

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

**CERTAIN HANDHELD ELECTRONIC
COMPUTING DEVICES, RELATED
SOFTWARE, AND COMPONENTS
THEREOF**

Inv. No. 337-TA-769

**ORDER NO. 32: INITIAL DETERMINATION GRANTING MICROSOFT'S
MOTION FOR SUMMARY DETERMINATION OF
RESPONDENTS' FIRST AFFIRMATIVE DEFENSE OF PATENT
MISUSE**

(January 31, 2012)

On December 7, 2011, complainant Microsoft Corporation ("Microsoft") filed a motion for summary determination on respondents Barnes & Noble, Inc.'s and barnesandnoble.com, LLC's (collectively, "Barnes & Noble") first affirmative defense of patent misuse. (Motion Docket No. 769-043.) On December 21, 2011, the Commission Investigative Staff ("Staff") filed a response in support of the motion.¹ On December 19, 2011, Barnes & Noble filed a response opposing the motion. On December 31, 2011, Microsoft filed a motion for leave to file a reply. (Motion Docket No. 769-059.) Motion No. 769-059 is GRANTED.

Microsoft argues that Barnes & Noble has failed to offer any conduct that could either by itself or collectively constitute patent misuse. Barnes & Noble responds that Microsoft is committing patent misuse through its actions against the Android operating system. Staff agrees with Microsoft that Barnes & Noble's theory does not amount to patent misuse.

¹ Staff moved on December 14, 2011 for an additional two days to respond to this motion. (Motion Docket No. 769-053.) That request was granted on December 19, 2011.

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The undisputed facts are as follows: In November 2007, Amazon.com introduced the Kindle eReader. (Microsoft Opening Statement of Undisputed Facts dated December 7, 2011 (“MSFT OSUF”) ¶ 8; Barnes & Noble Response to Microsoft’s Statement of Undisputed Facts dated December 19, 2011 (“BN RSUF”) ¶ 8.) Following the introduction of the Kindle, Barnes & Noble began work on the device that became the Nook. (BN RSUF ¶ 8.) After considering the Windows Mobile operating system, Barnes & Noble selected the Android operating system provided by Google because Barnes & Noble believed that Android would better serve its needs. (BN RSUF ¶ 9; Barnes & Noble Additional Material Facts dated December 19, 2011 (“BN AMF”) ¶¶ 49-52; Microsoft Response to Barnes & Noble’s Additional Material Facts dated December 30, 2011 (“MSFT RAMF”) ¶¶ 49-52.) In October 2009, Barnes & Noble announced the introduction of the Nook 1st Edition, its first eReader. (BN RSUF ¶ 8; BN AMF ¶ 53; MSFT RAMF ¶ 53.) In October 2010, Barnes & Noble introduced the Nook Color, a color version of the Nook. (BN RSUF ¶ 8; BN AMF ¶ 53; MSFT RAMF ¶ 53.)

Beginning in February 2010, Microsoft and Barnes & Noble engaged in discussions regarding the licensing of Microsoft’s 65,000 patent assets. (MSFT OSUF ¶¶ 11-12; BN RSUF ¶¶ 11-12; BN AMF ¶¶ 55; MSFT RAMF ¶ 55.) Their first meeting was in July 2010.² (MSFT OSUF ¶¶ 11-12; BN RSUF ¶¶ 11-12; BN AMF ¶¶ 21, 55; MSFT RAMF ¶¶ 21, 55.) At the meeting, Microsoft gave a presentation where it identified six patents that it alleged were infringed by the Android operating system and suggested that it believed that there might be other patents that it owned that were infringed. (BN AMF ¶¶ 58-60; MSFT RAMF ¶¶ 58-60.) Microsoft also suggested Barnes & Noble take a license to Microsoft’s patents and mentioned potential royalty rates. (BN AMF ¶ 61; MSFT RAMF ¶ 61.)

² The parties dispute some minor facets of this meeting, such as whether an NDA was necessary and what was precisely said. However, the larger details of what happened at this meeting are largely undisputed.

