

# Exhibit A

# BARNES & NOBLE

BOOKSELLERS

March 28, 2011

The Honorable Christine Varney  
Assistant Attorney General  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Assistant Attorney General Varney,

Barnes & Noble submits this letter: (1) to object to the anticompetitive effects of Novell's sale of 882 patents to CPTN Holdings LLC, a consortium of companies led by Microsoft, and (2) to request that the DOJ initiate an independent investigation regarding Microsoft's anti-competitive behavior surrounding its actions to suppress Android operating system competition, and (3) to seek DOJ to petition the International Trade Commission ("ITC") to dismiss Microsoft's anti-competitive Android related patent action against Barnes & Noble.

In our opinion as a competitor that uses the Android operating system and as a victim of Microsoft's attempts to use patents to drive open source software out of the market, we believe that the sale of Novell's patents is another element of Microsoft's attempts to monopolize the operating system markets. Microsoft has shown in the past year that it will use any patents it owns to bully smaller companies out of the market with threats of litigation and forced licenses, as it attempted to claim ownership of the Android operating system used in Barnes & Noble's Nook™ e-Reader, as well as Android smartphones, the Kindle e-Reader, and many other popular consumer devices. In the context of Microsoft's behavior regarding the Android operating system and similar behavior regarding Google's open source VP8 video codec, its acquisition of Novell's patents can only be seen as part of an attempt to claim ownership of any free operating system that might compete with Microsoft. Microsoft's business practices, and the acquisition of yet more patents that could be used to suppress competition from open source software, would certainly have the effect of substantially lessening competition, or tending to create a monopoly.

As you are well aware, members of the open-source community have expressed apprehension with regard to Novell's potential sale to Microsoft. The reason for this apprehension in part stems from Novell's acquisition of patents in 2005, which may be part of the current transaction between Novell and Microsoft. Novell is a member of the Open Invention Network (OIN) which claims to enable and protect certain open source software. In 2005 Novell, as a subsidiary of OIN, acquired a set of patents from Commerce One focusing on XML and e-commerce, for which OIN subsequently offered royalty free nonexclusive licenses. Although the details of the

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882 patents Microsoft is attempting to purchase are not public, there is concern that this deal will result in Microsoft's ownership and enforcement of patents, including the Commerce One patents and others that may read on the underpinnings of open source computing, which could cripple open source computing. Microsoft's acquisition in 2005, along with its attempted purchase of Novell's patents and numerous other actions, show a pattern of attempts to dominate and either drive out or reduce competition from open source software.

This pattern of behavior most recently came to the fore on Monday, March 21, 2011, when Microsoft filed complaints for patent infringement against us in the Western District of Washington and before the International Trade Commission, alleging that Barnes & Noble's Nook™ eReaders, which use the Android operating system, infringe Microsoft's patents.

It is clear from Microsoft's actions and statements that its issue is not with Barnes & Noble, but instead is with the Android operating system developed by Google, which has achieved in a short period what Microsoft, with all its resources, has failed to do over the past years. Namely, to develop a mobile operating system that would be embraced by both mobile smart device manufacturers and by the public, and for Microsoft to eliminate competition. Instead of directly addressing this issue with Google, Microsoft has decided to target Barnes & Noble, who merely incorporates the Android operating system into its e Readers.

The filing of the actions also included a press release by Microsoft and blog entries by Horacio Guitierrez, Microsoft's Deputy General Counsel, suggesting that it is a foregone conclusion that Barnes & Noble and other Android operating system users must take a license from Microsoft and pay it royalties is disputed by Barnes & Noble, just as other handheld device manufacturers have disputed this assertion. There is no legitimate basis for Microsoft's assertion of dominance over the Android free-source operating system which was not invented at or by Microsoft, but instead was developed in large part by Google.

The suit and ITC actions filed by Microsoft against Barnes & Noble and its suppliers is more akin to the conduct of what has come to be known as a "Patent Troll" than to the actions of an innovative R&D-based high-tech company. Microsoft in apparently seeking to dominate the operating system marketplace, serves no public interest, and will instead serve only to stifle innovation and competition.

