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7 Attorneys for Plaintiff
 8 APPLE INC.

9 **UNITED STATES DISTRICT COURT**
 10 **NORTHERN DISTRICT OF CALIFORNIA**

11 APPLE INC., a California corporation,

12 Plaintiff,

13 v.

14 AMAZON.COM, INC., a Delaware
 15 corporation, and AMAZON DIGITAL
 16 SERVICES, INC., a Delaware
 corporation,

17 Defendants.

Case No. CV 11-01327 PJH

**SECOND AMENDED COMPLAINT
 FOR**

- 18 **(1) Trademark Infringement; False
 Designation of Origin and False
 Description (Lanham Act § 43(a),
 15 U.S.C. § 1125(a))**
- 19 **(2) Dilution (Lanham Act § 43(c),
 15 U.S.C. § 1125(c))**
- 20 **(3) Trademark Infringement
 (Common Law)**
- 21 **(4) Dilution (Cal. Bus. & Prof. Code
 § 14247 and Common Law)**
- 22 **(5) False Advertising (Lanham Act
 § 43(a), 15 U.S.C. § 1125(a))**
- 23 **(6) Unfair Competition (Cal. Bus. &
 Prof. Code § 17200)**

DEMAND FOR JURY TRIAL

1 Plaintiff Apple Inc. (“Apple”) brings this action to enjoin Amazon.com, Inc.
2 and Amazon Digital Services, Inc.’s (collectively “Amazon”) unauthorized use of Apple’s
3 APP STORE™ trademark. Apple seeks permanent injunctive relief and damages under
4 the laws of the United States and the State of California and alleges on knowledge as to
5 itself and its own acts, and on information and belief as to all other matters, as follows:

6 **NATURE OF ACTION**

7 1. Apple is a market leading computer hardware, software, and mobile
8 computing technology and services company. Its APP STORE mobile software download
9 service has transformed the way that mobile device users customize and expand the
10 functionality of their devices. Apple, long renowned for its innovation and product
11 design, introduced the APP STORE service and coined the APP STORE mark three years
12 ago. In that short period of time, the service has experienced phenomenal growth and
13 success, and the service is now available on over 250 million devices worldwide and over
14 18 billion software programs have been downloaded by users.

15 2. Amazon has been improperly using Apple’s APP STORE mark in
16 connection with Amazon’s mobile software developer program, has recently launched a
17 mobile software download service using Apple’s mark, and has announced the release of a
18 tablet device that will utilize certain aspects of the mobile software download service.
19 Amazon’s uses are unauthorized and unlawful.

20 **PARTIES**

21 3. Plaintiff Apple is a corporation organized and existing under the laws
22 of the State of California and has its principal place of business in Cupertino, California.

23 4. On information and belief, defendant Amazon.com, Inc. is a
24 corporation organized and existing under the laws of the State of Delaware, with its
25 principal place of business in Seattle, Washington.

26 5. On information and belief, defendant Amazon Digital Services, Inc.
27 is a corporation organized and existing under the laws of the State of Delaware with its
28 principal place of business in Seattle, Washington. On information and belief, defendant

1 Amazon Digital Services, Inc. is a wholly-owned subsidiary of defendant Amazon.com,
2 Inc. and, at all times relevant to the allegations herein, has acted in concert with and/or at
3 the direction of defendant Amazon.com, Inc.

4 **JURISDICTIONAL STATEMENT**

5 **Jurisdiction**

6 6. The Court has jurisdiction over this action pursuant to 28 U.S.C. §
7 1331 and 1338, 15 U.S.C. §§ 1116 and 1125, and 28 U.S.C. § 1367.

8 **Venue**

9 7. Venue lies within this district because a substantial part of the events
10 giving rise to these claims occurred in this district and Amazon resides in this judicial
11 district for purposes of 28 U.S.C. § 1391(b) and (c).

12 **Intradistrict Assignment**

13 8. This action arises in Santa Clara County because a substantial part of
14 the events giving rise to the claim occurred in Santa Clara County. This is an intellectual
15 property action subject to district-wide assignment pursuant to Civil Local Rule 3-2(c).

16 **FACTUAL ALLEGATIONS**

17 **Apple Coins, Uses In Commerce, And Protects APP STORE**

18 9. On July 11, 2008, Apple launched its APP STORE service. Using
19 the APP STORE mobile software application, users of Apple's iPhone, iPod and, most
20 recently, iPad mobile devices, can browse for and license a wide range of third party
21 software programs, including games, business, educational, finance, news, sports,
22 productivity, social networking, health, reference, travel, and utility software. Users can
23 also browse and license software in the APP STORE section of Apple's popular iTunes
24 Store, accessed using Apple's iTunes software.