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The parties continued discussions. (BN AMF ¶ 62; MSFT RAMF ¶ 62.) In November 2010, Microsoft sent a cease and desist letter reiterating Microsoft's allegations that Barnes & Noble was infringing the six patents discussed in July 2010 [REDACTED]

[REDACTED] (BN AMF ¶ 62; MSFT RAMF ¶ 62.) The parties held a second meeting on December 16, 2010. (BN AMF ¶¶ 63-68; MSFT RAMF ¶¶ 63-68.) Following that meeting, Microsoft sent Barnes & Noble claim charts for five of the six patents mentioned in the cease and desist letter. Microsoft also sent Barnes & Noble two proposed license agreements, one on January 7, 2011 and another on February 11, 2011 ("the February draft license"). (BN AMF ¶¶ 69-71; MSFT RAMF ¶¶ 69-71.)

[REDACTED]

[REDACTED]

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Barnes & Noble made several counter-offers to the February draft license (whether those counter-offers were fair is disputed by the parties). (BN AMF ¶¶ 81-86; MSFT RAMF ¶¶ 81-86.) Microsoft did not consider them fair and did not respond. (MSFT RAMF ¶ 86.) On March 21, 2011, Microsoft filed a complaint with the ITC alleging infringement by Barnes & Noble of U.S. Patent Nos. 5,778,372, 6,339,780, 5,889,522, 6,891,551, and 6,957,233. (MSFT OSUF ¶¶ 1-2; BN RSUF ¶¶ 1-2; BN AMF ¶ 87; MSFT RAMF ¶ 87.) Some of those patents were not previously disclosed to Barnes & Noble. (BN AMF ¶ 88; MSFT RAMF ¶ 88.)

Microsoft has a licensing program directed at manufacturers and sellers of devices that use the Android operating system. (BN AMF ¶ 12; MSFT RAMF ¶ 12.) Microsoft has entered into patent license agreements with other manufacturers and sellers of devices that use the Android operating system. (BN AMF ¶ 15; MSFT RAMF ¶ 15.) Microsoft has also entered into the “Nokia/Windows Phone Strategic Collaboration Agreement” with Nokia, a European phone manufacturer. (BN AMF ¶ 28; MSFT RAMF ¶ 28.) As part of the Nokia/Windows agreement, a number of Nokia’s patents were transferred to a third-party, MOSAID, as a vehicle for

monetizing those Nokia patents. ((BN AMF ¶ 30; MSFT RAMF ¶ 30.) [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Microsoft has also recently been involved in efforts to acquire other patents. (BN AMF ¶¶ 41-48; MSFT RAMF ¶¶ 41-48.) Specifically, Microsoft was part of consortiums that bid on a number of patents owned by Novell, another software company, and Nortel, a bankrupt telecommunications company. (BN AMF ¶¶ 41-48; MSFT RAMF ¶¶ 41-48.)

Pursuant to Commission Rule 210.18, summary determination “. . . shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law.” 19 C.F.R. § 210.18(b); *see also DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001); *Wenger Mfg., Inc. v. Coating Machinery Sys., Inc.*, 239 F.3d 1225, 1231 (Fed. Cir. 2001). The evidence “must viewed in the light most favorable to the party opposing the motion . . . with doubt resolved in favor of the nonmovant.” *Crown Operations Int’l, Ltd. v. Solutia, Inc.*, 289 F.3d 1367, 1375 (Fed. Cir. 2002); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”). “Issues of fact are genuine only if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party.” *Id.* at 1375 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). The trier of fact should “assure itself that there is no reasonable version of the

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facts, on the summary judgment record, whereby the nonmovant could prevail, recognizing that the purpose of summary judgment is not to deprive a litigant of a fair hearing, but to avoid an unnecessary trial.” *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998). “Where an issue as to a material fact cannot be resolved without observation of the demeanor of witnesses in order to evaluate their credibility, summary judgment is not appropriate.” *Sandt Technology, Ltd. v. Resco Metal & Plastics Corp.*, 264 F.3d 1344, 1357 (Fed. Cir. 2001) (Dyk, J., concurring). “In other words, ‘[s]ummary judgment is authorized when it is quite clear what the truth is,’ [citations omitted], and the law requires judgment in favor of the movant based upon facts not in genuine dispute.” *Paragon Podiatry Laboratory, Inc. v. KLM Laboratories, Inc.*, 984 F.2d 1182, 1185 (Fed. Cir. 1993).

