,000.

FOURTH CLAIM FOR RELIEF
(Inducing Breach of Contract)

46. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

47. The owners and managers of Psystar have admitted in public statements their knowledge of the existence of the License Agreement governing the use of Mac OS X software and of its terms and conditions.

48. Apple is informed and believes, and on that basis alleges, that notwithstanding its knowledge of the existence and terms of the License Agreement, Psystar has advised, encouraged and assisted others to breach the License Agreement by, among other things, encouraging those consumers to acquire Mac OS X software and then assisting them to install, use and run it on non-Apple-labeled computers. In so doing Psystar has unlawfully induced breach of the License Agreement by others.

49. As a direct and proximate result of Psystar's actions to induce others to breach the License Agreement, Apple has suffered economic injury and damages in an amount to be proven at

trial in excess of $75,000.

FIFTH CLAIM FOR RELIEF
(Trademark Infringement)
(15 U.S.C. § 1114)

50. Plaintiff incorporates herein by reference each and every allegation in the preceding paragraphs.

51. Apple owns registered trademarks pertaining to the Mac computer, server and Leopard software (the "Infringed Marks") including: Apple® (U.S. Reg. Nos. 1078312), the Apple Logo® (U.S. Reg. Nos.1114431 and 2715578), Mac® (U.S. Reg. No. 1964391), the Mac Logo® (U.S. Reg. No. 1931078), Mac OS (Reg. No. 2000282), Leopard® (Reg. No.3386175) and XServe® (U.S. Reg. No. 2697680), copies of which are attached hereto as Exhibit 3.

52. Apple never consented to Psystar's use of Apple's Infringed Marks.

53. Prior to Psystar's first use of the Infringed Marks, Psystar was aware of Apple's business and had either actual notice and knowledge, or constructive notice of Apple's ownership and registrations of the Infringed Marks.

54. Defendant's unauthorized use of Apple's trademarks is likely, if not certain, to deceive or to cause confusion or mistake among consumers as to the origin, sponsorship or approval of the software and computers and/or to cause confusion or mistake as to any affiliation, connection or association between Apple and Psystar, in violation of 15 U.S.C. §§ 1114(a).

55. Apple is informed and believes, and on that basis alleges that Psystar's infringement of Apple's trademarks has been and continues to be intentional, willful and without regard to Apple's trademark rights.

56. Apple is informed and believes and on that basis alleges that Psystar has gained profits by virtue of its infringement of Apple's trademarks.

57. Apple also has sustained damages as a direct and proximate result of Psystar's infringement of Apple's trademarks in an amount to be proven at trial.

58. Apple will suffer and is suffering irreparable harm from Psystar's infringement of the Apple trademarks insofar as Apple's invaluable good will is being eroded by Defendant's continuing infringement. Apple has no adequate remedy at law to compensate it for the loss of business

reputation, customers, market position, confusion of potential customers and good will flowing from Psystar's infringing activities. Pursuant to 15 U.S.C. § 1116, Apple is entitled to an injunction against Defendant's continuing infringement of Apple's trademarks. Unless enjoined, Defendant will continue its infringing conduct.

59. Because Psystar's actions have been committed with intent to damage Apple and to confuse and deceive the public, Apple is entitled to treble its actual damages or Defendant's profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 1117(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 15 U.S.C. § 1117(c). Apple will make its election at the appropriate time before final judgment.

SIXTH CLAIM FOR RELIEF
(Trademark Infringement)
(15 U.S.C. § 1125(a))

60. Plaintiff incorporates herein by reference each and every allegation of the preceding paragraphs.

61. Through Plaintiff's use in interstate commerce, Apple also owns common law trademark rights throughout the United States in unregistered trademarks and other source identifiers in and in connection with the Mac and its OS X Leopard software.

62. Apple never consented to Psystar's use of Apple's various marks or its distinctive trade dress.

63. Apple is informed and believes, and on that basis alleges that Defendant chose to use the name Open Mac, Apple's various other trademarks and its distinctive trade dress, to cause confusion or mistake, or to deceive the public as to the origin, sponsorship, association or approval of the goods and services of Defendant and/or to falsely imply an association with Apple.

64. Defendant's unauthorized use of Apple's trademarks and its distinctive trade dress is likely, if not certain, to cause confusion or to deceive customers as to the affiliation, connection or association of Psystar with Apple.

65. Defendant's unauthorized use of the Apple's various trademarks and its distinctive trade dress is also likely, if not certain, to cause confusion or to deceive customers as to the origin,

sponsorship, association or approval of the goods and services of the Defendant.