25 10. Prior to the introduction of the APP STORE service, operators of
26 mobile communications networks offered a variety of downloadable mobile software such
27 as ringtones, wallpapers, and games. The operators branded their download services with
28 a variety of terms that bore no similarity to APP STORE. For example, Verizon called its

1 mobile software download service the “Get It Now virtual store” and later changed the
2 name of that service to the “Verizon Media Store.”

3 11. When it launched, the APP STORE service represented a
4 revolutionary kind of online software service and was an instant commercial and critical
5 success. As a columnist for *The New York Times* remarked soon after the launch of the
6 service, “[n]othing like the App Store has ever been attempted before.” Apple coined the
7 term APP STORE as a means of branding its new service. The term APP STORE was not
8 in general use in connection with the distribution of software programs prior to Apple’s
9 adoption of the term as a trademark.

10 12. The APP STORE service serves as the distribution center for a
11 variety of software programs developed by third parties or by Apple. For example, if a
12 user of an Apple mobile device wishes to play the popular “Angry Birds” video game, she
13 would touch the “App Store” icon on her mobile device, search for the “Angry Birds”
14 program and obtain a copy of that program on her device by licensing the software
15 through the APP STORE service.

16 13. In order to distribute software programs through the APP STORE
17 service, third party software developers are required to sign a distribution agreement in
18 which the developer appoints Apple as its worldwide agent for delivery of the software
19 programs. All of the software programs that are available through the APP STORE
20 service are licensed to consumers, not sold.

21 14. To date, there have been more than 18 billion downloads of programs
22 through the service by more than 250 million devices worldwide. An average of over a
23 million downloads take place every hour worldwide. There are currently more than
24 500,000 software programs available for download on the APP STORE service.

25 15. Apple has extensively advertised, marketed and promoted the APP
26 STORE service and the APP STORE mark, spending millions of dollars on print,
27 television, and internet advertising. News outlets have also commented extensively and
28 repeatedly on the operations of the APP STORE service in the months and years

1 following its launch. The enormous public attention given the APP STORE service, and
2 the success of the service, have cemented the public's identification of APP STORE as a
3 trademark for Apple's service. Moreover, Apple has obtained registrations of the APP
4 STORE mark covering more than fifty foreign jurisdictions, including the European
5 Union, Japan, and China.

6 16. Apple has applied to register the APP STORE mark in the United
7 States. The U.S. Patent and Trademark Office approved Apple's application to register
8 APP STORE as a trademark. Microsoft has opposed that application's registration. The
9 matter is currently subject to opposition proceedings before the Trademark Trial And
10 Appeal Board.

11 17. From Apple's launch of the APP STORE service in 2008, Apple has
12 prominently featured the APP STORE mark in print advertising in the United States,
13 California, and elsewhere. The mark has been featured in such print advertising
14 sponsored both by Apple as well as AT&T (which offers wireless connectivity for certain
15 Apple mobile devices). These ads have appeared in such magazines and newspapers as
16 *Fortune*, *The New Yorker*, *The Economist*, *Newsweek*, *Time*, *The New York Times*, the
17 *Washington Post*, as well as numerous other regional and local newspapers.

18 18. As part of its marketing for the APP STORE service, Apple has
19 implemented a unique television advertising campaign. Most recently, Apple has aired
20 nationwide television commercials that state "If you don't have an iPhone - you don't
21 have the App Store." These commercials highlight the different computer software
22 programs available through the APP STORE service and the variety of functions each
23 computer software program serves. These commercials verbally refer to the APP STORE
24 mark and also depict the APP STORE mark as featured on Apple's devices. Apple has
25 aired these and other commercials regarding its APP STORE services on all the major
26 television broadcast stations in the United States, including ABC, CBS, NBC, FOX, The
27 CW, BET, Comedy Central, CNN, ESPN, MTV, TBS, TNT, and VH1. As a result,
28 millions of consumers in the United States and California have been exposed to Apple's

1 television campaigns.

2 19. Not surprisingly given the success of Apple's APP STORE service,
3 the service and Apple's APP STORE mark have been the subject of an overwhelming
4 amount of high-profile positive unsolicited media coverage in the United States and
5 California. These articles recognize the APP STORE mark as referring exclusively to
6 Apple's service.

