

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**Before the Honorable Theodore R. Essex  
Administrative Law Judge**

**In the Matter of**

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

**Investigation No. 337-TA-769**

**MOTION TO QUASH BARNES & NOBLE, INC. AND BARNESANDNOBLE.COM'S  
LETTER OF REQUEST TO THIRD PARTY NOKIA CORPORATION AND REQUEST  
TO NOTIFY THE CENTRAL AUTHORITY OF FINLAND OF THE FILING OF THE  
MOTION TO QUASH**

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## I. Introduction

Non-party Nokia Corporation files this Motion to Quash the Request for International Judicial Assistance Pursuant to the Hague Convention of 19 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (“Letter of Request,” English version attached as Exhibit A) requested by Respondents Barnes & Noble, Inc. and barnesandnoble.com LLC (collectively, “Barnes & Noble”). The Letter of Request purports to compel the Ministry of Justice of Finland to require Nokia Corporation to produce documentary evidence in Finland and to require named Nokia Corporation senior executives to provide deposition testimony. As demonstrated below, the Letter of Request is untimely, violates both the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 Mar. 1970, 23 U.S.T. 2555, 847 U.N.T.S. 23 (“Hague Convention”) and the Finnish Code of Judicial Procedure, requests information that is duplicative of that which has already been provided by Complainant Microsoft Corporation or that is privileged, and unduly burdens Nokia Corporation. Thus, Nokia Corporation requests that the Letter of Request be quashed.<sup>1</sup> Nokia Corporation further requests that the ITC notify the Central Authority appointed by the Government of Finland under Article 2 of the Hague Convention that a motion to quash has been filed and that such motion to quash “automatically stays” compulsory third party discovery under Ground Rule 4.6.4.

The Letter of Request is untimely. It was served on Nokia Corporation on December 21, 2011, seven days **after** the already extended fact discovery deadline regarding patent misuse in this Investigation closed on December 14, 2011. *See* Notice of Service (attached as Exhibit B). Barnes & Noble did nothing to mitigate the effect of its late service on the Commission, the

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<sup>1</sup> Nokia reserves its right to lodge objections to the discovery requests contained in the Letter of Request under the USITC Rules of Practice and Procedure and the Federal Rules of Civil Procedure, including objections to the scope of those requests, both for documents as well as for testimony.

parties, or Nokia Corporation. It did not request an extension of the fact discovery deadline.<sup>2</sup> Moreover, the deadline for initial expert reports on patent misuse was November 21, 2011; rebuttal expert reports on patent misuse were due on December 19, 2011; and expert discovery cut-off and completion is January 6, 2012. *See* Order No. 27. Thus, any discovery that could be received from Nokia Corporation (located in Finland) would not be useful to any expert reports, because they have already been completed.

Furthermore, the Letter of Request was not properly served under the terms of both the Hague Convention and the Finnish Code of Judicial Procedure. Although it was served on a corporate entity, the requests for deposition testimony are seemingly directed at individuals, one of whom is not even located in Finland and not even employed by Nokia Corporation, the country receiving the Letter of Request. Further, the Letter of Request ignores specific requirements of the Hague Convention intended to limit the scope of document discovery that can be requested. In particular, the Hague Convention and Finnish courts prohibit “fishing expeditions” or the use of discovery requests for the development of possible avenues of further investigation. *See infra* Sections II.B and II.C.

Barnes & Noble relies on its alleged defense of patent misuse, under United States law, to attempt to justify its request for discovery on third party, foreign entities. However, patent misuse is directed toward the Microsoft patents-in-suit, and Barnes & Noble has not shown any connection between those patents-in-suit and any alleged analyses by Nokia Corporation of its own products and/or business interests in the United States. As a result, the documents and information requested in the Letter of Request are insufficiently relevant to the present action to

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<sup>2</sup> Nokia Corporation was not even served with a copy of *Barnes & Noble’s Motion To Approve Request For International Judicial Assistance In Procuring Evidence From Nokia Corporation And To Shorten Complainant Microsoft Corporation’s And The Staff’s Time To Respond (“Motion”)*.

justify the burden and expense those requests would impose. Moreover, much of the information sought has apparently already been produced by Complainant Microsoft Corporation or elicited in testimony taken already of Microsoft executives and employees, or would be covered by the attorney-client or other applicable privileges of Nokia Corporation, if truly related to any analysis of the Microsoft patent-in-suits, and certainly if related to Nokia patents more generally.<sup>3</sup>

Barnes & Noble's discovery requests are also abusive by any standard. Similar to the duty imposed on the district court in *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa*, 482 U.S. 522, 546 (1987), the ITC has a duty to supervise the foreign discovery sought by Barnes & Noble and quash the Letter of Request because (i) it is untimely, (ii) it violates the terms of the Hague Convention and Finnish law, (iii) it requests information that is duplicative of that which has already been provided by a party to the Investigation or that is protected by various privileges, and (iii) Nokia Corporation's burden far outweighs any possible benefit to the requesting party.

In the alternative, Nokia Corporation requests that the ITC wait until the Finnish authorities respond to Nokia Corporation based on timely objections raised to those Finnish authorities. When Nokia Corporation received the Letter of Request, it immediately contacted the Finnish Ministry of Justice as well as the Finnish District Courts located in Helsinki and Espoo through Finnish counsel. *See* Declaration of Aapo Saarikivi at ¶¶ 2-4. Nokia Corporation advised the Ministry of Justice of the limitations of discovery under the Hague Convention and Finnish law and is seeking guidance from those entities. *See id.* at ¶¶ 3-4.

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<sup>3</sup> To the extent that Nokia Corporation were to be made to produce documents in this situation, Nokia Corporation reserves the right to seek costs for the search, collection, and review of information for privilege, and potential generation of a privilege log.

Counsel for Nokia Corporation has contacted Jeffrey Hsu of the Office of Unfair Import Investigations (“OUII”) to determine whether the OUII consents to this motion, but due to the holiday schedule, the OUII’s position has not yet been obtained. Counsel for Barnes & Noble opposes this motion.

**II. The Letter of Request is Untimely**

The Letter of Request was served in Nokia Corporation on December 21, 2011. According to the procedural schedule applicable in this case, the already-extended fact discovery regarding patent misuse closed on December 14, 2011. *See* Order No. 27. Barnes & Noble did not request an extension of time of the fact discovery deadline to accommodate its last minute request, and the ITC did not extend the fact discovery deadline on its own. The extended deadlines for expert reports and rebuttal expert reports regarding patent misuse has already passed (November 21, 2011 extended from October 21, 2011 and December 19, 2011 extended from November 16, 2011, respectively). *See id.* In addition, all expert discovery regarding patent misuse must be completed by this Friday, January 6, 2012, which clearly does not provide sufficient time for the parties to incorporate any discovery that would be appropriately obtained from Nokia Corporation, if any. The Letter of Request is therefore untimely and should be quashed on this basis as well.

Moreover, Barnes & Noble violated Ground Rule 4.4.5, which requires “[a]ll discovery requests, including without limitation requests for admission, [to] be initiated in sufficient time prior to the fact discovery cutoff and completion date so that the responses will be due prior to that date within the time periods set forth above.” Ground Rule 4.4.5. Barnes & Noble knew that it would need evidence to support its patent misuse defense as early as May 10, 2011, when it first raised the defense. Barnes & Noble also knew that it would need to make a request

through the Hague Convention (although it attempted to circumvent the Hague Convention process by serving Nokia Inc. with a U.S. subpoena directed to issues that were within the purview of Nokia Corporation).<sup>4</sup> It further knew that that such requests had to be served by the Central Authority of Finland (*i.e.*, the Ministry of Justice of Finland), knew that such proceedings took time, and knew that foreign discovery pursued through the Hague Convention should be commenced early in the investigation.<sup>5</sup> Nevertheless, Barnes & Noble did not file its Motion until November 14, 2011, six months after it first raised its patent misuse defense and only one month before the extended fact discovery deadline expired (and on the last day of the original fact discovery deadline). The Commission granted Barnes & Noble's request on December 2, 2011, and fact discovery closed on December 14, 2011. Barnes & Noble's third-party discovery on Nokia Corporation, therefore, was not "initiated in sufficient time" to be completed before the close of fact discovery. Rather, it was initiated at a time and in a manner that was calculated and designed to extend beyond the fact discovery deadline, but Barnes & Noble did nothing to extend that deadline or otherwise ensure compliance with Ground Rule 4.4.5. *See In the Matter of Certain Printing and Imaging Devices*, Inv. No. 337-TA-690, Order No. 20 (Mar. 31, 2010) (finding a violation of Ground Rule 4.4.5 when deposition notices were served on Japanese witnesses only 22 days before the close of fact discovery).

Barnes & Noble has no excuse for failing to timely deal with its discovery needs in a fast-paced forum like the ITC. Commentators on the use of the Hague Convention to gather evidence from unwilling witnesses repeatedly and consistently make the point that Letters of Request must

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<sup>4</sup> *See* Motion to Limit or Quash Barnes & Noble, Inc. and Barnesandnoble.com's Subpoena *Duces Tecum* and *Ad Testificandum* to Third Party Nokia Inc.

<sup>5</sup> "Service in Finland through the Hague Service Convention **generally takes 3 months**, but can take longer. No request for expedited service is acknowledged." <http://www.plsprocess.com/process/countries/finland.html> (emphasis added).

be sought at the outset of the case. *See, e.g.,* Baker, W., Obtaining Evidence:- International Discovery Techniques - The Taking of Evidence Abroad for Use in American Courts at 4, *reprinted in*, International Business Litigation & Arbitration 173, 180 Practising Law Institute (2003) (“If one must pursue an unwilling foreign resident pursuant to the letter of request provisions ... of the Hague Convention, the process itself can often be extremely time consuming. ... Because of the long time delays, one may want to initiate letter of request procedures at the very outset of the case”); Bernabucci, S., Requesting Foreign Judicial Assistance For Discovery From Third Parties In Section 337 Investigations 337 Reporter, Vol. XX (Summer 2004) at 21, 28 (Due to the time constraints inherent in Section 337 Investigations, parties should make any requests for letters rogatory or letters of request as early in the investigation as possible”); Sundeen, M., *et al.*, Unfair Competition And The ITC: A Treatise on Section 337 Actions, § 4:49 (2010)(“[Hague Convention] procedures involving foreign authorities, including courts, will normally not be timely enough to be effective in a section 337 investigation unless the request ... is initiated early ....”); *see also In the Matter of Certain Printing and Imaging Devices*, Inv. No. 337-TA-690, Order No. 20 (Mar. 31, 2010) (finding deposition notices on Japanese witnesses to be untimely when they could have been served at the beginning of the discovery period to ensure that such depositions would be held prior to the close of fact discovery). Rather than start this process at the outset of the investigation, Barnes & Noble waited until 30 days before the close of fact discovery to ask the ALJ to issue a Letter of Request. In light of its delay, it is egregious for Barnes & Noble to now demand that Nokia Corporation drop everything to comply with the Letter of Request.

Nokia Corporation was not served with a copy of Barnes & Noble’s Motion nor has it been contacted by Barnes & Noble’s counsel regarding the Letter of Request. Instead, Barnes &



Noble requested that the Commission allow for expedited briefing on its Motion as well as expedient treatment of the request to obtain discovery. Although it asked both the Commission and Ministry of Justice of Finland to expeditiously address the Letter of Request, Barnes & Noble provided no advance notice of the individuals it identified as deponents to Nokia Corporation, the intended target of the discovery.

