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UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C.

**In the Matter of**

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

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

**RESPONDENTS BARNES & NOBLE, INC.'S AND BARNESANDNOBLE.COM  
LLC'S PETITION FOR REVIEW OF ORDER NO. 32: INITIAL  
DETERMINATION GRANTING MICROSOFT'S MOTION FOR SUMMARY  
DETERMINATION OF RESPONDENTS' FIRST AFFIRMATIVE DEFENSE OF  
PATENT MISUSE**

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### I. INTRODUCTION.

Respondents Barnes & Noble, Inc. and barnesandnoble.com LLC (collectively “Barnes & Noble”) respectfully submit this petition for review of Order No. 32, the Administrative Law Judge’s January 31, 2012 Initial Determination granting summary determination on Barnes & Noble’s First Affirmative Defense of Patent Misuse. The ALJ’s decision rests on both erroneous conclusions of law and a misstatement of the facts. Rather than reviewing all facts in the light most favorable to Barnes & Noble, as is required under ITC precedent, the ALJ’s decision actually mischaracterizes Barnes & Noble’s factual allegations (and the evidence supporting them) and, indeed, simply overlooks the central basis for Barnes & Noble’s patent misuse defense.

Consistent with the Federal Circuit’s *en banc* decision in *Princo Corp. v. International Trade Commission*, 616 F.3d 1318 (Fed. Cir. 2010), Barnes & Noble alleges and has adduced evidence demonstrating that Complainant Microsoft Corporation (“Microsoft”) has impermissibly “leveraged” or broadened the scope of the patents-in-suit through its “Android licensing program”. Specifically, Barnes & Noble has shown that the patents-in-suit—as well as certain other patents that Microsoft asserted against Barnes & Noble during licensing negotiations but did not sue on—cover at most trivial and outmoded details of certain implementations of the Android operating system. Put another way, Barnes & Noble has shown that these patents are not fundamental to the Android operating system and that once these patents are identified it would be easy for original equipment manufacturers (“OEMs”) to develop and sell mobile electronic devices based on the Android operating system that do not infringe these patents.

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Nonetheless, the evidence—all of which must be read in the light most favorable to Barnes & Noble with all inferences drawn in favor of Barnes & Noble and against Microsoft—shows that, through its Android licensing program, Microsoft:

- asserts that its patents cover every implementation of Android when in fact they do not;
- on that basis threatens to sue OEMs which sell *any* Android device—regardless of whether those devices in fact infringe any Microsoft patents—unless they take a license from Microsoft;
- asserts that it is impossible for OEMs to work around Microsoft’s patents because Microsoft will only show “sample” patents to the OEMs and will sue on other, unidentified patents if the OEMs work around the “sample” patents; and
- demands (under threat of litigation) that OEMs take a license from Microsoft that requires the OEMs to pay a hefty license fee to Microsoft for every Android device the OEMs sell *regardless of whether those devices actually infringe any Microsoft patents.*

Fairly read, this conduct impermissibly expands the scope of the patents-in-suit because Microsoft is using the patents-in suit, as part of its Android licensing program, to demand and extract licensing fees for products that do not infringe the patents-in-suit (or any other Microsoft patents). As the U.S. Supreme Court has held, conditioning a patent license on the payment of royalties for products that do not practice the patent is improper patent leveraging that constitutes patent misuse. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 136–38 (1969).

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The ALJ’s decision, however, does not squarely address what Barnes & Noble is complaining about, much less analyze this conduct under governing law. Rather, the ALJ’s decision incorrectly proceeds on the basis that “most of [Barnes & Noble’s] allegations are generalized allegations of commercial misconduct that bear no relation to the patents-in-suit or their licensing”. (Order No. 32, at 9.) To be sure, Barnes & Noble does rely on certain Microsoft conduct relating to patents other than the patents-in-suit because such conduct is part of a broader pattern of conduct—including the Android licensing program—that is intended to weaken the Android operating system and thereby prop up Microsoft’s monopoly in operating systems for personal computers (“PCs”). But it is simply not true that Barnes & Noble’s patent misuse defense relies primarily on those other patents or that Barnes & Noble is only making “generalized allegations of commercial misconduct”.

To the extent the ALJ’s decision addresses Microsoft’s Android licensing program, it does so by examining certain aspects of Microsoft’s conduct in isolation while ignoring how the conduct as a whole is impermissibly broadening the scope of the patents-in-suit. For example, the ALJ’s decision discusses (a) Microsoft’s refusal to identify the patents it believes are infringed by Android and (b) Microsoft’s assertions that it is impossible to work around Microsoft’s patents (even though that is not true) and concludes that, considered in isolation, this kind of conduct is not patent misuse but rather just “hard bargaining”. (*Id.* at 11.) The ALJ’s decision also concludes that charging high licensing fees for Android is not, in and of itself, contrary to law (Barnes & Noble never asserted that it was). (*Id.* at 12.) The ALJ’s decision briefly references Barnes & Noble’s claim that the patents-in-suit “are insufficient to dominate and control

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every implementation of the Android operating system” (*id.* at 12), but then analyzes that claim as if it concerned only whether the scope restrictions in the license Microsoft proposed to Barnes & Noble, considered in isolation, are permissible (*id.* at 12–14).

