

# Exhibit B



Gene DeFelice  
Vice President, General Counsel & Secretary

**VIA FEDERAL EXPRESS**

April 25, 2011

James J. Tierney  
Chief, Networks and Technology Enforcement Section  
Antitrust Division  
United States Department of Justice  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530

Dear Mr. Tierney:

On March 28, 2011, Barnes & Noble submitted a letter (a copy of which is attached) to the Antitrust Division objecting to the proposed acquisition of close to 900 Novell patents by CPTN Holdings, LLC (“CPTN”), a consortium of companies led by Microsoft. As described in that letter, Barnes & Noble objected to the acquisition as part of Microsoft’s larger scheme to drive open source software—including the Android Operating System (“Android”)—out of the mobile operating systems market.

Although we understand Microsoft subsequently agreed to modify the CPTN-Novell deal in order to try to address antitrust concerns—and that, in light of these modifications, the Department decided not to challenge the transaction<sup>1</sup>—Barnes & Noble continues to be deeply concerned with Microsoft’s anticompetitive behavior in the market for mobile operating systems. This anticompetitive behavior extends well beyond the CPTN transaction and continues unabated. Simply put, Microsoft is attempting to monopolize the mobile operating systems market and suppress competition by Android and other open source operating systems by, inter alia, demanding oppressive licensing terms directed to the entirety of Android, asserting this dominant position over Android on the basis of patents covering only trivial design choices and entering into a horizontal offensive patent agreement with Nokia.

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<sup>1</sup> See “CPTN Holdings LLC and Novell Inc. Change Deal in Order to Address Department of Justice’s Open Source Concerns” (April 20, 2011), available at [http://www.justice.gov/atr/public/press\\_releases/2011/270086.htm](http://www.justice.gov/atr/public/press_releases/2011/270086.htm).

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All of these actions by Microsoft pose serious anticompetitive concerns. Indeed, the Department of Justice's prior concern that the CPTN-Novell transaction would "jeopardize the ability of open source software, such as Linux, to continue to innovate and compete in the development and distribution of server, desktop, and mobile operating systems, middleware, and virtualization products", remains equally valid with respect to Microsoft's other anticompetitive behavior.

I. Microsoft's Demand for Oppressive Licensing Terms and Exorbitant Licensing Fees.

Instead of focusing on innovation and the development of new products for consumers, Microsoft has decided to invest its efforts into driving open source developers from the mobile operating systems market. Through the use of offensive licensing agreements and the demand for unreasonable licensing fees, Microsoft is hindering creativity in the mobile operating systems market.

In July 2010, Microsoft first met with Barnes & Noble to discuss "patent issues" related to Barnes & Noble's eReader. Microsoft specifically alleged that Barnes & Noble's Nook™ was infringing six patents purportedly owned by Microsoft. When Barnes & Noble asked Microsoft for more detailed information related to these patents, Microsoft refused, claiming that the information was confidential and could not be shared unless Barnes & Noble first executed a non-disclosure agreement ("NDA"). Because both the patents and Barnes & Noble's Nook™ product are public—meaning there was no need for an NDA—Barnes & Noble refused to sign one. In December 2010, Microsoft and Barnes & Noble then met to discuss Microsoft's assertions of patent infringement. In this meeting, Microsoft claimed that its patents were sufficient to entirely dominate and control the use of the Android by the Nook™ or Nook Color™, but Microsoft again refused to provide the basis for these claims unless Barnes & Noble entered into an NDA. To move the process forward, Barnes & Noble agreed to a very narrow NDA—one limited in scope to discussions relating to Microsoft's claim charts at this single meeting.

In January of 2011, Microsoft then sent a proposed patent license agreement to Barnes & Noble. Although, as noted, the NDA executed in December was narrow and applied only to discussion of claim charts, Microsoft asserted that its proposed license agreement was confidential and subject to this NDA (which it is not). This proposed licensing agreement covered Barnes & Noble's use of Android on its existing eReader devices but is structured in such a way as to presume that Microsoft's portfolio of patents dominate, and thereby control, the entire Android operating system and any devices that use Android. Indeed, the proposed license would have severely limited and, in some cases, entirely eliminated Barnes & Noble's ability to upgrade or improve the Nook™ or Nook Color™, even though Microsoft's asserted patents have nothing to do with such improvements. At the risk of inciting even more baseless litigation by Microsoft, Barnes & Noble does not feel comfortable sharing all of the details of the proposed license agreement in light of Microsoft's baseless assertion that it is confidential and covered by an NDA. Nevertheless, Barnes & Noble urges the

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Department of Justice to use its subpoena power to demand a copy of the proposed licensing agreement, and any other relevant documents, from Microsoft. Microsoft's assertion of confidentiality is simply a means to cloak its oppressive and anticompetitive licensing proposal and is another element in Microsoft's larger scheme to restrict competition in the mobile operating systems market.