66. Defendant's unauthorized use of Apple's various trademarks and its distinctive trade dress also facilitates the acceptance of Defendant's computers and related services not based on the quality of the goods and services provided by Defendant, but on the association that the public is likely to make with Apple and the reputation for outstanding quality and goodwill associated with Apple's goods and services.

67. Defendant's conduct deprives Apple of the ability to control the quality of the goods and services marketed under the Infringed Marks and Apple's unregistered common law trademarks and, instead, places Apple's valuable reputation and goodwill into the hands of Defendant, over which Apple has no control.

68. Apple is informed and believes, and on that basis alleges, that Psystar's infringement of Apple's trademarks has been and continues to be intentional, willful and without regard to Apple's trademark rights.

69. Apple is informed and believes, and on that basis alleges, that Psystar has gained profits by virtue of its infringement of Apple's trademarks.

70. Apple also has sustained damages as a direct and proximate result of Psystar's infringement of Apple's trademarks in an amount to be proven at trial.

71. Apple will suffer and is suffering irreparable harm from Psystar's infringement of the Apple trademarks insofar as Apple's invaluable good will is being eroded by Defendant's continuing infringement. Apple has no adequate remedy at law to compensate it for the loss of business reputation, customers, market position, confusion of potential customers and good will flowing from Psystar's infringing activities. Pursuant to 15 U.S.C. § 1116, Apple is entitled to an injunction against Defendant's continuing infringement of Apple's trademarks. Unless enjoined, Defendant will continue its infringing conduct.

72. Because Psystar's actions have been committed with intent to damage Apple and to confuse and deceive the public, Apple is entitled to treble its actual damages or Defendant's profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 1117(b). Alternatively, Apple is entitled to the

maximum statutory damages allowed under 15 U.S.C. § 1117(c). Apple will make its election at the appropriate time before final judgment.

SEVENTH CLAIM FOR RELIEF
(Trade Dress Infringement)
(15 U.S.C. § 1125(a))

73. Plaintiff incorporates herein by reference each and every allegation of the preceding paragraphs.

74. Apple is the owner of common law rights throughout the United States in Apple's Trade Dress through their use and promotion in interstate commerce.

75. Apple's Trade Dress has been prominently displayed in the Mac OS X Leopard, is well-known among consumers and has come to be associated exclusively with Apple and the Leopard version of the Mac OS X.

76. Apple's Trade Dress has become distinctive of Apple's Mac OS X Leopard operating system, and distinguishes Apple's goods and services from those offered by others.

77. Apple's Trade Dress was distinctive long before Defendant began offering its product for sale.

78. Apple's Trade Dress is non-functional.

79. Defendant's unauthorized use, sale and distribution of goods displaying Apple's Trade Dress is likely to cause confusion, to cause mistake, or to deceive as to the source of goods and services provided by Defendant, or as to affiliation, connection, association, sponsorship, or approval of such goods and services.

80. Defendant's unauthorized use, sale and distribution of good displaying Apple's Trade Dress constitutes trade dress infringement in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

81. Apple is informed and believes, and on that basis alleges, that Psystar's infringement of Apple's Trade Dress has been and continues to be intentional, willful and without regard to Apple's trademark rights.

82. Apple is informed and believes, and on that basis alleges, that Psystar has gained profits by virtue of its infringement of Apple's Trade Dress.

83. Apple also has sustained damages as a direct and proximate result of Psystar's infringement of Apple's Trade Dress in an amount to be proven at trial.

84. Pursuant to 15 U.S.C. § 1116, Apple is entitled to an injunction against Defendant's continuing infringement of Apple's trademarks. Unless enjoined, Defendant will continue its infringing conduct.

85. Because Psystar's actions have been committed with intent to damage Apple and to confuse and deceive the public, Apple is entitled to treble its actual damages or Defendant's profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 1117(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 15 U.S.C. § 1117(c). Apple will make its election at the appropriate time before final judgment.

EIGHTH CLAIM FOR RELIEF
(Trademark Dilution)
(15 U.S.C. § 1125(c))

86. Plaintiff incorporates herein by reference each and every allegation of the preceding paragraphs.

87. Apple possesses exclusive trademark rights associated with the Apple, Mac, and Mac OS X trademarks as well as other source identifiers found in the Mac OS X software. The Apple, Mac and Mac OS trademarks are famous in the United States and all were famous prior to the commencement of Psystar's infringing activities.

88. By its conduct, Psystar has diluted Apple's marks in violation of 15 U.S.C. § 1125(c).

89. Psystar willfully intends and intended to trade on Apple's reputation for excellence.

90. Apple will suffer and is suffering irreparable harm from Psystar's dilution of the Apple trademarks.

91. Pursuant to 15 U.S.C. § 1116, Apple is entitled to an injunction against Defendant's continuing infringement of Apple's trademarks.