Barnes & Noble's last minute third-party discovery against Nokia Corporation also would require an impermissible extension of the target date for the completion of the investigation. The target date for the final initial determination in this case is April 27, 2012. The hearing is presently set to commence on February 6, 2012. With only one month remaining before the commencement of the hearing, Nokia Corporation has not been provided sufficient time to respond to the Letter of Request. If the Letter of Request is not quashed, Nokia Corporation will need additional time to seek relief through available appeal channels, as well as to arrange for the availability of any witnesses who may be needed as deponents, to collect any requested documents allowed to be sought here, if any, to prepare privilege logs, and to permit travel to Finland by its counsel to obtain relevant information. Furthermore, the expert report deadlines have passed and expert discovery closes this Friday, January 6, 2012. Ground Rule 10.5.6 prevents any expert from testifying at the hearing regarding patent misuse based upon information obtained by Barnes & Noble from Nokia Corporation after January 6, 2012 unless the ALJ grants leave or extends the target date. *See* Ground Rule 10.5.6 ("An expert's testimony at the hearing shall be limited in accordance with the scope of his or her expert report(s), deposition testimony, or within the discretion of the Administrative Law Judge."). Barnes & Noble's delay in serving the Letter of Request on Nokia Corporation would necessarily delay the

target date, delaying the statutory directive to complete the Investigation at the earliest practicable time. *See* 19 U.S.C. § 1337.

The ITC has declined to allow third party foreign discovery in similar situations. In *Certain Home Vacuum Packaging Machines*, Inv. No. 337-TA-496, Order No. 39 (Jan. 12, 2004), for example, the ALJ granted respondent's request for letters rogatory and, in the alternative, letters of request for international judicial assistance to Italy. After the ALJ had granted the respondent's motion for international judicial assistance (a little over three months before the close of fact discovery), the Commission delayed the process by suspending the Letters and requesting that the parties first provide comment on the Commission's authority to issue them under the Hague Convention. The Commission had yet to rule on the issue when respondents requested an extended target date to allow additional time for their foreign discovery efforts, assuming the Commission allowed the Letters. Although the ITC appeared sympathetic to the respondent's situation, it nevertheless ruled that the delay could not stand in the way of statutory directive to complete the investigation at the earliest practicable time.

The facts of this case are considerably less compelling than the facts in *Certain Home Vacuum Packaging Machines* in that Barnes & Noble is responsible for the delay in this case, while the Commission was responsible for the delay in *Certain Home Vacuum Packaging Machines*. In this case, Barnes & Noble waited six months after it raised its patent misuse defense to seek foreign discovery from Nokia Corporation. It did not seek an extension of the discovery deadline and violated Ground Rule 4.4.5. It should be accorded no sympathy for its delay and the Letter of Request should be quashed.

### **III. The Letter Of Request Violates The Terms Of The Hague Convention**

The Letter of Request violates the terms of the Hague Convention. The Hague Convention is an undertaking among sovereigns that "establish[ed] optional procedures that

would facilitate the taking of evidence abroad.” *Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 538. The Hague Convention, however, is not an open invitation for American litigants, like Barnes & Noble, to subject foreign, non-party corporations and witnesses to lengthy, exhaustive document requests and testimonial examinations into subject matter that is not relevant to any claim or defense at issue or that has already been addressed by parties to the present Investigation. Rather, document discovery pursuant to a letter of request under the Government of Finland’s Article 23 reservation to the Hague Convention is limited to “particular documents specified” in the Letter of Request that are in Nokia Corporation’s possession, custody, and control. Deposition testimony is limited to testimony expected to be used at trial and that directly relates to the issues in the litigation. *See* The Finnish Code of Judicial Procedure (1.1.1734/4) (certified translation attached as Exhibit C), Ch. 17, Section 12. At the very least, because Nokia Corporation has already notified the Finnish Ministry of Justice about Barnes & Noble’s Letter of Request, the ITC is respectfully requested to either act to quash the Letter of Request<sup>6</sup> or to take no action until the Finnish authorities determine whether the requested discovery is appropriate under Finnish law in the first instance.

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<sup>6</sup> Notwithstanding the fact that Nokia Corporation is seeking relief from the Letter of Request from Finnish authorities, this Court has an independent obligation to supervise pre-trial proceedings and prevent abusive discovery requests on foreign persons:

American courts, in supervising pre-trial proceedings, should exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. Judicial supervision of discovery should always seek to minimize its costs and inconvenience and to prevent improper uses of discovery requests. When it is necessary to seek evidence abroad, however, the district court must supervise pretrial proceedings particularly closely to prevent discovery abuses. . . . Objections to “abusive” discovery that foreign litigants advance should therefore receive the most careful consideration.

*Societe Nationale Industrielle Aerospatiale*, 482 U.S. at 546.

Barnes & Noble's request is nothing more than an attempted fishing expedition into Nokia Corporation's work, licensing, and foreign business strategies. At best, Barnes & Noble has conjured up a conspiracy theory that accuses Complainant Microsoft Corporation and non-party Nokia Corporation of using **Nokia** patents (without providing any basis for asserting the alleged "misuse" is tied to the Microsoft patents-in-suit) to undermine the Android market for handsets in the United States. *See* Exhibit A, Letter of Request at A-10. Upon information and believe, the evidence taken by Barnes & Noble to date of party Microsoft, however, has soundly refuted that conspiracy theory, making the Letter of Request to Nokia Corporation even more inappropriate. *See* Complainant Microsoft Corporation's Motion For Summary Determination of Respondents' First Affirmative Defense; *see also* Commission Investigative Staff's Response to Complainant Microsoft Corporation's Motion for Summary Determination of Respondents' First Affirmative Defense (Patent Misuse) (supporting summary determination in Microsoft Corporation's favor). Thus, Barnes & Noble's Letter of Request for documents and testimony in Finland should be quashed for failure to meet the stringent standards of the Hague Convention and Finnish law, as well as Federal Rule of Civil Procedure 26(b). Alternatively, action on this Letter of Request should be deferred until Nokia Corporation can get a response from the Finnish authorities on the propriety of the discovery under the laws of Finland in the first instance.<sup>7</sup>

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<sup>7</sup> In the event the Court denies this motion to quash, Nokia Corporation hereby provides notice to the Court that it will request leave to seek interlocutory appeal of such Order under 19 C.F.R. § 210.24(b). The question of whether a letter of request that plainly violates both the Hague Convention and the local law of the Requested State should be quashed involves a "controlling question of law or policy as to which there is substantial ground for difference of opinion and that either an immediate appeal from the ruling may materially advance the ultimate completion of the investigation or subsequent review will be an inadequate remedy." 19 C.F.R. § 210.24(b). Indeed, the Commission already has signaled its concern regarding the propriety and scope of Letters of Request. In *Certain Home Vacuum Packaging Machines*, Inv. No. 337-TA-496, (Comm'n Order Jan. 21, 2004), the Commission *sua sponte* suspended letters of request issued

### **A. The Letter Of Request Was Improperly Served With Respect To Deposition Evidence**

Barnes & Noble's Letter of Request as to the pretrial depositions of Nokia Corporation executives is improper under both the Hague Convention and the laws of Finland because it is directed to five named individuals, but was served only on Nokia Corporation at a single address in Finland. To the extent that Barnes & Noble wished to have each of the five named individuals appear for a deposition, a separate letter of request was required to be served on each individual, and allowing each individual to raise its own objections and protect its own interests in these proceedings.

Article 3 of the Hague Convention provides that "where appropriate, the Letter [of Request] shall specify ... the names and addresses of the persons to be examined." Hague Convention, Article 3. This provision has been interpreted as meaning that "although the names and addresses of the witnesses are to be included 'where appropriate', such information will normally be required whenever witnesses are required, and a court may decline to issue Letters of Request containing a mere list of names with no additional data."<sup>8</sup> *Id.* In this case, the Letter of Request contains only the contact details of Nokia Corporation. Other than the address of Nokia headquarters, no contact information for the private individuals in question has been presented. Accordingly, the Request does not fulfill the criteria under Article 3 of the Hague Convention, and the Request should be quashed unless rectified.

Moreover, Article 9 of the Hague Convention states that a judicial authority which executes a letter of request shall apply its own law as to the methods and procedures to be followed, but "will follow a request of the requesting authority (*i.e.*, the ITC) that a special

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by the Administrative Law Judge and sought comment on the Commission's authority to issue same.

<sup>8</sup> McClean, David: International Co-operation in Civil and Criminal Matters, 2002, OUP, p. 114.

method or procedure be followed, unless this is incompatible with the internal law of the State of Execution (*i.e.*, Finland) or is impossible of performance by reason of its internal practice and procedures or by reason of practical difficulties.” Hague Convention, Article 9.

The law and procedures of Finland apply to the Letter of Request as to deposition testimony because the notice provided in the Letter of Request is incompatible with the internal law of Finland. In particular, Chapter 17, Section 26 of the Finnish Code of Judicial Procedure provides that the court is responsible for calling a witness to court, and that a subpoena shall be served on the witness in person. *See* Exhibit C, The Finnish Code of Judicial Procedure (1.1.1734/4), Ch. 17, Section 26. Chapter 11, Section 2 further provides that service of a notice (including calling witnesses) may be entrusted to a party only upon that party’s consent. *Id.* at Ch. 11, Section 2. The preparatory works to the provision further state that a party cannot be compelled to effect service. *See* Government Bill to Parliament for Act on Amending the Provisions on Service of Civil Cases in the Code of Judicial Procedure and Certain Other Acts, GB No. 16, p. 1990 (certified translation attached as Exhibit D). In other words, absent its consent, a company cannot be obligated to effect service of a subpoena on its employees or officers, which means that Nokia cannot be required under Finnish law to ensure that its officers appear to testify.

In this case, the Letter of Request has been served only on Nokia Corporation. Specifically, the Letter of Request seeks testimony from certain of Nokia Corporation’s top executives, including Stephen Elop (President and CEO), Kai Öistämö (Executive Vice President), Mary T. McDowell (Executive Vice President), Jaakko Kaskinen (Senior Manager), and Jukka Nihtilä (Director). However, only a single copy of the Letter of Request was served on Nokia Corporation at a single address. *See* Exhibit B, Notice of Service. There has been no

attempt to serve the individuals named in the Letter of Request. Thus, Barnes & Noble's Letter of Request, served on Nokia Corporation, but requesting the testimony of five particular individuals, is improper at least as to those individuals.

Even if Barnes & Noble had taken the proper steps to effectuate service through the Hague Convention, it would have had to serve a separate Letter of Request on the Central Authority of the United Kingdom as well (Mary McDowell is located in the United Kingdom, not in Finland). *See* Declaration of Shelly Crowley at ¶ 2. In fact, one of the named witnesses is not even employed by the served corporate entity, Nokia Corporation (Mary McDowell is employed by Nokia UK Limited). *See id.* Barnes & Noble cannot circumvent the rules of the Hague Convention by serving the corporate entity through one foreign Central Authority, but requesting the depositions of individuals who are located in multiple foreign jurisdictions. Adherence to these procedures is particularly important in this case when Barnes & Noble is trying to subject Nokia Corporation to the expense and disruption of having certain of its senior executives being deposed on a harried schedule brought about only by the overreaching and tardiness of Barnes & Noble. Because the Letter of Request was not properly directed to individuals and instead, was improperly served on a corporate entity, it should be quashed on this basis as well.<sup>9</sup>

**B. The Letter Of Request Is A Violation Of Finland's Pretrial Discovery Reservation Under Article 23 Of The Hague Convention**

Finland has made a reservation in accordance with Article 23 of the Hague Convention. *See* Hague Convention, Article 23. Finland will not execute Letters of Request referred to in Article 23 that are issued for the purpose of obtaining pre-trial discovery of documents as known

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<sup>9</sup> To the extent any deposition(s) were to be permitted at all in this situation, Nokia Corporation should be allowed to select the individuals to testify regarding the Topics. In any event Apex depositions of high level executives should go forward. *See infra* Section IV.

in common law countries. Rather, according to the reservation, Letters of Request issued for the purpose of obtaining pretrial discovery of documents are only executed if they require a person: (a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his or her possession, custody, or power; or (b) to produce any documents specified in the Letter of Request that are likely to be in his or her possession, custody, or power. *Id.* The Letter of Request fails to meet these requirements. Specifically, topics (c)-(g) of the documents sought by Barnes & Noble do not specify the documents that are requested, but rather ask for any “analyses created in preparation for and in conjunction with certain agreements.”<sup>10</sup> Exhibit A, Letter of Request at A-9-A-10. Barnes & Noble provides no evidence that such documents exist or are in Nokia Corporation’s possession, but merely states that it has a belief that they exist and are in Nokia's possession. *See* Exhibit A, Letter of Request at A-11. This is insufficient.