Patent misuse is an equitable defense to patent infringement. *See U.S. Philips Corp. v. Int’l Trade Comm’n*, 424 F.3d 1179, 1184 (Fed. Cir. 2005). It “arose to restrain practices that did not in themselves violate any law, but that drew anticompetitive strength from the patent right, and thus were deemed contrary to public policy.” *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 704 (Fed. Cir. 1992). The doctrine has a “narrow scope,” and “[g]iven that the patent grant entitles the patentee to impose a broad range of conditions in licensing the right to practice the patent, the doctrine of patent misuse ‘has largely been confined to a handful of specific practices by which the patentee seemed to be trying to extend his patent grant beyond its statutory limits.’” *Princo Corp. v. Int’l Trade Comm’n*, 616 F.3d 1318, 1329 (Fed. Cir. 2010) (en banc) (quoting *USM Corp. v. SMS Tech., Inc.*, 694 F.2d 505, 510 (7th Cir. 1982)). “[T]he key inquiry under the patent misuse doctrine is whether by imposing the condition in question, the patentee has impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects.” *Princo*, 616 F.3d at 1328. If the

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licensing restrictions in question are “reasonably within the patent grant, the patent misuse defense can never succeed.” *Monsanto Co. v. McFarling*, 363 F.3d 1336, 1341 (Fed. Cir. 2004) (quotation marks omitted). “[T]he essence of a patent grant is the right to exclude others from profiting by the patented invention.” *Dawson Chem. Co. v. Rohm & Haas Co.*, 448 U.S. 176, 215 (1980); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 135 (1969) (“The heart of (the patentee’s) legal monopoly is the right to invoke the State’s power to prevent others from utilizing the State’s power to prevent others from utilizing his discovery without his consent.”).

Congress has limited the patent misuse defense through 35 U.S.C. § 271(d), which provides:

(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following:

- (1) derived revenue from acts which if performed by another without his consent would constitute contributory infringement of the patent;
- (2) licensed or authorized another to perform acts which if performed without his consent would constitute contributory infringement of the patent;
- (3) sought to enforce his patent rights against infringement or contributory infringement;
- (4) refused to license or use any rights to the patent; or
- (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.

Barnes & Noble contends that (1) Microsoft’s licensing program, (2) Microsoft’s unfair licensing terms, (3) Microsoft’s agreement with Nokia, and (4) Microsoft’s other patent purchases are part of larger scheme to “kill Android.” Barnes & Noble suggests that this “scheme” is intended to perpetuate Microsoft’s monopoly in PC operating systems. Barnes &

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Noble argues that Microsoft sees Android as a significant threat to that monopoly because the markets for mobile operating systems and PC operating systems are converging. Barnes & Noble suggests that this totality of actions is patent misuse.

The ALJ finds that even viewing the undisputed facts in a light most favorable to Barnes & Noble, Barnes & Noble has failed to prove the defense of patent misuse in this case

Some of the confusion in Barnes & Noble's allegations stems from incoherence in patent misuse itself, which has been called "a schizophrenic doctrine that vacillates between IP and antitrust law." Christina Bohannon, *IP Misuse as Foreclosure*, 96 IOWA L. REV. 475, 476 (2011); *USM*, 694 F.2d at 512. The Federal Circuit, however, in *Princo*, resolved some of this incoherence by explaining "the defense of patent misuse is not available to a presumptive infringer simply because a patentee engages in some kind of wrongful commercial conduct, even conduct that may have anticompetitive effects." 616 F.3d at 1329. Indeed, "[w]here the patentee has not leveraged its patent beyond the scope of the rights granted by the Patent Act, misuse has not been found." *Princo*, 616 F.3d at 1328.