Barnes & Noble has never asserted that hard bargaining, high license fees or scope restrictions in a license, considered alone, always constitute patent misuse. Rather, Barnes & Noble asserts that Microsoft’s conduct in connection with its “Android licensing program”, when examined as a whole, constitutes patent misuse because through this conduct Microsoft is leveraging trivial patents—patents that could otherwise easily be worked around—in order to charge licensing fees for products that do not infringe any Microsoft patents at all.<sup>1</sup> Particularly in the context of a summary determination motion, Barnes & Noble is entitled to have these allegations and the supporting evidence read fairly and completely.

Accordingly, Barnes & Noble respectfully requests that the Commission review and reverse the ALJ’s Initial Determination and remand Barnes & Noble’s patent misuse defense for a hearing on the merits.

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<sup>1</sup> The ALJ’s error in addressing Barnes & Noble’s claim of patent leveraging on summary determination is compounded by the ALJ’s error in denying Barnes & Noble appropriate discovery concerning which of its patents Microsoft asserts are infringed by Android. As discussed below (*see* Parts II.F, IV.C *infra*), in response to Barnes & Noble’s claim that Microsoft has at most a handful of trivial and outmoded implementation patents relating to Android, Microsoft came forward with witness statements that relied on the “conclusions” of Microsoft’s Patent Analysis Group that Android infringed many more patents. However, the ALJ refused Barnes & Noble’s request for critical discovery to test those assertions, instead accepting Microsoft’s erroneous assertion that the “analyses” underlying the Patent Analysis Group’s “conclusions” are privileged.

II. BACKGROUND.

A. Microsoft Files a Complaint Against Barnes & Noble and Barnes & Noble Responds to Microsoft's Complaint.

On March 21, 2011, Microsoft filed a complaint against, among others, Barnes & Noble and requested that the Commission commence an investigation pursuant to Section 337 of the Tariff Act of 1930, as amended. In its complaint, Microsoft alleged that Barnes & Noble was infringing five Microsoft patents (*i.e.*, U.S. Patent Nos. 5,778,372; 5,889,522; 6,339,780; 6,891,551; and 6,957,233) through the sale of Barnes & Noble's Nook eReader devices. Microsoft sought an exclusion order and a cease-and-desist order to prevent Barnes & Noble from importing into or selling after importation within the United States its Nook products. (3/21/11 Am. Compl. ¶ 6.)<sup>2</sup>

Prior to filing suit, Microsoft had approached Barnes & Noble and asserted that, because the Nook devices were based on the Android operating system, Barnes & Noble required a license from Microsoft. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>2</sup> On April 8, 2011, Microsoft filed an Amended Complaint in which it supplemented its original complaint with six additional exhibits and amended six paragraphs of the original complaint in response to an inquiry from the Office of Unfair Import Investigations on April 6, 2011.

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[REDACTED] Indeed, Microsoft asserted that every Android device infringes Microsoft patents and requires a license from Microsoft.

[REDACTED]

[REDACTED]

[REDACTED] As part of these discussions, Microsoft identified six patents—*i.e.*, U.S. Patent Nos. 5,758,352; 5,579,517; 5,652,913; 6,339,780; 6,791,536; and 6,897,853 [REDACTED] that it said Barnes & Noble was infringing but insisted that these were only “sample” patents and, indeed, asserted that if Barnes & Noble attempted to work around these patents, Microsoft would assert other patents against Barnes & Noble. [REDACTED]

[REDACTED]; *see also* Ex. 78, Astarita Dep. Tr. at 161:19–24 (Microsoft made a “veiled

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<sup>3</sup> All references to “Ex.” are to the exhibits accompanying Barnes & Noble’s Response to Complainant Microsoft Corporation’s Motion for Summary Determination of Respondents’ First Affirmative Defense of Patent Misuse and all references to “MSFT Ex.” are to the exhibits accompanying Complainant Microsoft Corporation’s Motion for Summary Determination of Respondents’ First Affirmative Defense of Patent Misuse. (Mot. Docket No. 769-043.) Additionally, all references to “RX” are to Barnes & Noble’s trial exhibits which are cited in Barnes & Noble’s Pre-Hearing Brief. Because Barnes & Noble’s response to Microsoft’s motion for summary determination was filed only five days after the close of fact discovery and before any expert discovery had taken place for patent misuse, the ALJ should have also considered any additional facts that Barnes & Noble set forth in its January 17, 2012 Pre-Hearing Brief as part of his Initial Determination. (*See* 1/17/12 B&N Pre-Hr’g Br., at 288–332.) For the Commission’s convenience, Barnes & Noble has included all of the “Ex.” and “RX” exhibits from its prior filings as part of this submission. All “Ex.” exhibits are being submitted as their original exhibit numbers from Barnes & Noble’s Response to Microsoft’s motion for summary determination. All “RX” exhibits and any other exhibits to this petition for review that were not “Ex.” exhibits are referred to as “Pet. Ex.” exhibits throughout this petition.

