

1 Robert A. Mittelstaedt (State Bar No. 60359)
 ramittelstaedt@jonesday.com
 2 Adam R. Sand (State Bar No. 217712)
 arsand@jonesday.com
 3 Tracy M. Strong (State Bar No. 221540)
 tstrong@jonesday.com
 4 JONES DAY
 555 California Street, 26th Floor
 5 San Francisco, CA 94104
 Telephone: (415) 626-3939
 6 Facsimile: (415) 875-5700

7 Attorneys for Defendant
 APPLE INC. (f/k/a APPLE COMPUTER, INC.)
 8

9 UNITED STATES DISTRICT COURT
 10 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION
 11

12 **MELANIE TUCKER, on behalf of herself
 and all others similarly situated,**

13 **Plaintiff,**

14 **v.**

15 **APPLE COMPUTER, INC., a California
 Corporation,**

16 **Defendant.**
 17

Case No. C06 4457 JW

CLASS ACTION

DEFENDANT APPLE INC.'S ANSWER
 AND DEFENSES TO PLAINTIFF'S
 COMPLAINT

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

ANSWER AND AFFIRMATIVE DEFENSES

Now comes defendant Apple Inc., f/k/a Apple Computer, Inc. (hereinafter referred to as “Apple”), by its undersigned counsel, and in answer to the Complaint, and with the understanding that the allegations relate to activities within the United States, states as follows:

1. Apple is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1, and therefore denies them.

2. The allegations in Paragraph 2 are not susceptible to being answered because of their ambiguity. To the extent that an answer is deemed necessary, Apple denies the allegations, except that Apple admits that it operates the iTunes Store (f/k/a the iTunes Music Store), that the iTunes Store can be accessed through the iTunes application, and that users may purchase and download digital music and digital video files from the iTunes Store.

3. Answering the allegations in Paragraph 3, the allegations in the first sentence are not susceptible to being answered because of their ambiguity and because they state conclusions of law to which no answer is necessary. To the extent that an answer is deemed necessary, Apple denies the allegations in the first sentence of Paragraph 3. Apple is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 3 and therefore denies them, except that Apple admits that consumers may buy individual songs from its iTunes Store and that the iTunes Store currently offers over 3.5 million songs.

4. Apple is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 4, which relate principally to allegations regarding consumers, and therefore denies them.

5. The allegations in Paragraph 5 state conclusions of law to which no answer is necessary. To the extent that an answer is deemed necessary, Apple denies the allegations.

6. Answering the allegations in Paragraph 6, the allegations in the first sentence are not susceptible to being answered because of their ambiguity and because they state conclusions of law to which no answer is necessary. To the extent that an answer is deemed necessary, Apple denies the allegations in the first sentence of Paragraph 6. Apple is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 6,

1 and therefore denies them, except that Apple admits that some television shows, music videos and
2 short films are available in digital video format and sold online.

3 7. The allegations in Paragraph 7 state conclusions of law to which no answer is
4 necessary. To the extent that an answer is deemed necessary, Apple denies the allegations.

5 8. Answering the allegations in Paragraph 8, the allegations in the first sentence are
6 not susceptible to being answered because of their ambiguity and because they state conclusions
7 of law to which no answer is necessary. To the extent that an answer is deemed necessary, Apple
8 denies the allegations in the first sentence of Paragraph 8. Apple is without knowledge or
9 information sufficient to form a belief as to the truth of the remaining allegations in Paragraph 8
10 which relate principally to allegations regarding consumers, and therefore denies them.

11 9. The allegations in Paragraph 9 are not susceptible to being answered because of
12 their ambiguity and because they state conclusions of law to which no answer is necessary. To
13 the extent that an answer is deemed necessary, Apple denies the allegations.

14 10. The allegations in Paragraph 10 state conclusions of law to which no answer is
15 necessary. To the extent that an answer is deemed necessary, Apple denies the allegations.