Over the past year, Microsoft has aggressively worked to force companies manufacturing products that use the Android operating system to take a prohibitively expensive license to Microsoft's patents. As Microsoft is in the market for smartphones and tablets, these licenses raise competitors' costs and reduce their ability to compete with Microsoft's products, such as smartphones using Microsoft's Windows Phone 7 operating system. Barnes & Noble, a small player in the eReader market, could not agree to Microsoft's extortionate license (and also does not believe the infringement claims to be valid), and when we refused to pay, Microsoft filed its lawsuit.

Microsoft's press release regarding its lawsuit against Barnes & Noble states that the Android platform generally infringes Microsoft's patents, and that all Android device manufacturers must license Microsoft's patents.<sup>1</sup> Microsoft's corporate vice president stated that it would be forced to assert its patents against any company whose products run the Android operating system; such companies would either have to take an expensive license from Microsoft or fight a protracted and costly battle in federal court.<sup>2</sup> These statements show an intent to force any user of the Android operating system to pay an expensive license or get out of the market. That behavior reduces competition and innovation, as Google, in a public statement, said: "Sweeping software claims like Microsoft's threaten innovation."

The patents Microsoft is asserting against Barnes & Noble relate to features that add absolutely trivial, if any, value to handheld devices such as the Nook™ eReader. Microsoft's lawsuit against Barnes & Noble is therefore not a legitimate attempt to protect actual invention, but a misuse of acquired patents to bully a competitor into taking an unaffordable license. It is also a tactic that would become available in even more market areas Microsoft wishes to dominate should the purchase of Novell's patents be allowed.

Microsoft has shown its intent to drive out other open source software using overaggressive patent enforcement. The Microsoft dominated MPEG-LA consortium recently sent out a request for patents that would cover Google's VP8 video codec, and one company has already filed a private antitrust complaint against MPEG-LA for this behavior.<sup>3</sup> MPEG-LA is a patent pool organized to collect and license patents on the H.264/MPEG video codec, a method of digitally encoding video files and decoding them for playback. Google is attempting to introduce its own codec, the VP8 codec, to compete with the MPEG codec. Once again, by seeking non-essential patents to assert offensively rather than defensively, Microsoft intends to drive out competition from open source developers.

Microsoft had already tried and failed in 2007 to overpower open source software subject to the GNU Public License (GPL), in a scheme conducted in concert with Novell. Given Microsoft's history, it must be assumed that it intends to use any patents it acquires to dominate the open source software market.

Microsoft's patent acquisition and litigation practices lessen competition in multiple ways. Microsoft's willingness to bully small players with expensive litigation raises a substantial barrier to entry in any market in which it claims dominance. Microsoft's exorbitant licenses for its patents entrench the dominant players in the relevant markets because those players can afford to take a license, while small players cannot—for example, in the eReader market, dominant Amazon could afford Microsoft's fees, while the small competitor Barnes & Noble could not. Similarly, very small players such as independent developers not only cannot afford Microsoft's

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<sup>1</sup> <http://www.microsoft.com/presspass/press/2011/mar11/03-21corpnewspr.mspx>

<sup>2</sup> [http://blogs.technet.com/b/microsoft\\_on\\_the\\_issues/archive/2011/03/21/android-patent-infringement-licensing-is-the-solution.aspx](http://blogs.technet.com/b/microsoft_on_the_issues/archive/2011/03/21/android-patent-infringement-licensing-is-the-solution.aspx)

<sup>3</sup> [http://www.osnews.com/story/23346/Nero\\_Files\\_Antitrust\\_Case\\_Against\\_MPEG-LA](http://www.osnews.com/story/23346/Nero_Files_Antitrust_Case_Against_MPEG-LA)

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fees, but cannot begin to afford the legal fees necessary to fight Microsoft's patents. Microsoft's license fees are set at a high enough level that it also reduces competitor's abilities to compete with Microsoft's own products, such as smartphones using the Windows Phone 7 operating system. In addition to harming competitors, this behavior directly harms consumers, who often prefer systems using open source operating systems such as Android and Linux to Microsoft's operating systems, and who will never realize the benefit from independent developers that Microsoft drives out of the software industry.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Eugene V. DeFelice'.

Eugene V. DeFelice

Vice President, General Counsel & Secretary