7 20. The phenomenal popularity of Apple's mobile software download
8 service has prompted a number of competitors to offer their own services. In fact,
9 Microsoft, Google, Nokia, Research in Motion (Blackberry), Sprint, Verizon and other
10 major companies now offer software download services for mobile operating systems that
11 compete with Apple's mobile operating system. These competitors have found ways of
12 branding and describing their own mobile software download services without using the
13 term APP STORE. For example, Microsoft uses the term MARKETPLACE to refer to its
14 service and uses the descriptor "virtual store for apps."

15 21. In limited instances, third parties have made improper use of the term
16 APP STORE. In response, Apple has contacted those parties and requested that they
17 cease and desist from further use of the mark. In almost every instance, the entities
18 contacted by Apple agreed to cease use of Apple's APP STORE mark.

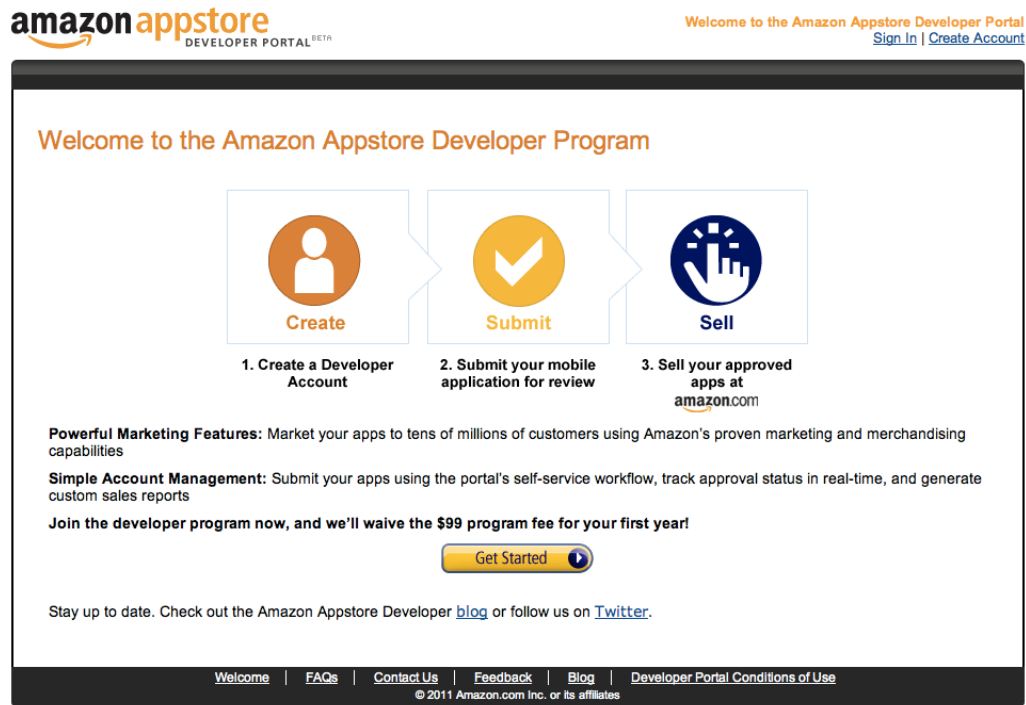
19 **Amazon Unlawfully Uses APP STORE And Expands That Unlawful Use**

20 22. In approximately January of 2011, Amazon began soliciting software
21 developers to participate in a future mobile software download service offered by
22 Amazon. On information and belief, Amazon began unlawfully using the APP STORE
23 mark in or about that same month.

24 23. Amazon has unlawfully used the APP STORE mark to solicit
25 software developers throughout the United States, including in the Northern District of
26 California. Amazon's unlawful use includes, but on information and belief is not limited
27 to, such use at web pages accessed through the developer.amazon.com URL.

28 24. Amazon continues to unlawfully use the APP STORE mark in

1 connection with what Amazon terms the “Amazon Appstore Developer Portal” and the
 2 “Amazon Appstore Developer Program.” The following is a screenshot of Amazon’s
 3 website showing that use on March 17, 2011:



16 25. At no time has Amazon received a license or authorization from
 17 Apple to use the APP STORE mark.

18 26. On or about January 19, February 4, and March 14, 2011, Apple
 19 communicated with Amazon and demanded that Amazon cease its use of the APP STORE
 20 mark. Amazon did not provide a substantive response to these communications until after
 21 Amazon launched its APPSTORE service and until after Apple filed its complaint in this
 22 action.