16 11. The allegations in Paragraph 11 state conclusions of law to which no answer is
17 necessary. To the extent that an answer is deemed necessary, Apple denies the allegations.

18 12. The allegations in Paragraph 12 are not susceptible to being answered because of
19 their ambiguity and because they state conclusions of law to which no answer is necessary. To
20 the extent that an answer is deemed necessary, Apple denies the allegations, except that Apple
21 admits that at a November 5, 2003 financial analyst meeting, Steve Jobs' response, in part, to a
22 question included the phrase ". . . we are working with the Microsoft of music stores"

23 13. The allegations in Paragraph 13 are not susceptible to being answered because of
24 their ambiguity and because they state conclusions of law to which no answer is necessary. To
25 the extent that an answer is deemed necessary, Apple denies the allegations.

26 14. The allegations in Paragraph 14 are not susceptible to being answered because of
27 their ambiguity and because they state conclusions of law to which no answer is necessary. To
28 the extent that an answer is deemed necessary, Apple denies the allegations.

1 15. The allegations in Paragraph 15 are not susceptible to being answered because of
2 their ambiguity and because they state conclusions of law to which no answer is necessary. To
3 the extent that an answer is deemed necessary, Apple denies the allegations.

4 16. The allegations in Paragraph 16 are not susceptible to being answered because of
5 their ambiguity and because they state conclusions of law to which no answer is necessary. To
6 the extent that an answer is deemed necessary, Apple denies the allegations.

7 17. Answering the allegations in Paragraph 17, Apple admits the allegations in the first
8 sentence. The remaining allegations in Paragraph 17 are not susceptible to being answered
9 because of their ambiguity. To the extent that an answer is deemed necessary, Apple's publicly
10 disclosed revenue and profit data speak for themselves, and no further disclosure is appropriate
11 for this answer. On that basis, Apple denies the remaining allegations.

12 18. Answering the allegations of Paragraph 18, Apple lacks knowledge or information
13 sufficient to form a belief as to the truth of the allegations and therefore denies them.

14 19. Answering the allegations of Paragraph 19, Apple lacks knowledge or information
15 sufficient to form a belief as to the truth of the allegations and therefore denies them.

16 20. Answering the allegations of Paragraph 20, Apple lacks knowledge or information
17 sufficient to form a belief as to the truth of the allegations and therefore denies them.

18 21. Answering the allegations of Paragraph 21, Apple admits that plaintiff purports to
19 invoke jurisdiction of this Court under 15 U.S.C. §§ 15 and 26, and 28 U.S.C. §§ 1331 and 1337.

20 22. Answering the allegations of Paragraph 22, Apple admits that it is headquartered
21 in Cupertino, California, that it transacts business in this judicial district and that the *Charoensak*
22 *et al. v. Apple Computer, Inc.* case is pending in this district, but Apple denies that it has engaged
23 in any conduct giving rise to that complaint or this Complaint in this, or any other, judicial
24 district. Apple denies the remaining allegations in Paragraph 22.

25 23. The allegations in Paragraph 23 are not susceptible to being answered because of
26 their ambiguity and because they state conclusions of law to which no answer is necessary. To
27 the extent that an answer is deemed necessary, Apple denies the allegations.
28

1 24. Answering the allegations in Paragraph 24, Apple admits that plaintiff purports to
2 bring this action on behalf of herself and others. Apple denies that the plaintiff has established or
3 can establish the prerequisites to certification and/or maintenance of the alleged classes pursuant
4 to Rule 23 of the Federal Rules of Civil Procedure.

5 25. Answering the allegations in Paragraph 25, Apple denies that the plaintiff has
6 established or can establish the prerequisites to certification and/or maintenance of the alleged
7 class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

8 26. Answering the allegations in Paragraph 26, Apple denies that the plaintiff has
9 established or can establish the prerequisites to certification and/or maintenance of the alleged
10 class pursuant to Rule 23 of the Federal Rules of Civil Procedure.

11 27. Apple denies the allegations in Paragraph 27.

