

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Circuit Mediation Office

Phone (415) 355-7900 Fax (415) 355-8599

<http://www.ca9.uscourts.gov/mediation>**MEDIATION QUESTIONNAIRE**

The purpose of this questionnaire is to help the court's mediators provide the best possible mediation service in this case; it serves no other function. Responses to this questionnaire are *not* confidential. Appellants/Petitioners must electronically file this document within 7 days of the docketing of the case. 9th Cir. R. 3-4 and 15-2. Appellees/Respondents may file the questionnaire, but are not required to do so.

Any party may provide additional information *in confidence* directly to the Circuit Mediation Office at [ca09\\_mediation@ca9.uscourts.gov](mailto:ca09_mediation@ca9.uscourts.gov). Please provide the case name and Ninth Circuit case number in your message. Additional information might include interest in including this case in the mediation program, the case's settlement history, issues beyond the litigation that the parties might address in a settlement context, or future events that might affect the parties' willingness or ability to mediate the case.

9th Circuit Case Number(s):	<input type="text" value="10-15113"/>	
District Court/Agency Case Number(s):	<input type="text" value="C08-03251-WHA"/>	
District Court/Agency Location:	<input type="text" value="USDC-CA-Northern District - San Francisco"/>	
Case Name:	<input type="text" value="Apple Inc."/>	v. <input type="text" value="Psystar Corporation"/>

Please briefly describe the dispute that gave rise to this lawsuit.

Through efforts spanning more than a decade and investments totaling hundreds of millions of dollars, Apple Inc. ("Apple") has developed its proprietary Mac OS X operating system. All of Apple's famous Mac line of computers, known for their seamless integration, ease-of-use and reliability, are sold with Mac OS X pre-installed. In order to maintain the high quality of its products and provide customers with the excellent Apple experience to which they are accustomed, Apple limits Mac OS X to run on Apple computers through the terms of its software license agreement and through technological protection measures in its Mac OS X software.

In April, 2008, Psystar Corporation ("Psystar") began selling the OpenMac (later renamed the Open Computer) and OpenPro computers pre-installed with, and enabled to run, Mac OS X in direct violation of the terms of Apple's Software License Agreement for Mac OS X (SLA). To make its computers run Mac OS X, Psystar engaged in wholesale copying, alteration and commercial distribution of Apple's copyrighted software and circumvented Apple's technological protection measures in that software. Psystar also marketed its computers using Apple's trademarks and trade dress in a manner that led to consumer confusion. In response to Psystar's infringement of Apple's intellectual property rights and its violation of the terms and conditions of the SLA, Apple filed suit against Psystar in 2008.

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Briefly describe the procedural history, the result below, and the main issues on appeal.

On July 3, 2008, Apple filed suit against Psystar in the Northern District of California for direct and contributory copyright infringement, breach and induced breach of contract, trademark and trade dress infringement and unfair competition. The case was assigned to Judge William Alsup. On August 28, 2008, Psystar filed its Answer and Counterclaims asserting that Apple was violating the antitrust laws by licensing Mac OS X for use only on Apple hardware. Apple moved and the Court dismissed Psystar's antitrust counterclaims with leave to amend. Psystar chose not to amend its antitrust counterclaims, instead seeking to file counterclaims seeking a declaratory judgment of copyright misuse. On December 2, 2008, Apple amended its complaint to add allegations that Psystar circumvented Apple's technological protection measure in Mac OS X. Psystar's motion to amend its counterclaim was granted in February, 2009, and the parties focused on discovery efforts.

On May 22, 2009, Psystar filed for bankruptcy under Chapter 11 in the Southern District of Florida. The bankruptcy court granted Apple's motion to lift the stay on June 19, 2009, and Psystar withdrew its bankruptcy petition. On October 8, 2009, after having completed discovery, the parties filed cross-motions for summary judgment. Apple sought summary judgment of its copyright infringement and DMCA claims and Psystar's affirmative defenses to those claims. Psystar sought summary judgment on all of Apple's claims. On November 13, 2009, the court granted Apple's motion in full, and denied Psystar's motion in full. Fewer than two weeks later, the court entered a stipulated judgment setting the damages for Psystar's copyright and DMCA violations at \$2.67 million, and dismissing Apple's trademark, trade dress and state law claims without prejudice. On December 14, 2009, the Court also issued a permanent injunction order enjoining Psystar from infringing Apple's copyrights in Mac OS X, circumventing Apple's technological protection measures and trafficking in circumvention devices. In its Notice, Psystar has stated that it plans to appeal all adverse rulings issued by the district court.

Describe any proceedings remaining below or any related proceedings in other tribunals.

As described above, the district court case is closed and there are no remaining proceedings in the lower court.

In September, 2009, Psystar filed duplicative litigation in the Southern District of Florida. The Psystar computers and software at issue in that case are both addressed in Judge Alsup's injunction order, and Psystar's Florida complaint asserts antitrust claims that were previously dismissed by Judge Alsup. Apple has moved the Florida court to dismiss or transfer Psystar's second-filed action to the Northern District of California. Briefing is closed and the parties are awaiting the Florida court's decision.

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Provide any other information that might affect the suitability of this case for mediation.

Both Apple and Psystar agree that this case is not suitable for mediation. The parties have previously participated in two court-ordered mediations that were unsuccessful. There is no reason to believe that another attempt at mediation will facilitate resolution of this dispute.

### CERTIFICATION OF COUNSEL

I certify that:

a current service list with telephone and fax numbers and email addresses is attached (see 9th Circuit Rule 3-2).

I understand that failure to provide the Court with a completed form and service list may result in sanctions, including dismissal of the appeal.

Signature

("s/" plus attorney name may be used in lieu of a manual signature on electronically-filed documents.)

Counsel for

**Note:** Use of the Appellate ECF system is mandatory for all attorneys filing in this Court, unless they are granted an exemption from using the system. **File this document electronically** in Appellate ECF by choosing Forms/Notices/Disclosure > File a Mediation Questionnaire.

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