23 27. Despite Apple’s multiple communications to Amazon informing
 24 them of Apple’s rights, Amazon launched its infringing APPSTORE service on Tuesday,
 25 March 22, 2011. Amazon’s service purports to make available nearly 4,000 mobile
 26 software applications, many of which are the same titles as some of the most popular
 27 applications available on Apple’s APP STORE service. Amazon provides its service both
 28 through its Amazon.com website and through a mobile software application entitled

1 “Appstore” that is available for download from Amazon or is pre-installed on certain
2 mobile devices. Three representative samples of Amazon’s use of the APPSTORE mark,
3 as obtained from Amazon’s website on March 23-24, 2011, are set forth below:



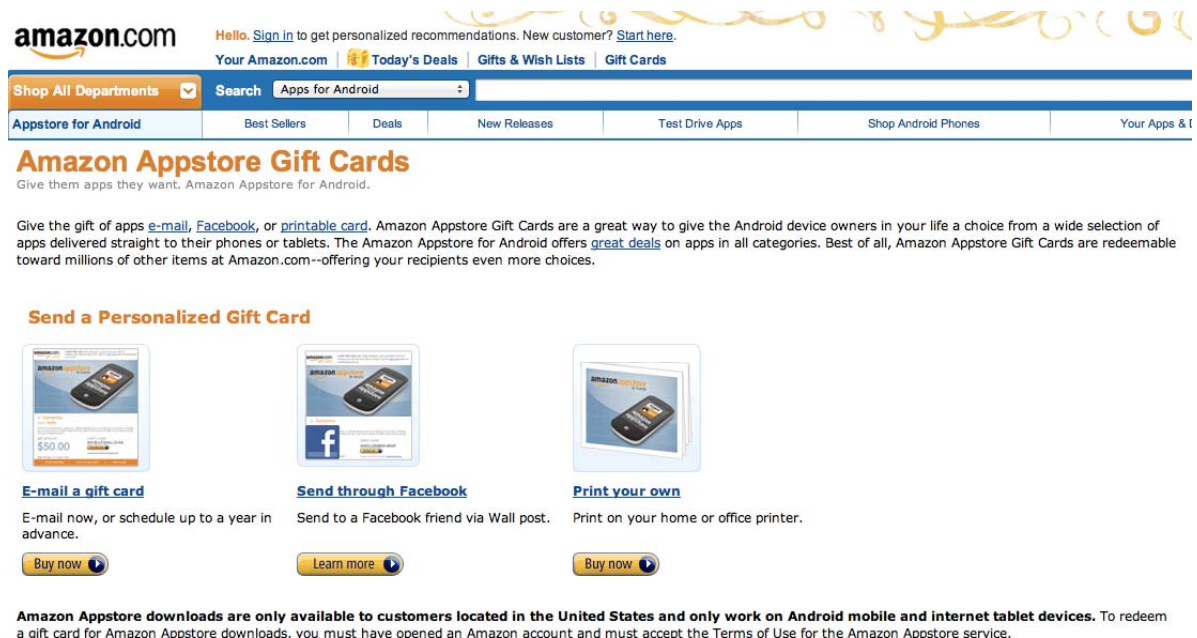
21 28. On March 25, 2011, Amazon communicated through its counsel that
22 it intended to continue use of the infringing mark.

23 29. Beginning in or about September 2011 Amazon began altering its use
24 of the infringing mark by omitting or de-emphasizing the use of the “for Android” suffix
25 to the “Amazon Appstore” phrase. For example, when Amazon announced in late
26 September 2011 that it would introduce a new hardware product named the Kindle Fire
27 (the “Fire”), Amazon promoted the Fire’s ability to use Amazon’s mobile software
28 download service but omitted the “for Android” phrase when using the APPSTORE mark.

1 An example of Amazon’s usage of the APP STORE mark in conjunction with the Fire,
 2 obtained from Amazon’s website at or near the time of the original Fire announcement, is
 3 set forth below:



13 30. Amazon’s alteration of its usage does not appear to be limited to
 14 promotions connected to the Fire. Set forth below is an image obtained from Amazon’s
 15 website on November 7, 2011. That image shows Amazon’s use of the phrase “Amazon
 16 Appstore Gift Cards” in large type with references to “for Android” or to “Android” in
 17 smaller, less prominent type:



27 Amazon Appstore downloads are only available to customers located in the United States and only work on Android mobile and internet tablet devices. To redeem
 28 a gift card for Amazon Appstore downloads, you must have opened an Amazon account and must accept the Terms of Use for the Amazon Appstore service.

1 adequate remedy at law. Apple is entitled to a permanent injunction pursuant to 15 U.S.C.
2 § 1116 restraining and enjoining Amazon and its agents, servants, employees, and all
3 persons acting thereunder, in concert with, or on their behalf, from using in commerce the
4 APP STORE mark or any colorable imitation thereof.