Further, the disclosure obligations of a party served under the Hague Convention concern only documents that can be assumed to have significance as evidence in a case. *See* Exhibit C, Ch. 17, Section 12. Barnes & Noble has failed to show a nexus between the Microsoft patents-in-suit and the testimony sought in its Deposition Topics. In fact, in its allegation of patent misuse, Barnes & Noble merely alleges generically that the “horizontal agreement between holders of significant patent portfolios is per se illegal under the antitrust laws, threatens

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<sup>10</sup> Document Request Topics (a) and (b) request copies of specific agreements:

- a. The agreements entered into by Microsoft and Nokia on or about February 11, 2011 and on or about April 21, 2011.
- b. The agreements entered into by Microsoft, Nokia and MOSAID on or about September 1, 2011.

Exhibit A, Letter of Request at A-9. Although these Topics (a) and (b) may meet the requirements of the Finnish Code of Judicial Procedure, these agreements can and likely have already been produced by Complainant Microsoft Corporation. Thus, Nokia Corporation should not be required to provide these documents, as such production would be duplicative and will not provide any significance as evidence in the Investigation.



competition for mobile device operating systems and is further evidence of Microsoft's efforts to dominate and control Android and other open source operating systems." Barnes & Noble's Response to the Complaint at 26. Barnes & Noble has advanced no credible evidence supporting this allegation.

#### **IV. Apex Depositions Should Not Be Permitted**

Barnes & Noble's Letter of Requests was served on Nokia Corporation, however, it identifies five very high level executives of Nokia Corporation to appear for depositions: Stephen Elop (President and CEO), Kai Öistämö (Executive Vice President), Mary T. McDowell (Executive Vice President), Jaakko Kaskinen (Senior Manager), and Jukka Nihtilä (Director). Commission Rule 210.34(a) states that an administrative law judge "may make any order ... that justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense[.]" Commission Rule 210.34(a). Under well-established law, Apex-level executives need be made available for deposition only if two conditions are met. First, they must have unique personal knowledge that is relevant to the case. Second, the party seeking the deposition must first attempt to obtain the information to be elicited by other less burdensome means of discovery. *Celerity, Inc. v. Ultra Clean Holding, Inc.*, 2007 WL 205067, at \*3 (N.D. Cal. Jan. 25, 2007); *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 126 (D. Md. 2009); *Liberty Mutual Ins. Co. v. Superior Ct.*, 13 Cal. Rptr. 2d 363, 367 (Ct. App. 1992); *In the Matter of Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Order No. 10 (Jan. 10, 2011).

Accordingly, the federal courts have quashed the depositions of senior executives and required the plaintiff to first attempt to seek discovery through "less burdensome means," including, for example, a Rule 30(b)(6) corporate deposition. *Gauthier v. Union Pacific*

*Railroad Co.*, Civil Action No. 1:07-CV-12 (TH/KFG), 2008 WL 2467016, at \*4 (E.D. Tex. June 18, 2008); *Computer Acceleration Corp. v. Microsoft Corp.*, Case No. 9:06-CV-140, Docket No. 81 (E.D. Tex. June 15, 2007) (order granting defendant’s motion for protective order quashing deposition notice of Bill Gates). Courts require such an executive to have “superior or unique personal knowledge” to justify a deposition that would be “oppressive, inconvenient, and burdensome” when there are other avenues of obtaining the information that “have not yet been exhausted or even pursued.” *Baine*, 141 F.R.D. at 335; *see also Folwell*, 210 F.R.D. at 173 (“*Baine* ... a leading case on this matter ... held that unless a high level executive has unique personal knowledge of the controversy, the court should regulate the discovery process to avoid oppression, inconvenience, and burden to the corporation and to the executive.”); *Computer Acceleration Corp.*, Docket No. 81 (“Plaintiff fails to show that if Mr. Gates has personal knowledge, it is ‘unique’ or unavailable from lower-level employees”); *Reif v. CNA Corp.*, 248 F.R.D. 448, 451-55 (E.D. Pa. 2008) (denying request in an age discrimination case to compel deposition of high-ranking executive who stated “[w]e need to get kids in here,” because plaintiffs failed to “show the information cannot be gathered from other [company] personnel” (internal quotations omitted)). The ITC similarly has protected Apex executives from deposition when these criteria have not been met. *See, e.g., In the Matter of Certain Video Game Systems and Controllers*, Inv. No. 337-TA-743, Order No. 10 (Jan. 10, 2011) (quashing the deposition notice of the Senior Managing Director of Nintendo Co., Ltd. and member of the Board of Directors on the grounds that he was an apex executive, does not possess unique, first hand, non-repetitive knowledge of discoverable facts, and complainant has not exhausted less intrusive discovery methods); *In the Matter of Certain Printing and Imaging Devices*, Inv. No. 337-TA-690, Order No. 20 (Mar. 31, 2010) (prohibiting the deposition of a corporate vice president and

senior vice president on the grounds that these individuals are Apex executives who had tangential involvement in the licensing activities in dispute, and respondents had made no showing that these individuals possessed information that could not be obtained through less intrusive means); *In the Matter of Certain Aramid Fiber Honeycomb*, Inv. No. 337-TA-305, Order No. 29 (Apr. 6, 1990) (prohibiting the deposition of a chief executive officer because the deposition would be fruitless and burdensome at such an advanced stage of discovery).

Notwithstanding the improper service of the Letter of Request on Nokia Corporation, and the failure to serve the named individuals, Barnes & Noble has not shown that any of the named individuals have unique or superior personal knowledge of the requested information or that less intrusive methods are unsatisfactory, insufficient, or inadequate. In fact, all of the requested information can, and has, been obtained or should have been obtained from Complainant Microsoft Corporation. For example, high level executives of named-party Microsoft Corporation apparently have already been deposed, including Steve Ballmer (CEO), Andy Lees (then President of Windows Phone); Terry Myerson (then Corporate VP of Windows Phone); David Kaefer (General Manager of IP Licensing); Horacio Gutierrez (Corporate VP and Deputy General Counsel of IP); and Bart Eppenauer (Chief Patent Counsel and Associate General Counsel). Some of these witnesses were produced for and asked questions by Barnes & Noble's counsel on the same topics that Barnes & Noble asks of Nokia Corporation.<sup>11</sup> Thus,

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<sup>11</sup> For example, Barnes & Noble's corporate representative deposition notice on Microsoft Corporation Topic No. 13 requests "Discussions, agreements, partnerships, joint ventures, understandings or negotiations with Nokia or MOSAID concerning the assertion of intellectual property rights," and Topic No. 14 requests "Microsoft's understanding with Nokia that Nokia will adopt Microsoft's Windows Phone 7 as its principal smartphone strategy, including evaluations, assessments or analyses of Microsoft's current or projected market share, both globally and in the United States, of operating systems based on Nokia's decision to adopt Microsoft's Windows Phone 7."

Complainant Microsoft Corporation has produced high-ranking executives to provide testimony on the same subject matter that Barnes & Noble seeks from non-party Nokia Corporation.

The named Nokia Corporation individuals (and one improperly named Nokia UK Limited individual) are all high-ranking executives who are subject to the Apex deposition rule. Barnes & Noble has not shown (or even attempted to show) that the named individuals possess unique first-hand, non-repetitive knowledge of the discovery facts in this Investigation. As such, non-party Nokia Corporation and its executives should not be required to provide any deposition testimony, and the Letter of Request should be quashed.

**V. The Requested Discovery is Duplicative or Privileged**

The discovery sought by Barnes & Noble is duplicative of documents and testimony already obtained from parties in the Investigation. Specifically, Nokia Corporation is informed that Microsoft has already produced documents in this Investigation that relate to Barnes & Noble's patent misuse defense. In addition, Nokia has been informed that Barnes & Noble has taken the corporate deposition(s) of Complainant Microsoft Corporation relating to the very issues requested from Nokia Corporation. Even where a subpoena includes requests for documents and testimony that are actually relevant to an Investigation, placing a severe burden on a non-party to produce information that may be otherwise available is reason to quash the subpoena in the ITC. *See Certain Adjustable Keyboard Support Systems and Components Thereof*, Inv. No. 337-TA-670, Order No. 11, (August 26, 2009). At least Deposition Topics (b)-(g) and (o) and Document Requests (a)-(b) request discovery that can be, and has been or should have been, obtained from Microsoft:

Document Requests:

*a. The agreements entered into by Microsoft and Nokia on or about February 11, 2011 and on or about April 21, 2011.*

*b. The agreements entered into by Microsoft, Nokia and MOSAID on or about September 1, 2011.*

\* \* \* \*

Deposition Topics:

*b. Discussions Nokia has had with Microsoft or MOSAID Technologies Incorporated ("MOSAID") relating to Barnes & Noble's Nook™ and Nook Color™ products.*

*c. Communications and agreements with Microsoft or MOSAID concerning the assertion of patent rights against devices using the Android™ Operating System or other open source operating system.*

*d. The agreement or partnership with Microsoft announced on or about February 11, 2011, including Nokia's or Microsoft's strategy or rationale regarding its decision to enter into the agreement or partnership.*

*e. The agreements entered into by Microsoft and Nokia on or about April 21, 2011.*

*f. The role of Nokia's CEO Stephen Elop in developing a coordinated strategy with Microsoft to compete with the Android™ Operating System or any other open source operating system.*

*g. Discussions between Nokia and Microsoft, including any discussions between CEO Stephen Elop and Microsoft CEO Steven Ballmer, about Nokia's and Microsoft's partnership agreement, Nokia's and Microsoft's combined patent portfolio, the Android™ Operating System or any other open source operating system.*

*o. The agreements entered into by Microsoft, Nokia and MOSAID on or about September 1, 2011.*

Additionally, Barnes & Noble has not shown how Deposition Topics (h)-(l) and (p) are related to its patent misuse defense. In particular, Nokia's knowledge and analyses of its own business has no relation to the Microsoft patents-in-suit:

*h. Nokia's knowledge of U.S. Patent No. 5,778,372, U.S. Patent No. 5,889,522, U.S. Patent No. 6,339,780, U.S. Patent No. 6,891,551, U.S. Patent No. 6,957,223, U.S. Patent No. 5,579,517, U.S. Patent No. 5,652,913, U.S. Patent No. 5,758,352, U.S. Patent No. 6,791,536 and U.S. Patent No. 6,897,853, or any other patent(s) that Nokia, Microsoft or MOSAID claims controls or dominates the Android™ Operating System or any other open source operating system.*

*i. Nokia's offensive and defensive use of its patent portfolio after entering its partnership with Microsoft in February 2011, including its licensing practices and litigation strategy.*

*j. Nokia's business plans or strategies relating to open source software, including its business plans relating to the Android™ Operating System or any other open source operating system.*

*k. The impact or effect of the Android™ Operating System or any other open source operating system on Nokia's or Microsoft's businesses, including businesses relating to mobile devices and tablet computers.*

*l. Nokia's and Microsoft's plans, strategies or efforts to increase their collective share or individual shares of the mobile device market, mobile operating system market or PC operating system market.*

*p. Nokia's strategy or rationale regarding its decision, announced on or about September 1, 2011, to enter into a revenue sharing arrangement with Microsoft and MOSAID.*

The above topics are so broad, irrelevant to the patent claims in this investigation, and overly burdensome that they need to be quashed in their entirety. Barnes & Noble has no justifiable basis to inquire into Nokia's business strategies or its use of patents generally. Barnes & Noble is simply searching for a defense and the use of a Letter of Request in this capacity is inappropriate. In addition, Deposition Topics (n) and (q) request information that is likely not in the possession, custody or control of Nokia Corporation or can be more conveniently obtained from another party, such as MOSAID:

*n. The agreement entered into by MOSAID and Core Wireless on or about September 1, 2011.*

*q. MOSAID's planned or predicted offensive or defensive use of patent rights, including regarding the patent portfolio of Core Wireless or any potential role played or to be played by Microsoft or Nokia in licensing or asserting MOSAID's patents.*

In fact, Barnes & Noble has already requested this information from Mosaid Corp. Ltd. and MOSAID Technologies Incorporated. See Respondents Barnes & Noble, Inc.'s and Barnesandnoble.com LLC's Ex Parte Application For Issuance of Subpoenas Duces Tecum and Subpoenas Ad Testificandum to Nokia Inc. and MOSAID Corp. Ltd. and Order No. 24 (granting Barnes & Noble's Letter Rogatory to MOSAID Technologies Incorporated).