The patents that Microsoft is asserting against Barnes & Noble do not even purport to cover hardware elements or basic software functions for mobile devices, and Microsoft thus has no right to require designers to adhere to any particular hardware or software specifications in order to obtain a license for those patents. Yet Microsoft is doing just that—abusing and seeking to expand the scope of its patents to control design elements over which Microsoft has no legitimate claim. This conduct is plainly anticompetitive and threatens Barnes & Noble's ability to modify and offer improved products to consumers.

In addition to the oppressive restrictions and prohibitions in Microsoft's proposed licensing agreement, Microsoft is also demanding exorbitant licensing fees for the use of the Android. Indeed, shortly after Microsoft sent Barnes & Noble a proposed licensing agreement on or about January 6, 2011, Microsoft confirmed to Barnes & Noble that it was demanding licensing fees [REDACTED] for each Nook™ and [REDACTED] for each Nook Color™. It is Barnes & Noble's understanding that these licensing fees that Microsoft demands for use of the Android are the same, or higher, than the licensing fees that Microsoft charges for its own Windows Phone 7—despite the fact that Microsoft only claims ownership of only trivial and non-essential design elements in Android-based devices, as opposed to an entire operating system.

Through the use of oppressive licensing terms that amount to a veto power over a wide variety of innovative features in Android devices of all kinds, as well as its prohibitively expensive licensing fees, Microsoft is attempting to push open source software developers out of the market altogether.

## II. Microsoft's Assertion of Trivial and Non-Essential Patents.

In seeking to extract its restrictive licensing terms and prohibitively expensive licensing fees, Microsoft is asserting patents that cover only arbitrary, outmoded and non-essential design features. As noted in Barnes & Noble's March 28, 2011 letter, Microsoft filed complaints in the U.S. District Court for the Western District of Washington and before the International Trade Commission alleging that Barnes & Noble's eReaders—*i.e.*, the Nook™ and the Nook Color™—infringe five of these non-essential patents.<sup>2</sup> Notably, in the discussions that preceded Microsoft's lawsuits,

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<sup>2</sup> Google, which has not been sued by Microsoft, issued a statement in response to Microsoft's litigation tactics in which it stated that “sweeping software-patent claims like Microsoft's threaten innovation. While we are not a party to this lawsuit [against Barnes & Noble], we stand behind the Android platform and the partners who have helped us to

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Microsoft asserted that Barnes & Noble's Nook™ products infringed six specific patents. However, when Microsoft sued, it did not even mention five of these patents, making claims based on only one of these patents plus four other patents that had never previously been discussed. All of these patents that Microsoft is seeking to use as means to suppress open source software in the mobile operating systems market cover trivial design elements such as the compatibility of file names between new and old operating systems or the placement of a loading status icon in the content viewing area of a browser. Indeed, Horacio Gutierrez, Microsoft's Corporate Vice President and Deputy General Counsel, has publicly stated that the five patents on which Microsoft has sued cover only (1) the "display of a webpage's content before the background image is received, allowing users to interact with the page faster"; (2) "easy ways to navigate through information provided by . . . device apps via a separate control window with tabs"; (3) "the select[ion] [of] text in a document and adjust[ment] [of] that selection"; (4) "the ability to annotate text without changing the underlying document"; and (5) permitting "apps to superimpose download status on top of the downloading content".<sup>3</sup>

None of these features drive consumer demand for Barnes & Noble's, or its competitors', products. And these trivial features do not give Microsoft lawful control over the Android. Microsoft did not invent, research, develop or make available to the public mobile devices using the Android or other open source operating systems. Nonetheless, Microsoft has commenced a campaign to assert control over the open source Android by requiring Android users to either pay exorbitant licensing fees to Microsoft—thereby, in essence, agreeing that Microsoft's trivial and non-essential patents in effect give it control of Android—or face the costs of a protracted patent infringement lawsuit.

And of course Barnes & Noble is not alone in being subjected to Microsoft's patent litigation campaign.<sup>4</sup> By Microsoft's own count, twenty-five of its

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develop it". See "Microsoft takes aim at Google's Android again", available at <http://www.marketwatch.com/story/microsoft-fires-more-shots-at-google-software-2011-03-21>.

<sup>3</sup> Id.

<sup>4</sup> In order to avoid the protracted costs of litigation, both HTC Corp., a large electronics manufacturer, and Amazon, which sells the Kindle eReader, have entered into license agreements with Microsoft. See "Microsoft and Amazon.com Sign Patent Agreement", available at <http://www.microsoft.com/presspass/press/2010/feb10/02-22msamazonpr.mspx>; "Microsoft Announces Patent Agreement with HTC", available at <http://www.microsoft.com/presspass/press/2010/apr10/04-27mshtcpr.mspx>. In contrast, because Motorola could not agree with Microsoft on a licensing agreement, Microsoft filed a lawsuit against Motorola for patent infringement. See "Microsoft sues Motorola over Android phones", available at [http://money.cnn.com/2010/10/01/technology/microsoft\\_motorola/index.htm](http://money.cnn.com/2010/10/01/technology/microsoft_motorola/index.htm).