With that clarity, it becomes obvious that Barnes & Noble's theory of patent misuse substantially fails because most of those allegations are generalized allegations of commercial misconduct that bear no relation to the patents-in-suit or their licensing. *See Princo*, 616 F.3d at 1329 ("While proof of an antitrust violation shows the patentee has committed wrongful conduct having anticompetitive effects, that does not establish misuse of the patent in suit unless the conduct in question restricts the use of that patent and does so in one of the specific ways that have been held to be outside the otherwise broad scope of the patent grant."); *see also Kolene Corp. v. Motor City Metal Treating, Inc.*, 440 F.2d 77, 84-85 (6th Cir. 1971) (noting there is no such thing as "misuse in the air. The misuse must be of the patent in suit. An antitrust offense

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does not necessarily amount to misuse merely because it involves patented products or products which are the subject of a patented process.” (citations omitted)). For example, Barnes & Noble devotes significant attention to Microsoft’s efforts to acquire patents from Novell and Nortel and Microsoft’s transactions with Nokia and MOSAID. None of those patents are at issue in this litigation, none are involved in the proposed licensing transaction, nor are they even currently owned by Microsoft. Accordingly, that evidence bears no connection to any “misuse” of the patents-in-suit. The only thing such concerted action might demonstrate is an ill-will towards Android. As such, this evidence lacks the connection that is required for proving misuse of the patents-in-suit and cannot form the basis of a successful misuse defense. *Cf. Republic Molding Corp. v. B.W. Photo Utilities*, 319 F.2d 347 (9th Cir. 1963) (“What does seem clear is that misconduct in the abstract, unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands. . .”).

Even assuming that these transactions and the related evidence establishes that Microsoft is bent on eliminating Android as a competitor, the mere fact that Microsoft is targeting Android for destruction is insufficient to establish an antitrust violation let alone patent misuse. *See In re Independent Service Organization Antitrust Litig.*, 203 F.3d 1322, 1327 (Fed. Cir. 2000) (“[I]f a [patent infringement] suit is not objectively baseless, an antitrust defendant’s subjective motivation is immaterial.”); *see also Ocean State Physicians Health Plan v. Blue Cross & Blue Shield*, 883 F.2d 1101, 1113 (1st Cir. 1989) (finding a “desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws”); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986) (“If conduct is not objectively anticompetitive the fact that it is motivated by hostility to competitors (‘these turkeys’) is irrelevant.”).

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Thus, despite Barnes & Noble's efforts to cast a broader net, its defense of patent misuse must rest on conduct more directly tied to the patents-in-suit. The only evidence it puts forward in that regard is with respect to the proposed license and the licensing negotiations.³

Barnes & Noble brings forward an assortment of complaints against Microsoft's licensing practices from the period leading up to this investigation. *First*, Barnes & Noble addresses Microsoft's tactics in their licensing negotiations. Barnes & Noble argues that Microsoft has never definitely identified which of Microsoft's over 65,000 patents are infringed by Android and that Microsoft has not conducted "sufficient technical analysis before demanding licensing fees from original equipment manufacturers ('OEMs') and original device manufacturers ('ODMs')." Barnes & Noble contends that even though the patents are "trivial" it cannot work around them because Microsoft has said that it would simply come forward with other patents to assert against Barnes & Noble. (Barnes & Noble Brief at 31.)

Microsoft's tactics are certainly hard bargaining, but they do not rise to patent misuse because there is absolutely nothing about such tactics that expand the scope of any patent. *See Va. Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (finding no patent misuse when patentee sent infringement notices in good faith); *see also Zinser v. Rose*, 868 F.2d 938, 942 (7th Cir. 1989) ("[T]he antitrust laws do not prohibit a buyer from bargaining for the best deal possible."). Patent misuse does not arise with every type of wrongful commercial conduct. *See Princo*, 616 F.3d at 1329. Moreover, the patent laws provide Barnes & Noble with other avenues to obtain relief if the case is meritless or Microsoft engages in other litigation misconduct. *See MarcTec LLC v. Johnson & Johnson*, No. 2010-1285, --- F.3d ----, 2012 WL

³ Barnes & Noble alludes at one point in its brief that Microsoft is in effect tying an Android license to a license for Microsoft's own proprietary mobile operating system. (Barnes & Noble Brief at 32.) The ALJ considers this only a recapitulation of the Barnes & Noble's arguments regarding the high cost of the license and deals with that argument with the other aspects of the licensing negotiation.