Moreover, Deposition Topic (m) is so broad in scope without any subject matter limitations or temporal restrictions, that it is unduly burdensome and is nothing more than an impermissible “catch all” request:

*m. The current or projected market share, including global market share and U.S. market share, of mobile devices and mobile operating systems.*

Finally, Document Requests (c)-(g) relate to information that is mostly privileged and certainly company confidential, it is exists at all. If Nokia Corporation were required to respond to the following document requests, a burdensome search, collection, and review of information for privilege, and potential generation of a privilege log would need to be undertaken, to the extent that such documents even exist:

*c. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to Microsoft and Nokia's combined patent portfolio.*

*d. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the patents infringed by the Android™ Operating System.*

*e. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the threat posed by the Android™ Operating System to Nokia's business model.*

*f. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the patents infringed by Barnes & Noble's Nook products.*

*g. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the competition posed by Barnes & Noble's Nook products.*

No responses to the Deposition Topics or Document Requests would lead to admissible evidence related to the issues in the subject Investigation. The Deposition Topics and Document Requests also fail to balance the necessity and undue burden against the likely benefit of the requested discovery. Thus, Barnes & Noble's Letter of Request fails to meet general U.S.

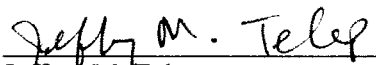
discovery standards, let alone the higher standard imposed by the Hague Convention and Finnish laws, as discussed above.

**VI. Conclusion**

For the foregoing reasons, the ITC should quash the Letter of Request because (i) it is untimely, (ii) it violates the terms of the Hague Convention and Finnish law, (iii) it requests information that is duplicative of that which has already been provided by a party to the Investigation or that is protected by various privileges, and (iii) Nokia Corporation's burden far outweighs any possible benefit of the requesting party. In addition, the ITC should notify the Central Authority appointed by the Government of Finland under Article 2 of the Hague Convention that a motion to quash has been filed and that such motion to quash "automatically stays" compulsory third party discovery under Ground Rule 4.6.4. In the alternative, Nokia Corporation requests that any discovery relating to the Letter of Request be stayed until the Finnish authorities determine whether the discovery is appropriate under Finnish law.

Dated: January 3, 2012

Respectfully submitted,

  
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Phone: (212) 556-2100  
Fax: (212) 556-2222

*Attorneys for Non-party  
Nokia Corporation*



# EXHIBIT A

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

Before The Honorable Theodore R. Essex  
Administrative Law Judge

In the Matter of

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

Investigation No. 337-TA-769

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE  
PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON  
THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL  
MATTERS

The United States International Trade Commission (“Commission”) presents its compliments to the Ministry of Justice of Finland and respectfully requests international judicial assistance to obtain evidence to be used in a civil action entitled In the Matter of Certain Handheld Electronic Computing Devices, Related Software, and Components Thereof, Investigation No. 337-TA-769, pending before the Commission. Based on the representations of Respondents Barnes & Noble, Inc. and barnesandnoble.com llc (collectively “Barnes & Noble”), the Commission believes that the testimony of Stephen Elop, Chief Executive Officer and President, Kai Öistämö, Executive Vice President and Chief Development Officer, Mary T. McDowell, Executive Vice President in charge of Nokia’s Mobile Phones Unit, Jaakko Kaskinen, Senior Manager of Nokia M&A, and Jukka Nihtilä, Head of Business Development, of Nokia Corporation, Keilalahdentie 2-4, P.O. Box 226, FIN-00045 Nokia Group, Finland (“Nokia”), persons with knowledge of the topics set forth below, and the particular documentary evidence in the possession of Nokia also stated herein, are necessary for

Barnes & Noble to defend fairly against the allegations made by Complainant Microsoft Corporation in this matter.

Therefore, the undersigned applicant has the honor to submit the following request that the Ministry of Justice of Finland cause the below identified witnesses to appear and testify, and to produce the documentary evidence referenced herein to the legal representatives of Barnes & Noble, in conformity with Article 3 of the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The documents and information sought will be subject to the Protective Order in the action pending before the Commission, attached hereto as Exhibit 1.

The Commission respectfully requests that the Ministry of Justice expedite this request, if possible and permissible. There are two important deadlines in the action pending before this Commission relevant to this Request. First, fact discovery must conclude by December 14, 2011. Second, the Commission's hearing in this action begins February 6, 2012. Thus, to the extent the Ministry of Justice can expedite this request, it is necessary to accelerate the process of obtaining the evidence requested below so that Barnes & Noble can defend itself fairly against the allegations made by Complainant Microsoft Corporation in this matter.

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| 1. Sender:  | Office of the Secretary<br>United States International Trade Commission<br>500 E Street, N.W.<br>Washington, D.C. 20436<br>U.S.A.<br>(Telephone number: (202) 205-2000) |
| 2. Central Authority of the Requested State:              | Ministry of Justice<br>P.O. Box 25<br>FIN-00023 Government<br>Finland<br>(Telephone number: 358-9-1606-7628)<br>(Fax number: 358-9-1606-7524)                           |
| 3. Person to whom the executed request is to be returned: | Honorable Theodore R. Essex<br>Administrative Law Judge<br>United States International Trade Commission   |

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|   | 500 E Street, N.W., Room 317<br>Washington, D.C. 20436  |
| 4. Specification of the date by which the requesting authority requires receipt of the response to the Letter of Request: | A response is requested by November 25, 2011, or as soon as practicable before that, in order to ensure that the evidence may be obtained before the period for fact discovery concludes on December 14, 2011. Expedient treatment of this request will allow the parties and the witness(es) to arrange a mutually agreeable date for testimony and avoid disruption to the witness(es)'s business or personal plans.  |
| In conformity with Article 3 of the Convention, the undersigned applicant has the honor to submit the following request:  |   |
| 5.  | United States International Trade Commission<br>500 E Street, N.W.<br>Washington, D.C. 20436  |
| a. Requesting judicial authority:   |   |
| b. To the competent authority of:   | Republic of Finland   |
| c. Name of the case and any identifying number:   | <u>In the Matter of Certain Handheld Electronic Computing Devices, Related Software, and Components Thereof</u> , Investigation No. 337-TA-769  |
| 6. Names and addresses of the parties and their representatives:  | <b>Microsoft Corporation</b>  |
| a. Plaintiff (Complainant):   | <b><u>Representatives:</u></b><br>V. James Adduci II<br>Andrew Pratt<br>Jonathan J. Engler<br>ADDUCI, MASTRIANI & SCHAUMBERG LLP<br>1200 Seventeenth Street, NW, Fifth Floor<br>Washington, D.C. 20036<br><br>Dale M. Heist<br>Daniel J. Goettle<br>WOODCOCK WASHBURN LLP<br>Cira Centre, 12th Floor<br>2929 Arch Street<br>Philadelphia, PA 19104<br><br>Robert A. Rosenfeld<br>ORRICK, HERRINGTON & SUTCLIFFE LLP<br>405 Howard Street<br>San Francisco, CA 94105<br>Telephone: (415) 773-5700<br><br>John A. Jurata, Jr. |

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|  | <p>Jonathan A. Drenfeld<br/> ORRICK, HERRINGTON &amp; SUTCLIFFE LLP<br/> 1152 Fifteenth Street, NW<br/> Washington, DC 20005<br/> Telephone: (202) 339-8400</p> <p>Brian R. Nester<br/> Kevin C. Wheeler<br/> SIDLEY AUSTIN LLP<br/> 1501 K Street, NW<br/> Washington, D.C. 20005</p> <p>Richard A. Cederth<br/> John W. McBride<br/> SIDLEY AUSTIN LLP<br/> One South Dearborn<br/> Chicago, IL 60603</p>  |
| <p>b. Defendants<br/> (Respondents):</p> | <p><b>Barnes &amp; Noble, Inc., barnesandnoble.com llc</b></p> <p><b><u>Representatives:</u></b><br/> Richard L. DeLucia<br/> A. Antony Pfeffer<br/> Charles A. Weiss<br/> Paul M. Richter<br/> John R. Kenny<br/> KENYON &amp; KENYON LLP<br/> One Broadway<br/> New York, NY 10004</p> <p>Marcia H. Sundeen<br/> Jeffrey S. Gerchick<br/> Aimee N. Soucie<br/> KENYON &amp; KENYON LLP<br/> 1500 K Street, NW<br/> Washington, DC 20005</p> <p>Stuart W. Gold<br/> Stephen S. Madsen<br/> Peter T. Barbur<br/> CRAVATH, SWAINE &amp; MOORE LLP<br/> Worldwide Plaza<br/> 825 Eighth Avenue<br/> New York, NY 10019</p> <p><b><u>Representatives in Finland:</u></b><br/> Patrik Lindfors<br/> Petra Kiurunen<br/> LINDFORS &amp; CO ATTORNEYS AT LAW</p> |

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|                   | <p>Kluuvikatu 3<br/>00100 Helsinki</p> <p><b>Inventec Corporation</b></p> <p><b><u>Representatives:</u></b><br/>Richard DeLucia<br/>Elizabeth Gardner<br/>John Kenny<br/>Paul Richter<br/>Charles Weiss<br/>Antony Pfeffer<br/>KENYON &amp; KENYON LLP<br/>One Broadway<br/>New York, NY 10004-1050</p> <p>Marcia H. Sundeen<br/>Jeffrey S. Gerchick<br/>Aimee N. Soucie<br/>KENYON &amp; KENYON LLP<br/>1500 K Street, N.W.<br/>Washington, DC 20005</p> <p><b>Foxconn Electronics, Inc., Foxconn Precision<br/>Component (Shen Zhen) Co. Ltd., Foxconn<br/>International Holdings Ltd. and Hon Hai Precision<br/>Industry Co., Ltd.</b></p> <p><b><u>Representatives:</u></b><br/>Edward M. Lebow<br/>HAYNES AND BOONE, LLP<br/>1615 L Street, N.W., Suite 800<br/>Washington, D.C. 20036</p> <p>Glenn E. Westreich<br/>Steven M. Levitan<br/>Inchan M. Kwon<br/>HAYNES AND BOONE, LLP<br/>2033 Gateway Place, Suite 300<br/>San Jose, CA 95110</p> |
| c. Other parties: | <p><b>United States International Trade Commission</b></p> <p><b><u>Representative:</u></b><br/>Jeffrey T. Hsu<br/>Investigative Attorney<br/>OFFICE OF UNFAIR IMPORT INVESTIGATIONS<br/>U.S. International Trade Commission<br/>500 E Street, S.W., Suite 401</p>  |