5 37. Pursuant to 15 U.S.C. § 1117, Apple is also entitled to recover (i)
6 Amazon's profits, (ii) Apple's ascertainable damages, and (iii) Apple's costs of suit.
7 Amazon's willful use of Apple's APP STORE mark without excuse or justification
8 renders this an exceptional case and entitles Apple to its reasonable attorney fees.

9 **SECOND CAUSE OF ACTION**

10 **(Dilution – Lanham Act § 43(c), 15 U.S.C. § 1125(c))**

11 38. Apple repeats and realleges each and every allegation of paragraphs 1
12 through 32 above, and incorporates them by reference as if fully set forth herein.

13 39. The APP STORE mark is famous and distinctive, and that mark
14 became famous prior to Amazon's commencement of use of the mark.

15 40. Amazon's use of the APP STORE mark for its developer program
16 and/or its mobile software download service are likely to cause dilution by blurring or
17 dilution by tarnishment of the APP STORE mark. For example, Amazon's use of the
18 APP STORE mark is likely to reduce the distinctiveness of that mark by reducing the
19 general consuming public's association of the mark with Apple's services.

20 41. Amazon's wrongful activities have caused Apple irreparable injury.
21 Apple is informed and believes that unless said conduct is enjoined by this Court, Amazon
22 will continue and expand those activities to the continued and irreparable injury of Apple.
23 This injury includes a reduction in the distinctiveness of Apple's APP STORE mark that
24 cannot be remedied through damages, and Apple has no adequate remedy at law. Apple is
25 entitled to a permanent injunction pursuant to 15 U.S.C. § 1116 restraining and enjoining
26 Amazon and its agents, servants, employees, and all persons acting thereunder, in concert
27 with, or on their behalf, from using in commerce the APP STORE trademark or any
28 colorable imitation thereof.

1 **FOURTH CAUSE OF ACTION**

2 **(Dilution – Cal. Bus. & Prof. Code § 14247 and Common Law)**

3 47. Apple repeats and realleges each and every allegation of paragraphs 1
4 through 32 and 38 through 42 above, and incorporates them by reference as if fully set
5 forth herein.

6 48. Amazon’s use of the APP STORE mark in California (i) has diluted,
7 and on information and belief will continue to dilute, the distinctive quality of the APP
8 STORE mark and/or (ii) has tarnished, and on information and belief will continue to
9 tarnish, the image of Apple’s APP STORE mark, in violation of Section 14247 of the
10 California Business and Professions Code.

11 49. Amazon’s wrongful activities in the State of California have caused
12 Apple irreparable injury. Apple is informed and believes that unless said conduct is
13 enjoined by this Court, Amazon will continue and expand those activities to the continued
14 and irreparable injury of Apple. This injury includes a reduction in the distinctiveness of
15 Apple’s APP STORE mark and injury to Apple’s reputation that cannot be remedied
16 through damages, and Apple has no adequate remedy at law. Apple is entitled to a
17 permanent injunction restraining and enjoining Amazon and its agents, servants,
18 employees, and all persons acting thereunder, in concert with, or on their behalf, from
19 using in commerce the APP STORE trademark or any colorable imitation thereof.
20

21 **FIFTH CAUSE OF ACTION**

22 **(False Advertising– Lanham Act § 43(a), 15 U.S.C. § 1125(a))**

23 50. Apple repeats and realleges each and every allegation of paragraphs 1
24 through 32 above, and incorporates them by reference as if fully set forth herein.

25 51. Amazon uses APPSTORE in connection with, and in commercial
26 advertising or promotion of, its service and products. Amazon's use of APPSTORE
27 constitutes a false advertisement that misrepresents the nature, characteristics and qualities
28 of Amazon's mobile download service and/or deceives or has a tendency to deceive a

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or on their behalf, to immediately cease from causing any and all dilution and/or tarnishment of Apple's APP STORE mark;

C. Award Apple its ascertainable damages, costs, and attorneys' fees;

D. Award Apple Amazon's profits attributable to Amazon's unauthorized use of Apple's APP STORE mark.

E. Impose a constructive trust in favor of Apple on all profits obtained from Amazon's misappropriation of Apple's APP STORE mark.

F. Award Apple all amounts by which Amazon has been unjustly enriched through its use of Apple's APP STORE mark.

G. Award such other and further relief as this Court deems just and proper.

Dated: November 16, 2011

O'MELVENY & MYERS LLP

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

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JURY DEMAND

Apple respectfully requests a jury trial on all issues triable thereby.

Dated: November 16, 2011

O'MELVENY & MYERS LLP

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