92. Because Psystar's actions have been committed with intent to damage Apple and to confuse and deceive the public, Apple is entitled to treble its actual damages or Defendant's profits, whichever is greater, and to an award of costs and, this being an exceptional case, reasonable

attorneys' fees pursuant to 15 U.S.C. § 1117(a) and 1117(b). Alternatively, Apple is entitled to the maximum statutory damages allowed under 15 U.S.C. § 1117(c). Apple will make its election at the appropriate time before final judgment.

NINTH CLAIM FOR RELIEF
(State Unfair Competition)
(Cal. Bus. & Prof. Code § 17200)

93. Plaintiff incorporates herein by reference each and every allegation of the preceding paragraphs.

94. Psystar's business practices as alleged above constitute unfair competition and unfair business practices and business acts in violation of Section 17200 *et seq.* of the California Business & Professions Code.

95. Pursuant to California Business and Professions Code §17203, Apple is entitled to enjoin these practices. Without injunctive relief, Apple has no means by which to control Psystar's unlawful copying and distribution of Apple's copyrighted works. Similarly, Apple has no way to control the confusion created by Psystar's infringement of Apple's trademarks. Apple is therefore entitled to injunctive relief prohibiting Psystar from continuing such acts of unfair competition pursuant to California Business and Professions Code § 17203.

TENTH CLAIM FOR RELIEF
(Common Law Unfair Competition)

96. Plaintiff incorporates herein by reference each and every allegation of the preceding paragraphs.

97. Psystar's business practices as alleged above constitute unfair competition and unfair business practices under state common law.

98. As a direct and proximate result of Psystar's infringing conduct, Apple has suffered and will continue to suffer lost sales and profits in an amount not yet fully ascertained in an amount to be proven at trial. In addition, Apple has suffered and continues to suffer injury to its business reputation and goodwill for which no adequate remedy exists at law and for which Apple is entitled to injunctive relief.

/ / /

PRAYER FOR RELIEF

WHEREFORE, in consideration of the foregoing, Plaintiff prays for judgment as follows:

1. Awarding Apple actual damages and/or any profits gained by defendants and/or statutory damages for direct and/or contributory copyright infringement as determined at trial;

2. Awarding Apple a permanent injunction against sales of the Psystar Open Computer and OpenServ server with Apple software and requiring Psystar to recall all such products sold to the public as a result of Psystar's infringement of Apple's copyrights;

3. Awarding damages as a result of Psystar's breach of Apple's Software License Agreement for Mac OS X and Mac OS X Server;

4. Awarding damages as a result of Psystar's inducement of others to breach Apple's Software License Agreement for Mac OS X and Mac OS X Server;

5. Awarding Apple actual and statutory damages for trademark infringement as determined at trial;

6. Awarding Apple actual and statutory damages for trade dress infringement as determined at trial;

7. Awarding Apple a permanent injunction against sales of the Psystar Open Computer and OpenServ server with Apple software and requiring Psystar to recall all such products sold to the public as a result of Psystar's infringement of Apple's trademarks;

8. Awarding Apple a permanent injunction against sales of the Psystar Open Computer and OpenServ server with Apple software and requiring Psystar to recall all such products sold to the public as a result of Psystar's dilution of Apple's trademarks;

9. Awarding Apple a permanent injunction against sales of the Psystar Open Computer and OpenServ server with Apple software and requiring Psystar to recall all such products sold to the public as a result of its statutory and common law unfair competition;

10. Ordering Apple actual damages as a result of Psystar's common law unfair competition;

11. Awarding Apple treble damages for Psystar's willful acts;

12. Awarding Apple its reasonable attorneys' fees and costs; and

13. Awarding Apple such other relief as the Court deems appropriate.

DEMAND FOR JURY TRIAL

Plaintiff Apple Inc. hereby demands a trial by jury of all issues triable by jury pursuant to Federal Rule of Civil Procedure 38(b) and Civil Local Rule 3-6(a).

DATED: July 3, 2008

Respectfully submitted,

TOWNSEND AND TOWNSEND AND CREW LLP

By: JAMES G. GILLILAND, JR.

Attorneys for Plaintiff
APPLE INC.

61421234 v1

Exhibit 1 to Complaint

ENGLISH

APPLE INC.
SOFTWARE LICENSE AGREEMENT FOR MAC OS X
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EA0390
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EA0395
Rev. 7/24/07

Exhibit 3 to Complaint

Int. Cl.: 9

Prior U.S. Cl.: 26

United States Patent Office

Reg. No. 1,078,312

Registered Nov. 29, 1977

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APPLE

Apple Computer, Inc. (California corporation)
20863 Stevens Creek Blvd.
Cupertino, Calif. 95014

For: COMPUTERS AND COMPUTER PROGRAMS RECORDED ON PAPER AND TAPE, in CLASS 9 (U.S. CL. 26).