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|  | Washington, D.C. 20436  |
| 7. Nature of the proceedings and summary of the facts: | <p>The nature of the proceedings for which the evidence is requested is a civil patent infringement action based upon an amended verified complaint filed by Microsoft Corporation ("Microsoft") on April 8, 2011. The complaint alleges that Barnes &amp; Noble, Inc., barnesandnoble.com llc, Foxconn Electronics, Inc., Foxconn Precision Component (Shen Zhen) Co. Ltd., Foxconn International Holdings Ltd. and Hon Hai Precision Industry Co., Ltd. and Inventec Corporation ("Respondents") import, sell for importation and/or sell within the United States after importation certain handheld electronic computing devices, related software and components thereof that allegedly infringe U.S. Patent No. 5,778,372, U.S. Patent No. 5,889,522, U.S. Patent No. 6,339,780, U.S. Patent No. 6,891,551 and U.S. Patent No. 6,957,233. Microsoft seeks an exclusion order barring importation of the allegedly infringing devices.</p> <p>The United States International Trade Commission (the "Commission") under Section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337), as amended, instituted proceedings based on Microsoft's complaint and subsequently published notice of those proceedings in The Federal Register. Upon institution, the proceeding was assigned to Administrative Law Judge Theodore R. Essex to preside over pretrial matters, conduct a trial and issue an initial determination on the merits of the investigation. The initial determination of Judge Essex is subject to possible review by the Commission, with a right of appeal to the U.S. Court of Appeals for the Federal Circuit and further appeal to the Supreme Court of the United States.</p> <p>Several defenses have been raised against Microsoft's allegations of patent infringement, including the defenses of patent misuse, non-infringement, invalidity of the patents, unenforceability of the patents, public interest and lack of domestic industry.</p> <p>The patent misuse defense asserted by Respondents Barnes &amp; Noble, Inc. and barnesandnoble.com llc requires information about Microsoft's efforts to use its licensing practices to broaden improperly the scope of its patents with anticompetitive effect.</p> |
| 8. Evidence to be obtained and                         | It is respectfully requested that the executing judicial  |

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| <p>purpose:</p> | <p>authority of Finland require Stephen Elop (CEO and President), Kai Öistämö (Exec. Vice President and Chief Development Officer), Mary T. McDowell (Executive Vice President), Jaakko Kaskinen (Senior Manager of Nokia M&amp;A) and Jukka Nihtilä (Head of Business Development) to appear at a time and place to be determined by that authority, and to give testimony on oral examination concerning these topics:<sup>1</sup></p> <ul style="list-style-type: none"> <li>a. The subject matter of the documents produced in response to this request.</li> <li>b. Discussions Nokia has had with Microsoft or MOSAID Technologies Incorporated (“MOSAID”) relating to Barnes &amp; Noble’s Nook™ and Nook Color™ products.</li> <li>c. Communications and agreements with Microsoft or MOSAID concerning the assertion of patent rights against devices using the Android™ Operating System or other open source operating system.</li> <li>d. The agreement or partnership with Microsoft announced on or about February 11, 2011, including Nokia’s or Microsoft’s strategy or rationale regarding its decision to enter into the agreement or partnership.</li> <li>e. The agreements entered into by Microsoft and Nokia on or about April 21, 2011.</li> <li>f. The role of Nokia’s CEO Stephen Elop in developing a coordinated strategy with Microsoft to compete with the Android™ Operating System or any other open source operating system.</li> <li>g. Discussions between Nokia and Microsoft, including any discussions between CEO</li> </ul> |
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<sup>1</sup> While Barnes & Noble believes that at their levels in the company each of the witnesses will have relevant information about all of the topics listed, Kai Öistämö’s testimony will likely focus more on topics (a), (d), (e), (g), (j), (k), (l) and (m), and Jukka Nihtilä’s testimony will likely focus more on (a), (b), (c), (d), (e), (g), (h), (i), (j), (n), (o), (p) and (q).



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|  | <p>Stephen Elop and Microsoft CEO Steven Ballmer, about Nokia's and Microsoft's partnership agreement, Nokia's and Microsoft's combined patent portfolio, the Android™ Operating System or any other open source operating system.</p> <p>h. Nokia's knowledge of U.S. Patent No. 5,778,372, U.S. Patent No. 5,889,522, U.S. Patent No. 6,339,780, U.S. Patent No. 6,891,551, U.S. Patent No. 6,957,223, U.S. Patent No. 5,579,517, U.S. Patent No. 5,652,913, U.S. Patent No. 5,758,352, U.S. Patent No. 6,791,536 and U.S. Patent No. 6,897,853, or any other patent(s) that Nokia, Microsoft or MOSAID claims controls or dominates the Android™ Operating System or any other open source operating system.</p> <p>i. Nokia's offensive and defensive use of its patent portfolio after entering its partnership with Microsoft in February 2011, including its licensing practices and litigation strategy.</p> <p>j. Nokia's business plans or strategies relating to open source software, including its business plans relating to the Android™ Operating System or any other open source operating system.</p> <p>k. The impact or effect of the Android™ Operating System or any other open source operating system on Nokia's or Microsoft's businesses, including businesses relating to mobile devices and tablet computers.</p> <p>l. Nokia's and Microsoft's plans, strategies or efforts to increase their collective share or individual shares of the mobile device market, mobile operating system market or PC operating system market.</p> <p>m. The current or projected market share, including global market share and U.S. market share, of mobile devices and mobile operating systems.</p> <p>n. The agreement entered into by MOSAID and Core Wireless on or about September 1,</p> |
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|  | <p>2011.</p> <ul style="list-style-type: none"> <li>o. The agreements entered into by Microsoft, Nokia and MOSAID on or about September 1, 2011.</li> <li>p. Nokia's strategy or rationale regarding its decision, announced on or about September 1, 2011, to enter into a revenue sharing arrangement with Microsoft and MOSAID.</li> <li>q. MOSAID's planned or predicted offensive or defensive use of patent rights, including regarding the patent portfolio of Core Wireless or any potential role played or to be played by Microsoft or Nokia in licensing or asserting MOSAID's patents.</li> </ul> <p>The executing judicial authority is also requested to require Nokia to produce the following documents for use as evidence at trial to the legal representatives of Barnes &amp; Noble no later than ten (10) days prior to the examination of the witnesses:</p> <ul style="list-style-type: none"> <li>a. The agreements entered into by Microsoft and Nokia on or about February 11, 2011 and on or about April 21, 2011.</li> <li>b. The agreements entered into by Microsoft, Nokia and MOSAID on or about September 1, 2011.</li> <li>c. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to Microsoft and Nokia's combined patent portfolio.</li> <li>d. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the patents infringed by the Android™ Operating System.</li> <li>e. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the threat posed by the Android™</li> </ul> |
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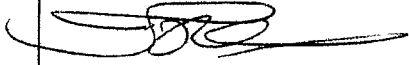
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|  | <p>Operating System to Nokia's business model.</p> <p>f. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the patents infringed by Barnes &amp; Noble's Nook products.</p> <p>g. The analyses created in preparation for and in conjunction with the agreements specified in subsections (a) and (b) with respect to the competition posed by Barnes &amp; Noble's Nook products.</p> <p><u>Purpose of the evidence:</u><br/> The purpose of the testimony and documents sought is to obtain relevant evidence to be used at trial to defend against the allegations made in Microsoft's complaint. Specifically, Barnes &amp; Noble seeks the evidence requested in order to prove that Microsoft is improperly expanding the scope of its patents in an attempt to dominate mobile operating systems such as Android that threaten Microsoft's monopoly in PC operating systems. Such conduct constitutes patent misuse, which renders the patents at issue unenforceable.</p> <p>The evidence from Nokia is highly relevant because Microsoft recently entered into partnership agreements with Nokia whereby, among other things, Nokia agreed to replace its Symbian operating system with Microsoft's Windows Phone 7 as its principal smartphone strategy. In addition to increasing Microsoft's market share in the worldwide mobile operating system market, one of the publicly stated motivations for this partnership was to combine the parties' respective patent portfolios and to coordinate their offensive use of the patents to drive out open source operating systems, including Android specifically, that threaten Microsoft's monopoly. Microsoft and Nokia also recently entered into an agreement with a patent licensing company, MOSAID, transferring approximately 2,000 Nokia patents to MOSAID in exchange for MOSAID's efforts to license those patents (or sue those that do not take a license) and promise to pay approximately two-thirds of any royalties back to Microsoft and Nokia.</p> |
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|  | <p>Barnes &amp; Noble seeks the evidence requested to prove that Microsoft is using patents, assuming they are even valid, that are trivial with respect to Android based devices (as well as other open source operating devices) in a coordinated campaign to restrict competition and is expanding that strategy by linking with Nokia and MOSAID—in violation of the U.S. antitrust laws and constituting patent misuse. Thus, Barnes &amp; Noble anticipates that the requested testimony and documents will be highly material to the issue of patent misuse.</p> <p>Nokia Corp.'s U.S. subsidiary has represented to Barnes &amp; Noble and to the Commission that the evidence sought "is more likely in the possession, custody or control of Nokia Corporation," and that the testimony subjects should be addressed to Nokia Corp.'s CEO, Stephen Elop, and others in Finland. Nokia Inc. has suggested that the agreements with Microsoft and MOSAID were negotiated by Nokia Corp. in Finland and hence the knowledgeable witness(es) and responsive documents are likely to be located in Finland. Since these constitute major agreements and strategies for Nokia and Microsoft, it is highly likely that they performed detailed analyses regarding these agreements. Thus, Barnes &amp; Noble believes that the evidence requested exists and is in the possession of Nokia Corp.</p> |
| <p>9. Identity and address of any person to be examined:</p>   | <p>Stephen Elop<br/> Kai Öistämö<br/> Mary T. McDowell<br/> Jaakko Kaskinen<br/> Jukka Nihtilä<br/> Nokia Corporation<br/> Keilalahdentie 2-4<br/> P.O. Box 226<br/> FIN-00045 Nokia Group<br/> Finland<br/> (Telephone No. 358 (0) 7180 08000)<br/> (Fax No. 358 7180 34003)</p>   |
| <p>10. Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined:</p> | <p>Please see the topics set forth in part 8 above.</p>   |
| <p>11. Documents or other</p>  | <p>In accordance with part 8 above, the executing judicial</p>  |

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| property to be inspected:  | authority is respectfully requested to require Nokia to produce the documentary evidence set forth in that part.  |
| 12. Any requirement that the evidence be given under oath or affirmation and any specific form to be used: | <p>The following is respectfully requested:</p> <ul style="list-style-type: none"> <li>a. An examiner or other appropriate judicial officer of Finland direct that the witness be duly sworn in accordance with the applicable procedures of Finland;</li> <li>b. The testimony be recorded by the court, and the court provide Barnes &amp; Noble with a copy of the tape; and</li> <li>c. The court allow the parties to record the testimonies by a videographer chosen by Barnes &amp; Noble's legal representatives.</li> </ul> <p>In the event that the evidence cannot be taken in the manner requested, it is to be taken in such manner as provided by local law for the formal taking of evidence.</p>  |
| 13. Special method or procedure to be followed:  | <p>Pursuant to Article 9 of the Hague Convention, it is respectfully requested that:</p> <ul style="list-style-type: none"> <li>a. The examination be conducted orally;</li> <li>b. The parties' legal representatives or their designees, their interpreters, a stenographer and a videographer be permitted to be present during the examination;</li> <li>c. The stenographer be permitted to record verbatim the examination;</li> <li>d. The videographer be permitted to record the examination by audiovisual means;</li> <li>e. The attorneys identified above in part 6 from the law firm of Lindfors &amp; Co Attorneys at Law, acting as legal representatives to Barnes &amp; Noble, along with the attorneys identified above in part 6 from the law firm Cravath, Swaine &amp; Moore LLP be permitted to conduct the examination and ask questions regarding the topics listed in part 8 above;</li> <li>f. The witness(es) be examined as soon as</li> </ul> |