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8322 (Fed. Cir. January 3, 2012) (discussing factors for finding exceptional case under 35 U.S.C. § 285).

Second, Barnes & Noble contends that the February draft license would have made it prohibitively expensive for Barnes & Noble to use Android. Barnes & Noble also argues that Microsoft is attempting to drive up the cost of Android to make Microsoft's Windows product more attractive. Barnes & Noble argues that Microsoft is doing this by charging a licensing fee that is commensurate with the cost of licensing Microsoft's own mobile operating system. However, "[a] patent empowers the owner to extract royalties as high as he can negotiate with the leverage of that monopoly." *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964). Indeed, the patent laws even permit unilateral refusals to license patents. *See SCM Corp. v. Xerox Corp.*, 645 F.2d 1195, 1204 (2d Cir. 1981); *see also* 35 U.S.C. § 271(d)(4). Accordingly, this is not misuse.

Finally, Barnes & Noble complains that the restrictions in the February draft license described above are not related to the subject matter of the patents-in-suit and would thwart Barnes & Noble's ability to innovate. Barnes & Noble contends that the restrictions contained in the February draft license would have created business uncertainty for Barnes & Noble because the definitions do not make clear whether updates or upgrades to the Nook would be covered by the license. [REDACTED]

[REDACTED]

[REDACTED]

Barnes & Noble asserts that the patents "relate to trivial design choices and implementation details and as such are insufficient to dominate and control every implementation of the Android operating system." (Barnes & Noble Brief at 3.) In effect, Barnes & Noble contends that Microsoft is leveraging its patents, including the patents-in-suit to

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impose over-broad conditions on their use. Barnes & Noble's experts opine that "none of the restrictions [Microsoft's licensing terms] create, are within, or would extend from, the scope of either the five patents-in-suit asserted by Microsoft, or the [other patents mentioned in the licensing negotiation]." (Barnes & Noble Exhibit 93, November 21, 2011 Further Expert Report of Benjamin F. Goldberg at 10.) Barnes & Noble explains that "Microsoft is attempting to impose licensing restrictions that are unrelated to the subject matter of the patents" and that "there is no relation between the patents asserted against Android manufacturers and the restrictions contained in the Microsoft license." (Barnes & Noble Brief at 30.)

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED] The

ALJ discerns no difference between these restrictions, which dictate what pieces of software on the device will be licensed, and any of the other field of use restrictions that courts have approved. *See Princo*, 616 F.3d at 1328-29 (A patentee may "limit the scope of the license to a particular 'field of use.'"); *see also, e.g., Gen. Talking Pictures Corp. v. W. Elec. Co.*, 305 U.S. 124 (1938) (Brandeis, J.) (allowing license creating "commercial" field of use and "home" field of use, noting "[t]he practice of granting licenses for a restricted use is an old one [, and] [s]o far as appears, its legality has never been questioned"); *Cty. Materials Corp. v. Allan Block Corp.*, 502 F.3d 730, 737 (7th Cir. 2007) (approving non-compete clause); *Monsanto Co. v. Scruggs*, 459 F.3d 1328, 1339-41 (Fed. Cir. 2006) (approving a no research policy and Monsanto's refusal

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to allow seed partners to stack the Roundup Ready® trait with transgenic traits developed by competitors); *McFarling*, 363 F.3d at 1341-43 (approving restriction prohibiting replanting of seeds); *United States v. Studiengesellschaft Kohle mbH*, 670 F.2d 1122, 1133 n.15 (D.C. Cir. 1981) (collecting cases). If a licensor can limit the use of its amplifier to “commercial uses” and “home uses” the licensor can certainly limit what subsequent versions of software are licensed, or exclude certain types of software running on an otherwise licensed device from its license. Thus, this is within the scope of the patent grant and cannot be misuse. *See McFarling*, 363 F.3d at 1341 (“In the cases in which the restriction is reasonably within the patent grant, the patent misuse defense can never succeed.”).