12 28. Apple denies the allegations in Paragraph 28

13 29. Apple denies the allegations in Paragraph 29.

14 30. Apple denies the allegations in Paragraph 30.

15 31. Apple lacks knowledge or information sufficient to form a belief as to the truth of
16 the allegations in Paragraph 31, and therefore denies them.

17 32. The allegations in Paragraph 32 state conclusions of law to which no answer is
18 necessary. To the extent that an answer is deemed necessary, Apple denies the allegations.

19 33. The allegations in Paragraph 33 are not susceptible to being answered because of
20 their ambiguity. To the extent that an answer is deemed necessary, Apple denies the allegations.

21 34. Apple lacks knowledge or information sufficient to form a belief as to the truth of
22 the allegations in Paragraph 34, and therefore denies them, except that Apple admits that the
23 record companies require Apple to use Digital Rights Management technology when licensing
24 their digital music.

25 35. Answering the allegations of Paragraph 35, Apple is informed and believes that the
26 online digital music stores listed in this paragraph use WMA protected format and Apple lacks
27 knowledge or information sufficient to form a belief as to the truth of the remaining allegations in
28 Paragraph 35, and therefore denies them.

1 36. The allegations in Paragraph 36 are not susceptible to being answered because of
2 their ambiguity. To the extent that an answer is deemed necessary, Apple denies the allegations.

3 37. Answering the allegations in Paragraph 37, Apple admits that the iPod uses parts
4 manufactured by third parties and that it has used the Portal Player System-On-A-Chip in some
5 versions of its iPod. Apple lacks knowledge or information sufficient to form a belief as to
6 whether the Portal Player System-On-A-Chip supports WMA by default, and therefore denies that
7 allegation. Apple denies that it deliberately designed the iPod's software so that it would only
8 play protected AAC. The remaining allegations in Paragraph 37 are not susceptible to being
9 answered because of their ambiguity. To the extent that an answer to those allegations is deemed
10 necessary, Apple denies them.

11 38. Apple denies the allegations in Paragraph 38.

12 39. Answering the allegations in Paragraph 39, Apple admits that it has used the
13 SigmaTel STMP3550 in the iPod Shuffle. Apple lacks knowledge or information sufficient to
14 form a belief as to whether every Digital Music Player other than the iPod that contains the
15 SigmaTel STMP3550 plays WMA files, and therefore denies that allegation. Apple denies that it
16 prevents the iPod Shuffle from playing WMA files. The remaining allegations in Paragraph 39
17 are not susceptible to being answered because of their ambiguity. To the extent that an answer to
18 those allegations is deemed necessary, Apple denies them.

19 40. Apple lacks knowledge or information sufficient to form a belief as to the truth of
20 the allegations in Paragraph 40, and therefore denies them.

21 41. The allegations in Paragraph 41 are not susceptible to being answered because of
22 their ambiguity and because they state conclusions of law to which no answer is necessary. To
23 the extent that an answer is deemed necessary, Apple denies the allegations.

24 42. The allegations in Paragraph 42 are not susceptible to being answered because of
25 their ambiguity and because they state conclusions of law to which no answer is necessary. To
26 the extent that an answer is deemed necessary, Apple denies the allegations.

27
28

1 43. The allegations in Paragraph 43 are not susceptible to being answered because of
2 their ambiguity and because they state conclusions of law to which no answer is necessary. To
3 the extent that an answer is deemed necessary, Apple denies the allegations.

4 44. The allegations in Paragraph 44 are not susceptible to being answered because of
5 their ambiguity and because they state conclusions of law to which no answer is necessary. To
6 the extent that an answer is deemed necessary, Apple denies the allegations.

7 45. The allegations in Paragraph 45 are not susceptible to being answered because of
8 their ambiguity and because they state conclusions of law to which no answer is necessary. To
9 the extent that an answer is deemed necessary, Apple denies the allegations.