First use during April 1976; in commerce during April 1976.

Ser. No. 120,444, filed Mar. 25, 1977.

G. T. GLYNN, Examiner

Int. Cl.: 9

Prior U.S. Cl.: 26, 38

United States Patent and Trademark Office

Reg. No. 1,114,431
Registered Mar. 6, 1979

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The mark consists of a silhouette of an apple with a a bite removed.

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Ser. No. 162,799, filed Mar. 20, 1978.

J. TINGLEY, Examiner

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36 and 38

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Registered May 13, 2003

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Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

Reg. No. 1,964,391

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FIRST USE 12-31-1994; IN COMMERCE 12-31-1994.

SN 74-357,318, FILED 2-9-1993.

MARY CRAWFORD, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36 and 38

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Registered Oct. 31, 1995

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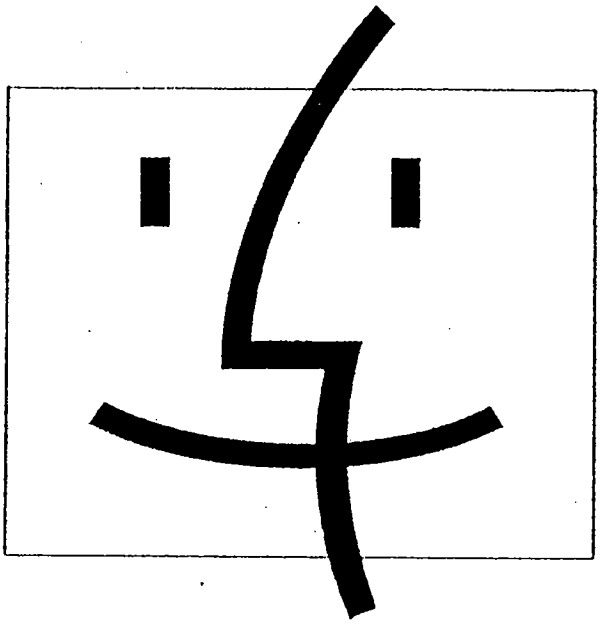

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CUPERTINO, CA 95014

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FIRST USE 11-1-1994; IN COMMERCE 11-1-1994.

SER. NO. 74-552,639, FILED 7-25-1994.

ALAN ATCHISON, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

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MAC OS

APPLE COMPUTER, INC. (CALIFORNIA CORPORATION)
ONE INFINITE LOOP
CUPERTINO, CA 95014

FOR: COMPUTERS, COMPUTER OPERATING SYSTEM SOFTWARE, AND A FULL LINE OF PRERECORDED COMPUTER PROGRAMS, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 11-1-1994; IN COMMERCE 11-1-1994.

NO CLAIM IS MADE TO THE EXCLUSIVE RIGHT TO USE "OS", APART FROM THE MARK AS SHOWN.

SN 74-547,403, FILED 7-8-1994.

JAMES A. RAUEN, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36, and 38

United States Patent and Trademark Office

Reg. No. 3,386,175
Registered Feb. 19, 2008

TRADEMARK
PRINCIPAL REGISTER

LEOPARD

APPLE INC. (CALIFORNIA CORPORATION)
1 INFINITE LOOP
CUPERTINO, CA 95014

FOR: COMPUTER OPERATING SYSTEM SOFTWARE, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 10-26-2007; IN COMMERCE 10-26-2007.

SN 78-270,003, FILED 7-2-2003.

KELLY BOULTON, EXAMINING ATTORNEY

Int. Cl.: 9

Prior U.S. Cls.: 21, 23, 26, 36 and 38

United States Patent and Trademark Office

Reg. No. 2,697,680
Registered Mar. 18, 2003

TRADEMARK
PRINCIPAL REGISTER

XSERVE

APPLE COMPUTER, INC. (CALIFORNIA CORPORATION)
1 INFINITE LOOP
CUPERTINO, CA 95014

FOR: COMPUTER HARDWARE, IN CLASS 9 (U.S. CLS. 21, 23, 26, 36 AND 38).

FIRST USE 5-14-2002; IN COMMERCE 5-14-2002.

PRIORITY CLAIMED UNDER SEC. 44(D) ON SWITZERLAND APPLICATION NO. 033632002, FILED 4-15-2002.

SER. NO. 76-407,499, FILED 5-14-2002.

ALICE SUE CARRUTHERS, EXAMINING ATTORNEY