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patents are now “in litigation for infringement by Android smartphones, tablets and other devices”.<sup>5</sup>

### III. Microsoft’s Anticompetitive Agreement with Nokia.

Microsoft’s anticompetitive conduct and intent to drive open source developers out of the market is further evidenced by its recent horizontal offensive patent agreement with Nokia. On February 11, 2011, Microsoft announced plans to form a strategic partnership with Nokia. As part of those plans, Microsoft is paying Nokia \$1 billion and Nokia is committing to replace its Symbian operating system with Microsoft’s Windows Phone 7 operating system as “its principal smart phone strategy”.<sup>6</sup> Microsoft is thus paying to drive one competitive operating system out of the market and to substantially increase Microsoft’s footprint in the mobile operating systems market. In the fourth quarter of 2010, Nokia was the second largest smartphone provider, with a global market share of 30.6 percent, and Microsoft had a global market share of 3.1 percent (Microsoft has about a 10 percent share in the U.S. market). The only larger provider of smartphone operating systems besides Nokia is Google, with a global market share of 32.9 percent. Indeed, Microsoft and Nokia have identified Google’s Android as their fiercest competition. As Nokia’s CEO, Stephen Elop, stated to the press shortly after the Microsoft-Nokia partnership was announced, “This Windows phone ecosystem, more than anything else, must compete effectively with Android . . .” and our “[n]umber one priority is to compete with Android”.<sup>7</sup>

As part of Microsoft’s and Nokia’s strategy to “compete” with Android, Microsoft and Nokia have apparently agreed upon a strategy of coordinated use of their patents to drive out competitors—that is, a horizontal offensive patent agreement. As Mr. Elop stated:

It is the case, and it was absolutely a topic of discussion with Microsoft, that Microsoft plus Nokia has a remarkably strong intellectual property portfolio. That is something that we will use appropriately within the context of our ecosystem, which means both defending the ecosystem from outside attacks as well as appropriately ensuring that the value that

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<sup>5</sup> Horacio Gutierrez, Corporate Vice President and Deputy General Counsel, “Android Patent Infringement: Licensing is the Solution”, available at [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>6</sup> “Open Letter from CEO Stephen Elop, Nokia and CEO Steve Ballmer, Microsoft”, available at <http://conversations.nokia.com/2011/02/11/open-letter-from-ceo-stephen-elop-nokia-and-ceo-steve-ballmer-microsoft>.

<sup>7</sup> “Nokia Conversations: Q&A videos, break down”, available at <http://conversations.nokia.com/2011/02/22/qa-videos-break-down>.

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we have created through our patents are properly collected from other people who may choose to take advantage of that technology.<sup>8</sup>

Thus, instead of actually competing with the open source Android, Microsoft and Nokia have agreed to a coordinated offensive to assert patents in order to remove open source software from the market altogether. Microsoft's partnership with Nokia, coupled with Microsoft's demand for licensing fees for the use of Android, has created a great risk that Microsoft will garner substantial market power in the upstream market for operating systems. After Microsoft's CEO Steve Ballmer initially labeled the Android nothing more than a "press release" and contrasted Android with Microsoft's "many millions of customers, great software, many hardware devices" while "welcom[ing]" the Android to "[Microsoft's] world",<sup>9</sup> Microsoft has now determined that Android is only welcome to the extent Microsoft controls the open source operating system through either exorbitant licensing fees or lengthy courtroom battles. By establishing "an industry-wide patent licensing program for Android device manufacturers",<sup>10</sup> coupled with its partnership with Nokia, Microsoft has continued its campaign to control the mobile operating systems market—*i.e.*, "[Microsoft's] world".

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For the reasons outlined in this letter as well as those in Barnes & Noble's March 28, 2011 letter to the Department of Justice, Barnes & Noble respectfully submits that the Department of Justice should initiate an investigation of Microsoft's anticompetitive conduct in the mobile operating systems market.

Please feel free to contact me if you have any questions about either of Barnes & Noble's letters.

Sincerely,



Eugene V. DeFelice  
Vice President, General Counsel & Secretary

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<sup>8</sup> Id.

<sup>9</sup> "Google Android Just a Press Release, Says Ballmer", available at [http://www.pcworld.com/businesscenter/article/139421/google\\_android\\_just\\_a\\_press\\_release\\_says\\_ballmer.html](http://www.pcworld.com/businesscenter/article/139421/google_android_just_a_press_release_says_ballmer.html).

<sup>10</sup> Horacio Gutierrez, Corporate Vice President and Deputy General Counsel, "Android Patent Infringement: Licensing is the Solution", supra at note 2.



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 much smaller company without the market power of Microsoft, 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.

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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 customer of 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 Barnes & Noble could not. Similarly, very small players such as independent developers not only cannot afford Microsoft's

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

<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,



Eugene V. DeFelice

Vice President, General Counsel & Secretary