10 46. Answering the allegations in Paragraph 46, Apple admits that the European
11 Commission has notified Apple that it is investigating certain matters relating to the iTunes Store
12 in the European Union in connection with allegations that Apple is charging more for online
13 music in the UK than in Eurozone countries and is preventing UK consumers from purchasing
14 online music from iTunes Store in Eurozone countries. The remaining allegations in Paragraph
15 46 are not susceptible to being answered because of their ambiguity and because they state
16 conclusions of law to which no answer is necessary. To the extent that an answer to those
17 allegations is deemed necessary, Apple denies them.

18 47. Answering the allegations in Paragraph 47, Apple admits that a consumer
19 association in France filed a lawsuit in connection with allegations that the iPod is exclusively
20 compatible with music purchased from the iTunes Store and vice versa. Apple denies the
21 remaining allegations.

22 48. Answering the allegations in Paragraph 48, Apple denies the allegations except
23 that Apple admits that the two chambers of the French Parliament passed different versions of a
24 bill on the subject of legal protection of technological protection measures.

25 49. Answering the allegations in the first sentence of Paragraph 49, Apple denies the
26 allegations except that Apple admits that the French Parliament approved a law affording legal
27 protection to DRM (Digital Rights Management). Answering the allegations in the second and
28 third sentence of Paragraph 49, Apple lacks knowledge or information sufficient to form a belief

1 as to the truth of the allegations and therefore denies them. Answering the allegations in the
2 fourth sentence of Paragraph 49, Apple admits that it made a comment about “state sponsored
3 piracy” in relation to one of the earlier versions of the law. Apple denies the remaining
4 allegations in Paragraph 49.

5 50. Apple lacks knowledge or information sufficient to form a belief as to the truth of
6 the allegations in Paragraph 50, and therefore denies them.

7 51. The allegations in Paragraph 51 are not susceptible to being answered because of
8 their ambiguity and because they state conclusions of law to which no answer is necessary. To
9 the extent that an answer is deemed necessary, Apple denies the allegations, except that Apple
10 admits that the Office of the Norwegian Consumer Ombudsman sent a letter to Apple asking
11 questions about the use of DRM.

12 52. Apple lacks knowledge or information sufficient to form a belief as to the truth of
13 the allegations in Paragraph 52, and therefore denies them, except that Apple admits that an
14 article appeared in the *Financial Times* on June 14, 2006 that mentioned Apple’s iPod and the
15 iTunes Store in Denmark, Sweden and Finland.

16 53. The allegations in Paragraph 53 are not susceptible to being answered because of
17 their ambiguity and because they state conclusions of law to which no answer is necessary. To
18 the extent that an answer is deemed necessary, Apple denies the allegations.

19 54. The allegations in Paragraph 54 are not susceptible to being answered because of
20 their ambiguity and because they state conclusions of law to which no answer is necessary. To
21 the extent that an answer is deemed necessary, Apple denies the allegations.

22 55. The allegations in Paragraph 55 are not susceptible to being answered because of
23 their ambiguity and because they state conclusions of law to which no answer is necessary. To
24 the extent that an answer is deemed necessary, Apple denies the allegations.

25 56. Apple denies the allegations in paragraph 56.

26 57. Apple denies the allegations in paragraph 57.

27 58. The allegations in Paragraph 58 are not susceptible to being answered because
28 they state conclusions of law to which no answer is necessary. As to the allegations of the NAND

1 spot market, Apple lacks knowledge or information sufficient to form a belief as to the truth of
2 the allegations and therefore denies them. To the extent that an answer is deemed necessary to
3 any additional portions of the paragraph, Apple denies the allegations. The current retail prices at
4 which Apple sells its products are stated on the Apple website located at www.apple.com.

5 59. Apple denies the allegations in Paragraph 59.

6 **COUNT I**

7 60. Paragraph 60, which purports to incorporate by reference all of the allegations of
8 the Complaint, requires neither admission nor denial.

9 61. Apple denies the allegations in Paragraph 61.

10 62. Apple denies the allegations in Paragraph 62.

11 63. Apple denies the allegations in Paragraph 63.