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|   | <p>practicable, but before December 14, 2011, the date for the close of discovery; and the documentary evidence be produced at least ten (10) days before the examination of the witnesses.</p>   |
| <p>14. Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified:</p> | <p>The undersigned respectfully requests, pursuant to Article 7 of the Hague Convention, that it be informed in writing of the time when and the place where the proceedings will take place at:</p> <p>Honorable Theodore R. Essex<br/> Administrative Law Judge<br/> United States International Trade Commission<br/> 500 E Street, N.W., Room 317<br/> Washington, D.C. 20436</p> <p>It is also requested that notification of the time and place for the execution of this Request be sent to the following representatives of the parties by way of facsimile or e-mail:</p> <p>V. James Adduci II<br/> Andrew Pratt<br/> Jonathan J. Engler<br/> ADDUCI, MASTRIANI &amp; SCHAUMBERG LLP<br/> 1200 Seventeenth Street, NW, Fifth Floor<br/> Washington, D.C. 20036<br/> Telephone: (202) 467-6300<br/> Fax: (202) 467-2006<br/> E-mail: MSFT-2@adduci.com, MSFT-L14External@woodcock.com, MSFT BN@orrick.com</p> <p>Robert A. Rosenfeld<br/> ORRICK, HERRINGTON &amp; SUTCLIFFE LLP<br/> 405 Howard Street<br/> San Francisco, CA 94105<br/> Telephone: (415) 773-5700<br/> Fax: (415) 773-5759<br/> E-mail: rrosenfeld@orrick.com</p> <p>Stuart W. Gold<br/> Stephen S. Madsen<br/> Peter T. Barbur<br/> CRAVATH, SWAINE &amp; MOORE LLP<br/> Worldwide Plaza<br/> 825 Eighth Avenue<br/> New York, NY 10019</p> |

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|   | <p>Telephone: (212) 474-1394<br/> Fax: (212) 474-3700<br/> E-mail: sgold@cravath.com</p> <p>Patrik Lindfors<br/> Petra Kiurunen<br/> LINDFORS &amp; CO ATTORNEYS AT LAW<br/> Kluuvikatu 3<br/> 00100 Helsinki<br/> Telephone: +358 20 762 2510<br/> Fax: +358 20 762 2519<br/> E-mail: petra.kiurunen@lindforsco.com</p> <p>Richard DeLucia<br/> Elizabeth Gardner<br/> John Kenny<br/> Paul Richter<br/> Charles Weiss<br/> Antony Pfeffer<br/> KENYON &amp; KENYON LLP<br/> One Broadway<br/> New York, NY 10004-1050<br/> Telephone: (212) 425-7200<br/> Fax: (212) 425-5288<br/> E-mail: 337-769Kenyon@kenyon.com</p> <p>Edward M. Lebow<br/> HAYNES AND BOONE, LLP<br/> 1615 L Street, N.W., Suite 800<br/> Washington, D.C. 20036<br/> Telephone: (202) 654-4514<br/> Fax: (202) 654-4244<br/> E-mail: HonHai769@haynesboone.com</p> <p>Jeffrey T. Hsu, Investigative Attorney<br/> OFFICE OF UNFAIR IMPORT INVESTIGATIONS<br/> U.S. International Trade Commission<br/> 500 E Street, S.W., Suite 401<br/> Washington, D.C. 20436<br/> Telephone: (202) 205-2516<br/> Fax: (202) 205-2158<br/> E-mail: Jeffrey.Hsu@usitc.gov</p> |
| 15. Request for attendance or participation of judicial personnel of the requesting authority at the execution of | None.   |

|  |   |
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| the Letter of Request:   |   |
| 16. Specification of privilege or duty to refuse to give evidence under the law of the state of origin:  | <p>The witness(es) may refuse to give evidence only insofar as he or she has a privilege or duty to refuse to give evidence under the laws of the United States or the laws of Finland.</p> <p>Under the law of the United States, the witness(es) may refuse to answer any question if such answer (1) would subject him to a real and appreciable danger of criminal liability in the United States, or (2) would disclose a confidential communication between him and his attorney.</p> |
| 17. The fees and costs incurred which are reimbursable under the second paragraph of Article 14 or under Article 26 of the Convention, will be borne by: | <p>Stuart W. Gold<br/> Stephen S. Madsen<br/> Peter T. Barbur<br/> CRAVATH, SWAINE &amp; MOORE LLP<br/> Worldwide Plaza<br/> 825 Eighth Avenue<br/> New York, NY 10019<br/> U.S.A.<br/> (Attorneys for Respondent Barnes &amp; Noble)</p>   |
| 18. Date of request:   | <p><u>December 2</u>, 2011<br/> Month Day</p>   |
| 19. Signature and seal of the requesting authority:  | <p></p> <hr/> <p>Hon. Theodore E. Essex<br/> Administrative Law Judge<br/> United States International Trade Commission</p>   |



# EXHIBIT B



TIEDOKSIANTOTODISTUS

ASIA/diaarinumero 22 / 722 / 2011  
337/TA / 769

Yllä mainittuun asiaan liittyvä asiakirja liitteineen on annettu tiedoksi

Nokia Corporation / Minna Jokinen

(Nimi /virka-asema , esim yhtiölle annettaessa tarvittaessa selvennettävä).

Tiedoksiannon vastaanottajalle on samalla annettu jäljennökset asiakirjoista.

Tiedoksianto aika ja -paikka

21.12.2011 Espoossa

Tiedoksiannon toimittajan allekirjoitus (haastemies)

Virka-asema, nimen selvennys ja puhelinnumero

**Minna Molsio**  
haastemies  
Espoon kärjäoikeus  
Puh 010 384 5060  
050-405 8249

Syy sijaistiedoksiannon käyttämiseen /este tiedoksiannolle

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

# EXHIBIT C

Translation from Finnish

Code of Judicial Procedure 1<sup>st</sup> January 1734/4

**CHAPTER 11 (22<sup>nd</sup> July 1991/1056)**

**Service in legal proceedings (11th July 1997/690)**

**Section 2 (22<sup>nd</sup> July 1991/1056)**

The court can with the consent of a party assign attending to service to a party if the court holds that there is cause to do so. At the same time, the court shall order when a document shall at the latest be served and when a certificate of service shall at the latest be delivered to the court. (14th May 2010/362)

If service of a summons is entrusted to the plaintiff, he shall be informed that if he has failed by the date when the court resumes the hearing of the case to deliver a certificate of service of the summons within the deadline and as laid down, the matter can be withdrawn. At the same time, it shall be notified that the plaintiff can request an extension to the deadline, a new deadline or that the court attend to service.

**CHAPTER 17 (29th July 1948/571)**

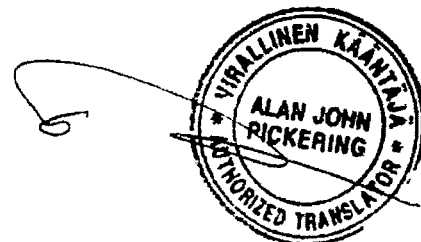
**Presentation of evidence**

**Obligation to produce a document**

**Section 12 (29th July 1948/571)**

Whoever has a document in his possession shall be under an obligation, when it can be assumed that the document is of significance as evidence in the matter, to bring it to the court. Nevertheless, this provision shall not be applied in a criminal case to an accused person and to a person related to him as referred to in section 20.

A party or a person related to him as referred to in section 20 shall not be under an obligation to produce a document containing communication between the party and that person, or persons in the said relationship. A public servant or other person mentioned in section 23 shall not present a document if it can be assumed to contain information concerning which he could not be heard as a witness; if a document is in the possession of the party in whose interest the obligation to observe secrecy has been laid down, he shall not be under an obligation to produce it. What is laid down in section 24 regarding a witness's right to refuse to disclose a fact or to answer a question or to give a statement shall be applied correspondingly to the obligation to produce a document if the content of the document is as referred to in this section of law.



A written note or other document that is intended solely for personal use shall not be ordered to be brought to court unless very important reasons demand it.

**Section 24 (29th July 1948/571)**

A witness may refuse to disclose a fact or to answer a question if he could not do it without making himself, or others who are related to him as referred to in section 20, liable to prosecution. A witness may likewise refuse to give a statement with which a trade or professional secret would become disclosed, unless very important reasons demand that the witness be questioned on them.

The author, publisher or broadcaster of a communication made available to the public referred to in the Act on the Exercise of Freedom of Speech in the Mass Media (460/2003) may refuse to answer the question regarding who has provided that data that the communication is based on, likewise a question that cannot be answered without disclosing the provider of the data. The same right is enjoyed by a party that has learnt of the aforesaid aspects while in the service of the author, publisher or broadcaster of the communication. (13th June 2003/461)

The person mentioned above in paragraph 2 may also refuse to answer the question regarding who has drafted the communication made available to the public, likewise a question which cannot be answered without disclosing the identity of the author of the communication. (13th June 2003/461)

Whenever the matter referred to in paragraph 2 or 3 concerns a crime which may lead to six years' imprisonment or a more severe punishment, or an attempt at a crime of the said kind or complicity in it, or information that has been provided contrary to such an obligation to maintain secrecy, for the violation of which a punishment has been laid down separately, the person mentioned in the said paragraph can nevertheless be obligated to answer the question referred to therein. (19th July 1974/622)

**Section 26 (22nd July 1991/1056)**

When a person appointed as a witness is present in court, he is under an obligation to testify immediately.

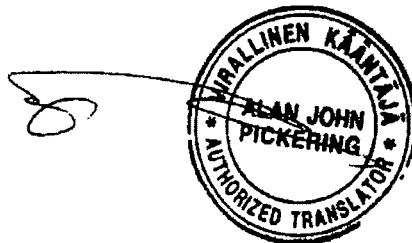
*Paragraph 2 has been repealed by the Act of 11<sup>th</sup> July 1997/690.*

The court shall attend to the summoning of a witness, unless it has on a ground mentioned in chapter 11, section 2, been assigned to be dealt with by the parties. A witness shall be summoned on penalty of a fine set by the court and the summons shall be served on the witness personally as laid down in chapter 11, sections 3, 3 b and 4. (14th May 2010/362)

The witness shall be notified in the summons on the date and time as well as where the hearing is to be held. The requisite information on the parties and matter shall also be mentioned in the summons. In addition, what is laid down in sections 36 and 39 as well as in section 40, paragraphs 4 and 5, shall be declared in the summons.