In sum, viewing the facts in a light most favorable to Barnes & Noble, the ALJ finds the restrictions in this case do not amount to patent misuse as a matter of law. The ALJ notes that the purpose of patent misuse, like the purpose of the Sherman Act, “is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful.” *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 291 (2d Cir. 1979). Instead, the purpose of patent misuse is to balance patent rights with competitive concerns.⁴ *Mallinckrodt*, 976 F.2d at 704. Microsoft’s IP rights do not give it unlimited leeway. *See United States v. Microsoft Corp.*, 253 F.3d 34, 63 (D.C. Cir. 2001) (en banc). Nevertheless, it is permitted to engage in conduct within the scope of its statutorily granted patent rights without being guilty of misuse. *See Princo*, 616 F.3d at 1328-29. These restrictions

⁴ While restrictive licensing terms can at times stifle innovation, patent litigation can also stifle innovation. *See FTC v. Schering-Plough Corp.*, 402 F.3d 1056, 1075 (11th Cir. 2005) (“[T]he caustic environment of patent litigation may actually decrease product innovation by amplifying the period of uncertainty around the . . . manufacturer’s ability to research, develop, and market the patented product or allegedly infringing product.”). Thus, licensing that avoids patent litigation can have significant pro-competitive benefits. *See* U.S. Dep’t of Justice & Fed. Trade Comm’n, *Antitrust Guidelines for Licensing Intellectual Property* § 2.3 (April 6, 1995) (discussing pro-competitive benefits of licensing), available at <http://www.justice.gov/atr/public/guidelines/0558.htm> (last visited January 30, 2012).

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are within the scope of the patent grant and are not misuse. Accordingly, Motion No. 769-043 is GRANTED.

The evidentiary hearing in this investigation is set to begin on Monday, February 6, 2012. In light of the ALJ's ruling herein, he sees no reason to take evidence on Barnes & Noble's patent misuse defense at the hearing. The ALJ is aware that there are several outstanding motions and discovery issues related to Barnes & Noble's patent misuse defense. However, the ALJ finds that permitting such discovery to continue or ruling on those outstanding motions would be an inefficient use of the parties' and the Commission's resources at this time. Thus, the ALJ will not hear or take any evidence on Barnes & Noble's patent misuse defense at the evidentiary hearing.⁵

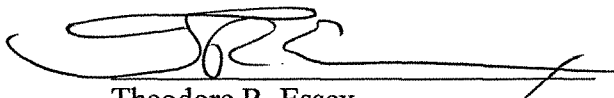
Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues here.

⁵ Should the Commission ultimately decide to remand the issue (and depending on any remand order from the Commission), the ALJ may consider those motions at that time should they still be ripe for adjudication and may re-open the record to permit the parties to complete the outstanding discovery.

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Within seven days of the date of this document, each party shall submit to the Office of the Administrative Law Judges a statement as to whether or not it seeks to have any portion of this document deleted from the public version. Any party seeking to have any portion of this document deleted from the public version thereof shall also submit to this office a copy of this document with red brackets indicating any portion asserted to contain confidential business information. The parties' submissions may be made by facsimile and/or hard copy by the aforementioned date. The parties' submissions concerning the public version of this document need not be filed with the Commission Secretary.

SO ORDERED

A handwritten signature in black ink, appearing to read 'T. Essex', is written over a horizontal line.

Theodore R. Essex
Administrative Law Judge

**CERTAIN HANDHELD ELECTRONIC
COMPUTING DEVICES, RELATED
SOFTWARE, AND COMPONENTS THEREOF**

Inv. No. 337-TA-769

PUBLIC CERTIFICATE OF SERVICE

I, James R. Holbein, hereby certify that the attached **ORDER 32** has been served by hand upon the Commission Investigative Attorney, **Jeffrey Hsu, Esq.**, and the following parties as indicated on **February 13, 2012**.

James R. Holbein, Secretary
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PUBLIC CERTIFICATE3 OF SERVICE – PAGE TWO

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