12 64. Apple denies the allegations in Paragraph 64.

13 65. Apple denies the allegations in Paragraph 65.

14 66. Paragraph 66, which purports to incorporate by reference all of the allegations of
15 the Complaint, requires neither admission nor denial.

16 67. Apple denies the allegations in Paragraph 67.

17 68. Apple denies the allegations in Paragraph 68.

18 69. Apple denies the allegations in Paragraph 69.

19 70. Apple denies the allegations in Paragraph 70.

20 71. Apple denies the allegations in Paragraph 71.

21 **COUNT II**

22 72. Paragraph 72, which purports to incorporate by reference all of the allegations of
23 the Complaint, requires neither admission nor denial.

24 73. Apple denies the allegations in Paragraph 73.

25 74. Apple denies the allegations in Paragraph 74.

26 75. Apple denies the allegations in Paragraph 75.

27
28

COUNT III

1
2 76. Paragraph 76, which purports to incorporate by reference all of the allegations of
3 the Complaint, requires neither admission nor denial.

4 77. Apple denies the allegations in Paragraph 77.

5 78. Apple denies the allegations in Paragraph 78.

6 79. Apple denies the allegations in Paragraph 79.

7 80. Paragraph 80, which purports to incorporate by reference all of the allegations of
8 the Complaint, requires neither admission nor denial.

9 81. Apple denies the allegations in Paragraph 81.

10 82. Apple denies the allegations in Paragraph 82.

11 83. Apple denies the allegations in Paragraph 83.

12 84. Paragraph 84, which purports to incorporate by reference all of the allegations of
13 the Complaint, requires neither admission nor denial.

14 85. Apple denies the allegations in Paragraph 85.

15 86. Apple denies the allegations in Paragraph 86.

16 87. Apple denies the allegations in Paragraph 87.

17 88. Apple denies the allegations in Paragraph 88.

18 89. Apple denies the allegations in Paragraph 89.

19 90. Paragraph 90, which purports to incorporate by reference all of the allegations of
20 the Complaint, requires neither admission nor denial.

21 91. Apple denies the allegations in Paragraph 91.

22 92. Apple denies the allegations in Paragraph 92.

23 93. Apple denies the allegations in Paragraph 93.

24 94. Apple denies the allegations in Paragraph 94.

25 95. Apple denies the allegations in Paragraph 95.

26 96. Paragraph 96, which purports to incorporate by reference all of the allegations of
27 the Complaint, requires neither admission nor denial.

28 97. Apple denies the allegations in Paragraph 97.

1 98. Apple denies the allegations in Paragraph 98.

2 99. Apple denies the allegations in Paragraph 99.

3 100. Apple denies the allegations in Paragraph 100.

4 101. Apple denies the allegations in Paragraph 101.

5 102. Apple denies the allegations in Paragraph 102.

6 **COUNT IV**

7 103. Paragraph 103, which purports to incorporate by reference all of the allegations of
8 the Complaint, requires neither admission nor denial.

9 104. Apple denies the allegations in Paragraph 104.

10 105. Apple denies the allegations in Paragraph 105.

11 106. Apple denies the allegations in Paragraph 106.

12 **COUNT V**

13 107. Paragraph 107, which purports to incorporate by reference all of the allegations of
14 the Complaint, requires neither admission nor denial.

15 108. Apple denies the allegations in Paragraph 108.

16 109. Apple denies the allegations in Paragraph 109.

17 110. Apple denies the allegations in Paragraph 110.

18 111. Apple denies the allegations in Paragraph 111.

19 112. Apple denies the allegations in Paragraph 112.

20 113. Apple denies the allegations in Paragraph 113.

21 114. Apple denies the allegations in Paragraph 114.

22 **COUNT VI**

23 115. Paragraph 115, which purports to incorporate by reference all of the allegations of
24 the Complaint, requires neither admission nor denial.

25 116. Answering the allegations of Paragraph 116, Apple lacks knowledge or
26 information sufficient to form a belief as to the truth of the allegations and therefore denies them.