For a true translation,

Helsinki, 30<sup>th</sup> December 2011



## Oikeudenkäymiskaari 1.1.1734/4

### **11 LUKU (22.7.1991/1056)**

#### **Tiedoksiannosta oikeudenkäynnissä (11.7.1997/690)**

##### **2 § (22.7.1991/1056)**

Tuomioistuin voi asianosaisen suostumuksella antaa tiedoksiannosta huolehtimisen asianosaiselle, jos tuomioistuin katsoo siihen olevan aihetta. Samalla tuomioistuimen on määrättävä, milloin asiakirja on viimeistään annettava tiedoksi ja milloin todistus tiedoksiannosta on viimeistään toimitettava tuomioistuimelle. (14.5.2010/362)

Jos haasteen tiedoksiantaminen uskotaan kantajalle, hänelle on ilmoitettava, että mikäli hän ei ole siihen mennessä, kun tuomioistuin jatkaa asian käsittelyä, toimittanut todistusta haasteen tiedoksiantamisesta määrättyssä ajassa ja säädetyllä tavalla, asia voidaan jättää sillensä. Samalla on ilmoitettava, että kantaja voi pyytää määräajan pitennystä, uutta määräaikaa tai tuomioistuinta huolehtimaan tiedoksiannosta.

### **17 LUKU (29.7.1948/571)**

#### **Todistelusta**

##### **Asiakirjan esittämisvelvollisuus**

##### **12 § (29.7.1948/571)**

Jolla on asiakirja hallussaan, olkoon velvollinen, kun voidaan olettaa asiakirjalla olevan merkitystä todisteena asiassa, tuomaan sen oikeuteen. Tätä säännöstä älköön kuitenkaan rikosasiassa sovellettako syytettyyn ja häneen 20 §:ssä sanotussa suhteessa olevaan henkilöön.

Asianosainen tai häneen 20 §:ssä mainitussa suhteessa oleva henkilö älköön olko velvollinen esittämään asiakirjaa, joka sisältää asianosaisen ja tuon henkilön tahii sanotussa suhteessa olevien henkilöiden välisen tiedonannon. Virkamies tai muu 23 §:ssä mainittu henkilö älköön esiintuoko asiakirjaa, jos sen voidaan olettaa sisältävän sellaista, josta häntä ei voitaisi kuulla todistajana; jos asiakirja on sen asianosaisen hallussa, jonka eduksi vaitiovelvollisuus on säädetty, älköön hän olko velvollinen esittämään sitä. Mitä 24 §:ssä säädetään todistajan oikeudesta kieltäytyä kertomasta seikkaa tai vastaamasta kysymykseen tahii antamasta lausumaa, sovellettakoon vastaavasti asiakirjan esittämisvelvollisuuteen, jos asiakirjan sisältö on sellainen, kuin tässä lainkohdassa tarkoitetaan.

Sellaista kirjallista muistiinpanoa tai muuta kirjoitusta, joka on tarkoitettu yksinomaan henkilökohtaista käyttöä varten, älköön määrättäkö tuotavaksi oikeuteen, elleivät erittäin tärkeät syyt sitä vaadi.

**24 § (29.7.1948/571)**

Todistaja saa kieltäytyä kertomasta seikkaa tai vastaamasta kysymykseen, jos hän ei voisi sitä tehdä saattamatta syytteen vaaraan itseään tai toisia, joka on häneen sellaisessa suhteessa, kuin 20 §:ssä on sanottu. Todistaja saa niin ikään kieltäytyä antamasta lausumaa, jolla liike- tai ammattisalaisuus tulisi ilmaista, jolleivät erittäin tärkeät syyt vaadi, että todistajaa kuulustellaan niistä.

Sananvapauden käyttämisestä joukkoviestinnässä annetussa laissa (460/2003) tarkoitettu yleisön saataville toimitetun viestin laatija taikka julkaisija tai ohjelmatoiminnan harjoittaja saa kieltäytyä vastaamasta kysymykseen, kuka on antanut viestin perusteena olevat tiedot, samoin kuin kysymykseen, johon ei voi vastata paljastamatta tietojen antajaa. Sama oikeus on sillä, joka on saanut tiedon edellä mainituista seikoista ollessaan asianomaisen viestin laatijan taikka julkaisijan tai ohjelmatoiminnan harjoittajan palveluksessa. (13.6.2003/461)

Edellä 2 momentissa mainittu henkilö saa kieltäytyä vastaamasta myös kysymykseen, kuka on laatinut yleisön saataville toimitetun viestin, samoin kuin kysymykseen, johon ei voi vastata paljastamatta viestin laatijan henkilöllisyyttä. (13.6.2003/461)

Milloin 2 tai 3 momentissa tarkoitettu asia koskee rikosta, mistä saattaa seurata vankeutta kuusi vuotta tai ankarampi rangaistus, taikka sanotunlaisen rikoksen yritystä tai osallisuutta siihen, taikka tietoa, joka on annettu vastoin sellaista salassapitovelvollisuutta, jonka rikkomisesta on erikseen säädetty rangaistus, voidaan sanotussa momentissa mainittu henkilö kuitenkin velvoittaa vastaamaan siinä tarkoitettuun kysymykseen. (19.7.1974/622)

**26 § (22.7.1991/1056)**

Kun todistajaksi nimetty on tuomioistuimessa saapuvilla, hän on velvollinen heti todistamaan.

*2 momentti on kumottu L:lla 11.7.1997/690.*

Todistajan kutsumisesta huolehtii tuomioistuin, jollei sitä 11 luvun 2 §:ssä mainitulla perusteella ole annettu asianosaisten huolehdittavaksi. Todistaja on kutsuttava tuomioistuimen asettaman sakon uhalla ja kutsu on annettava todistajalle henkilökohtaisesti tiedoksi siten kuin 11 luvun 3, 3 b ja 4 §:ssä säädetään. (14.5.2010/362)

Kutsussa on todistajalle ilmoitettava, minä päivänä ja kellonaikana sekä missä istunto pidetään. Kutsussa on myös mainittava tarpeelliset tiedot asianosaisista ja asiasta. Lisäksi kutsussa on ilmoitettava, mitä 36 ja 39 §:ssä sekä 40 §:n 4 ja 5 momentissa säädetään.

# EXHIBIT D



Translation from Finnish

1990 ps. – GB no. 16

**Government bill to Parliament for Act on Amending the provisions on service in civil cases in the Code of Judicial Procedure and certain other acts**

## **DETAILED REASONS**

### **1. Reasons for the legislative proposals**

#### **1.1. The Code of Judicial Procedure**

##### **Chapter 11. On service in legal proceedings and on a summons in a criminal matter**

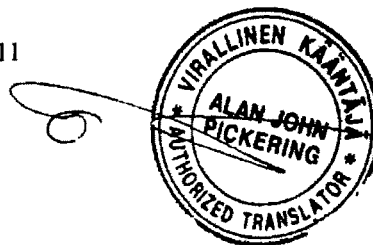
Section 2. Even though attending to service would indeed, as a rule, be the task of the court, it is proposed in paragraph 1 of the section, nevertheless, for the reasons described above in the general justifications, that it be laid down that a party can itself attend to the effecting of service. Under the section, this is nevertheless possible only when the party requests it from the court, and the court holds that there is justified cause to do so.

A party would thus on the basis of the section under consideration be under no obligation to attend to service, and he could not be compelled to do so. A party would nevertheless be under an obligation of this kind on the grounds of special provisions that are still to be complied with. Thereby on the grounds of the Payment Orders Act, section 6, a creditor would still attend to service in payment order proceedings.

The fact, for example, that he is evidently in a better position than the authority to learn where a person sought is residing can be regarded as a justified cause, referred to in the section, for assigning service to be dealt with by the party. The fact that service shall be effected urgently can be regarded as another possible situation. Service ought nevertheless not to be assigned for a party to attend to, for example, when it can be assumed that it is advantageous for the party to delay service or to decline to effect service or to effect it incorrectly.

On the basis of the section under consideration, service could be assigned to a party in all stages of the legal proceedings. On the other hand, a court that has assigned attending to service to a party, can later, if a reason to do so arises, on the grounds of section 19, paragraph 2, decide that it will itself attend to service.

For a true translation, Helsinki, 30<sup>th</sup> December 2011



1990 vp. – HE n.o 16

**Hallituksen esitys Eduskunnalle laiksi oikeudenkäymiskaaren sekä eräiden muiden lakien tiedoksiantoa riita-asioissa koskevien säännösten muuttamisesta**

**YKSITYISKOHTAISET PERUSTELUT**

**1. Lakiehdotusten perustelut**

**1.1. Oikeudenkäymiskaari**

**11 luku. Tiedoksiannosta oikeudenkäynnissä ja haasteesta rikosasiassa**

2 §. Vaikka tiedoksiantamisesta huolehtiminen olisikin pääsääntöisesti tuomioistuimen tehtävänä, ehdotetaan pykälän 1 momentissa kuitenkin edellä yleisperusteluissa selostetuista syistä säädettäväksi, että asianosainen voi itse huolehtia tiedoksiannon toimittamisesta. Pykälän mukaan tämä on kuitenkin mahdollista ainoastaan silloin, kun asianosainen pyytää sitä tuomioistuimelta ja tuomioistuin katsoo siihen olevan perusteltua aihetta.

Asianosaisella ei olisi siis käsiteltävänä olevan pykälän perusteella mitään velvollisuutta huolehtia tiedoksiannosta, eikä häntä voitaisi siihen pakottaa. Tällainen velvollisuus asianosaisella olisi kuitenkin edelleen noudatettavien erityissäännösten nojalla. Siten maksamismääräyslain 6 §:n nojalla velkoja huolehtisi edelleen tiedoksiannosta maksamismääräysmenettelyssä.

Pykälässä tarkoitettuna perusteltuna aiheena tiedoksiannon antamiselle asianosaisen huolehdittavaksi voidaan pitää esimerkiksi sitä, että hänellä ilmeisesti on viranomaista paremmat mahdollisuudet saada tieto siitä, missä etsittävä henkilö oleskelee. Toisena tilanteena voidaan pitää sitä, että tiedoksianto on toimitettava kiireellisesti. Tiedoksiantoa ei kuitenkaan tulisi antaa asianosaisen huolehdittavaksi esimerkiksi silloin, kun voidaan olettaa, että asianosaiselle on edullista viivyttää tiedoksiantamista tai jättää tiedoksiantaminen toimittamatta taikka toimittaa se väärin.

Käsiteltävänä olevan pykälän perusteella tiedoksianto voitaisiin antaa asianosaisen tehtäväksi oikeudenkäynnin kaikissa vaiheissa. Toisaalta tuomioistuin, joka on antanut tiedoksiannosta huolehtimisen asianosaisen tehtäväksi, voi myöhemmin, jos siihen syytä ilmenee, 19 §:n 2 momentin nojalla päättää, että se huolehtii itse tiedoksiantamisesta.

# Declaration of Shelly Crowley

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

Before the Honorable Theodore R. Essex  
Administrative Law Judge

In the Matter of

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

Investigation No. 337-TA-769

DECLARATION OF SHELLY CROWLEY IN SUPPORT OF NOKIA  
CORPORATION'S MOTION TO QUASH BARNES & NOBLE, INC. AND  
BARNESANDNOBLE.COM'S LETTER OF REQUEST TO THIRD PARTY NOKIA  
CORPORATION AND REQUEST TO NOTIFY THE CENTRAL AUTHORITY OF  
FINLAND OF THE FILING OF THE MOTION TO QUASH

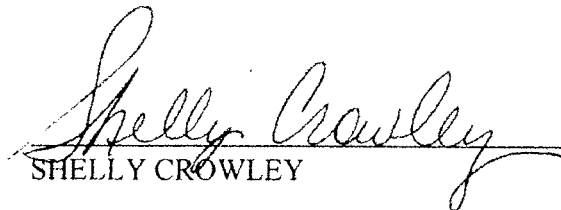
I, Shelly Crowley, declare as follows:

1. I am a litigation paralegal at Nokia Inc. and I have been employed by Nokia Inc. continuously since March 1, 1999. I have personal knowledge of the facts contained in this declaration and, if called upon to testify to the truth of them, I could and would do so competently.