27 117. Apple denies the allegations in Paragraph 117.

28

1 118. Apple denies the allegations in Paragraph 118, except that Apple admits that its
2 current stock market capitalization is over 80 billion dollars.

3 119. Apple denies the allegations in Paragraph 119.

4 120. Apple denies the allegations in Paragraph 120.

5 **COUNT VII**

6 121. Paragraph 121, which purports to incorporate by reference all of the allegations of
7 the Complaint, requires neither admission nor denial.

8 122. Apple denies the allegations in Paragraph 122.

9 **AFFIRMATIVE DEFENSES**

10 Apple sets forth below its affirmative defenses. Each defense is asserted as to all claims
11 against Apple. By setting forth these affirmative defenses, Apple does not assume the burden of
12 proving any fact, issue, or element of a cause of action where such burden properly belongs to the
13 plaintiffs. Moreover, nothing stated herein is intended or shall be construed as an admission that
14 any particular issue or subject matter is relevant to the plaintiff's allegations.

15 Apple reserves the right to amend or supplement its affirmative defenses and raise
16 counterclaims as additional facts concerning its defenses become known to it.

17 As separate and distinct affirmative defenses, Apple alleges as follows:

18 **FIRST AFFIRMATIVE DEFENSE**

19 The Complaint, in whole or in part, fails to state a claim upon which relief may be
20 granted.

21 **SECOND AFFIRMATIVE DEFENSE**

22 The plaintiff and/or others claimed to be members of the putative class lack standing to
23 assert their claims and/or to seek some or all of the requested relief.

24 **THIRD AFFIRMATIVE DEFENSE**

25 The plaintiff and/or others claimed to be members of the putative class have sustained no
26 injury in fact or damages caused by any act or omission of Apple.

27
28

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

FOURTH AFFIRMATIVE DEFENSE

The plaintiff and/or others claimed to be members of the putative class have not suffered and will not suffer any injury that is cognizable under the antitrust laws.

FIFTH AFFIRMATIVE DEFENSE

The activities of Apple alleged in the Complaint do not give rise to antitrust liability because they did not result in adverse effects on competition or, in the alternative, any such effects were outweighed by the pro-competitive benefits of the activities.

SIXTH AFFIRMATIVE DEFENSE

Defendant Apple has at all times and in all relevant manners acted reasonably, as necessary to serve legitimate business purposes, in furtherance of trade, in good faith, and with the purpose and effect of promoting, encouraging, or increasing competition. Apple has not acted with the purpose or intent to suppress or restrain competition.

SEVENTH AFFIRMATIVE DEFENSE

The claims of the plaintiff and/or others claimed to be members of the putative class are barred, in whole or in part, by the applicable statutes of limitations and/or the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE

The claims of the plaintiff and/or others claimed to be members of the putative class are barred, in whole or in part, under the doctrine of unclean hands.

NINTH AFFIRMATIVE DEFENSE

The claims of the plaintiff and/or others claimed to be members of the putative class are barred, in whole or in part, under the doctrines of waiver and/or estoppel.

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

TENTH AFFIRMATIVE DEFENSE

The claims of the plaintiffs and/or others claimed to be members of the putative class are barred, in whole or in part, because the alleged damages sought are too speculative and uncertain.

ELEVENTH AFFIRMATIVE DEFENSE

The plaintiff and/or others claimed to be members of the putative class have failed to mitigate their damages, if any.

WHEREFORE, defendant Apple respectfully requests that this Court:

1. Enter judgment against the plaintiff and in favor of Apple;
2. Dismiss the Complaint in its entirety, with prejudice;
3. Decline to award the requested relief;
4. Award Apple its costs and reasonable attorneys' fees incurred in this action; and
5. Grant such other and further relief as the Court may deem just and proper.

Dated: January 11, 2007

Respectfully submitted,

Jones Day

By: /s/ Tracy M. Strong
Tracy M. Strong

Counsel for Defendant
APPLE INC.