2. I confirmed with the office of the chief legal officer of Nokia that Mary T. McDowell is a member of Nokia's Leadership Team and VP. She is an employee of Nokia UK Limited and is located in London, United Kingdom.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: January 3, 2012

  
SHELLY CROWLEY

# Declaration of Aapo Saarikivi

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**Before the Honorable Theodore R. Essex  
Administrative Law Judge**

**In the Matter of**

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

**Investigation No. 337-TA-769**

**DECLARATION OF AAPO SAARIKIVI IN SUPPORT OF NOKIA CORPORATION'S  
MOTION TO QUASH BARNES & NOBLE, INC. AND BARNESANDNOBLE.COM'S  
LETTER OF REQUEST TO THIRD PARTY NOKIA CORPORATION AND REQUEST  
TO NOTIFY THE CENTRAL AUTHORITY OF FINLAND OF THE FILING OF THE  
MOTION TO QUASH**

I, Aapo Saarikivi, declare as follows:

1. I am a senior associate with the Finnish law firm Roschier, counsel for Nokia Corporation. I have personal knowledge of the facts contained in this declaration and, if called upon to testify to the truth of them, I could and would do so competently.

2. On December 21, 2011, I contacted each of the Finnish District Courts of Helsinki and Espoo, and I requested them to list all pending matters involving Nokia Corporation in order to ascertain the status of Barnes & Noble's Letter of Request that was served on Nokia Corporation on the 21st of December, 2011 in Finland. The Letter of Request was not among the matters pending before the courts.

3. On December 23, 2011, I contacted Tuuli Kainulainen of the Finnish Ministry of Justice via telephone regarding the Letter of Request received by Nokia Corporation.

4. On December 23, 2011, I contacted Tuuli Kainulainen of the Finnish Ministry of Justice via electronic mail regarding the untimely nature of the Letter of Request and the

noncompliance of the Letter of Request with provisions of the Hague Convention. A true and correct copy of the electronic mail is attached hereto as Exhibit 1. An unofficial English translation of the electronic mail is attached hereto as Exhibit 2.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 3, 2012



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AAPO SAARIKIVI

# EXHIBIT 1



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**From:** Aapo Saarikivi [Aapo.Saarikivi@roschier.com]  
**Sent:** Friday, December 23, 2011 3:57 AM  
**To:** tuuli.kainulainen@om.fi  
**Cc:** Petri Taivalkoski  
**Subject:** Oikeusapupyynnö Barnes & Noble [ROSCH-WDocs.FID208795]

Hei,

Äskeiseen puheluunne viitatakseni kiitokset vielä ajastasi ja neuvoistasi näin joulun kynnyksellä.

Nokian alustavat huomiot oikeusapupyynnöön siis olivat:

- 1) Olisi tärkeää selvittää ITC:ltä itseltään, onko oikeusapupyynnö yhä voimassa ja/tai ajankohtainen siitä huolimatta, että vastausta on pyydetty 25.11.2011 mennessä ja että fact discovery on ITC:ssä päättynyt jo 14.12.2011.
- 2) Suomi on antanut Haagin konvention 23 artiklan mukaisen varauman, jonka mukaan se ei tule suostumaan oikeusapupyynnöihin, joiden tarkoituksena on toteuttaa common law –maissa tunnettu "pre-trial discovery of documents". Oikeusapupyynnön perusteella vaikuttaa selvältä, että Nokialle esitetyt asiakirjoja koskevat esittämispyynnöt ovat juuri 23 artiklassa kuvailtuja pyyntöjä.

Jos ymmärsin oikein, oikeusministeriö selvittää asiaa ja olette yhteydessä meihin ensi viikon loppupuolella tai uuden vuoden jälkeen. Kuten mainitsin, olen poissa toimistolta välipäivät mutta minuun saa tarvittaessa yhteyden puhelimitse tai sähköpostitse. Yhteystietoni selviävät sähköpostiallekirjoituksesta.

Toivotan rauhallista joulua,

Aapo Saarikivi

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Roschier, Attorneys Ltd. Business ID:9209362-9

# EXHIBIT 2

**From:** Apoo Saarikivi  
**Sent:** 23 December 2011 10:57  
**To:** 'tuuli.kainulainen@om.fi'  
**Cc:** Petri Taivalkoski  
**Subject:** Request for Judicial Assistance Barnes & Noble

Hello,

With reference to our telephone conversation just now, thank you again for your time and advice this close to Christmas.

As discussed, Nokia's preliminary remarks to the Request for Judicial Assistance were:

- 1) It would be important to enquire from the ITC itself whether the Request for Judicial Assistance is still in force and/or topical despite the fact that a response was requested by 25 November 2011 and that fact discovery with the ITC has already ended on 14 December 2011.
- 2) Finland has made a reservation in accordance with Article 23 of the Hague Convention according to which it is not going to execute Letters of Request issued for the purpose of obtaining "pre-trial discovery of documents" as known in the common law countries. Based on the Request for Judicial Assistance it seems evident that the document production requests directed at Nokia are such requests as described in Article 23.

If I understood correctly, the Ministry of Justice will look into the matter and you will contact us towards the end of next week or after New Year's. As mentioned, I will be out of office between Christmas and New Year's, but you can reach me by phone or by e-mail if needed. My contact details can be found in my e-mail signature.

I wish you a peaceful Christmas,

**Aapo Saarikivi**

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Roschier, Attorneys Ltd. Business ID:9209362-9

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.**

**Before the Honorable Theodore R. Essex  
Administrative Law Judge**

**In the Matter of**

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

**Investigation No. 337-TA-769**

**ORDER**

Upon consideration of Non-Party Nokia Corporation's Motion To Quash Barnes & Noble, Inc. And Barnesandnoble.com's Letter Of Request to Third Party Nokia Corporation And Request To Notify The Central Authority Of Finland Of The Filing Of The Motion To Quash, it is hereby

ORDERED that the motion is granted, and it is further

ORDERED that the Request For International Judicial Assistance Pursuant To The Hague Convention Of 18 March 1970 On The Taking Of Evidence Abroad In Civil Or Commercial Matters served on Nokia Corporation on December 21, 2011 is quashed.

Date: \_\_\_\_\_

\_\_\_\_\_  
Theodore R. Essex  
Administrative Law Judge

UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

Before the Honorable Theodore R. Essex  
Administrative Law Judge

In the Matter of

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

Investigation No. 337-TA-769

**ORDER**

Upon consideration of Non-Party Nokia Corporation's Motion To Quash Barnes & Noble, Inc. And Barnesandnoble.com's Letter Of Request to Third Party Nokia Corporation And Request To Notify The Central Authority Of Finland Of The Filing Of The Motion To Quash ("Nokia's Motion"), it is hereby

ORDERED that the Clerk of the Commission is directed to provide notice to the Central Authority appointed by the Government of Finland under Article 2 of the Hague Convention Of 18 March 1970 On The Taking Of Evidence Abroad In Civil Or Commercial Matters of Nokia Corporation's Motion and that the filing of such motion "automatically stays" compulsory third-party discovery under Ground Rule 4.6.4 of the Court's Rules of Procedure.

Date: \_\_\_\_\_

\_\_\_\_\_  
Theodore R. Essex  
Administrative Law Judge

**United States International Trade Commission**

**Investigation No. 337-TA-769**

**In the Matter of Certain Handheld Electronic Computing Devices, Related Software, and Components Thereof**

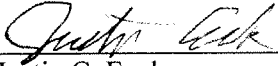
**CERTIFICATE OF SERVICE**

The undersigned certifies that, on January 3, 2012 he caused the foregoing **MOTION TO QUASH BARNES & NOBLE, INC. AND BARNESANDNOBLE.COM'S LETTER OF REQUEST TO THIRD PARTY NOKIA CORPORATION AND REQUEST TO NOTIFY THE CENTRAL AUTHORITY OF FINLAND OF THE FILING OF THE MOTION TO QUASH** to be served upon the following parties as indicated below:

|   |  |
|---|--|
| <p>The Honorable James R. Holbein<br/>Secretary<br/>U.S. International Trade Commission<br/>500 E Street S.W., Room 112<br/>Washington, D.C. 20436</p>  | <p><input checked="" type="checkbox"/> Via Electronic Filing<br/><input checked="" type="checkbox"/> Via Hand Delivery (Two Copies by the following day by noon)</p>   |
| <p>Hon. Theodore R. Essex<br/>Administrative Law Judge<br/>U.S. International Trade Commission<br/>500 E Street, S.W., Room 317<br/>Washington, DC 20436</p>  | <p><input checked="" type="checkbox"/> Via Hand Delivery (Two Copies)<br/><input checked="" type="checkbox"/> Via Electronic Service<br/>tamara.foley@usitc.gov</p>  |
| <p>Jeffrey Hsu<br/>Office of Unfair Import Investigations<br/>U.S. International Trade Commission<br/>500 E Street, S.W.<br/>Washington, DC 20436</p>   | <p><input checked="" type="checkbox"/> Via Hand Delivery<br/><input type="checkbox"/> Via First Class Mail<br/><input type="checkbox"/> Via Overnight Delivery<br/><input checked="" type="checkbox"/> Via Electronic Service<br/>jeffrey.hsu@usitc.gov</p>  |
| <p><i>Counsel for Complainant Microsoft Corporation:</i><br/><br/>V. James Adduci<br/><b>Adduci, Mastriani &amp; Schaumberg LLP</b><br/>1200 Seventeenth Street, NT 5<sup>th</sup> Floor<br/>Washington, DC 20036</p> | <p><input checked="" type="checkbox"/> Via Hand Delivery<br/><input type="checkbox"/> Via First Class Mail<br/><input type="checkbox"/> Via Overnight Delivery<br/><input checked="" type="checkbox"/> Via Electronic Service<br/>MSFT-2@adduci.com, MSFT-L14External@woodcock.com, MSTF_BN@orrick.com</p> |
| <p><i>Counsel for Respondents Barnes &amp; Noble, Inc. and barnesandnoble.com LLC:</i><br/><br/>Marcia H. Sundeen, Esq.<br/><b>Kenyon &amp; Kenyon LLP</b><br/>1500 K Street, NW<br/>Washington, DC 20005</p>         | <p><input checked="" type="checkbox"/> Via Hand Delivery<br/><input type="checkbox"/> Via First Class Mail<br/><input type="checkbox"/> Via Overnight Delivery<br/><input checked="" type="checkbox"/> Via Electronic Service<br/>msundeen@kenyon.com</p>  |

|  |  |
|--|--|
| <p><i>Counsel for Respondents Hon Hai Precision Industry Co., Ltd., Foxconn Electronics, Inc., Foxconn International Holdings Ltd., and Foxconn Precision Components (Shenzhen) Co., Ltd.</i></p> <p>Edward M. Lebow<br/> <b>Haynes and Boone LLP</b><br/> 1615 L Street, NW Suite 800<br/> Washington, DC 20036</p> | <input checked="" type="checkbox"/> Via Hand Delivery<br><input type="checkbox"/> Via First Class Mail<br><input type="checkbox"/> Via Overnight Delivery<br><input checked="" type="checkbox"/> Via Electronic Service<br>HonHai769@haynesboone.com |
| <p><i>Counsel for Respondent Inventec Corporation</i></p> <p>Richard L. DeLucia<br/> <b>Kenyon &amp; Kenyon LLP</b><br/> One Broadway<br/> New York, NY 10004</p>  | <input type="checkbox"/> Via Hand Delivery<br><input type="checkbox"/> Via First Class Mail<br><input checked="" type="checkbox"/> Via Overnight Delivery<br><input checked="" type="checkbox"/> Via Electronic Service<br>337-769Kenyon@kenyon.com  |

Dated: January 3, 2012

  
Justin C. Enck  
International Trade Paralegal Assistant  
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