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threat” that it had “a lot more things that [it] can conjure up based on the fact that [Microsoft has] this massive patent portfolio”); Ex. 5, Feuer Dep. Tr. at 61:5–11 (“And what they basically told us was, it doesn’t matter if you have defenses, whether you don’t infringe, whether our patents are invalid, you’re going to need to take a license, because there’s no way that you can get out of our grasp, that we have so many patents that we could overwhelm you.”).) Five of these six patents were different from the patents on which Microsoft ultimately sued Barnes & Noble. [REDACTED]

[REDACTED] Indeed, Microsoft only sued on one (No. 6,339,780) of the six patents it had identified during the preceding licensing discussions.

Also prior to filing suit, Microsoft sent a draft license agreement to Barnes & Noble that would have provided rights to certain Microsoft patents for Android-based electronic devices sold by Barnes & Noble. [REDACTED]

[REDACTED] When Microsoft and Barnes & Noble were unable to agree to the terms for such a license, Microsoft filed this lawsuit.<sup>4</sup>

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<sup>4</sup> On the same day that Microsoft filed its complaint in this Investigation, it also sued Barnes & Noble in the United States District Court for the Western District of Washington. *Microsoft v. Barnes & Noble, Inc. et al.*, No. 2:11-cv-00485 (RAJ). On

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On May 10, 2011, Barnes & Noble filed a Response to Microsoft's Amended Complaint in which it asserted several affirmative defenses, including an affirmative defense of patent misuse.<sup>5</sup> (*See* 5/10/11 Resp. to Am. Compl., at 24–41, ¶¶ 1–56.) As set forth in its Response, Barnes & Noble alleged, *inter alia*, that:

“Microsoft has impermissibly broadened the physical scope of the ’372, ’780, ’522, ’551, and ’233 patents in furtherance of a plan or scheme orchestrated by Microsoft and its agents to eliminate or marginalize the competition to Microsoft’s own Windows Phone 7 mobile device operating system posed by the open source Android™ Operating System and other open source operating systems. As part of this scheme, Microsoft has asserted patents that extend only to arbitrary, outmoded, or non-essential design features, but uses these patents to demand that every manufacturer of an Android-based mobile device take a license from Microsoft and pay exorbitant licensing fees or face protracted and expensive patent infringement litigation.” (*Id.* at 24, ¶ 2.)

In addition to alleging that Microsoft had impermissibly broadened the scope of its patents, Barnes & Noble also alleged that “Microsoft has a well-established monopoly in the PC operating system market” and “[t]hrough the use of these outdated and trivial patents in the mobile operating system market, Microsoft is attempting to minimize, or eliminate competition, for devices, including tablets, eReaders, and other mobile devices, that employ the Android™ Operating System and other open source operating systems, that pose a threat to Microsoft’s monopoly in the PC operating system market”. (*Id.* at 41, ¶ 56.)

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June 8, 2011, the proceedings in that federal court action were stayed. (6/8/11 Order, Docket Entry No. 43.)

<sup>5</sup> Barnes & Noble subsequently filed two amended Responses, on July 8, 2011 and August 24, 2011. None of the amendments to Barnes & Noble’s initial May 10, 2011 Response relates to Barnes & Noble’s First Affirmative Defense of Patent Misuse.

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- B. Microsoft Unsuccessfully Moves to Strike Barnes & Noble's Patent Misuse Defense and Seeks to Block Discovery Relating to Patent Misuse.

On April 28, 2011, Barnes & Noble served its first set of discovery requests on Microsoft and sought, among other things, information relating to Barnes & Noble's patent misuse defense. On May 16, 2011, Microsoft responded and objected to providing documents or information relating to Barnes & Noble's patent misuse defense, but Microsoft did not move for or obtain any stay of discovery or protective order relating to the requested discovery. Thereafter, Barnes & Noble sent Microsoft a letter on June 3, 2011, demanding that Microsoft "amend its responses" and agree to provide the requested information relating to Barnes & Noble's patent misuse defense. (*See* Pet. Ex. B (6/3/11 Letter from P. Richter to A. Goranin), at 2.)

On June 6, 2011, Microsoft filed a motion to strike Barnes & Noble's First Affirmative Defense of Patent Misuse. (6/6/11 Mot. to Strike (Mot. Docket No. 769-001).) Microsoft argued that Barnes & Noble's allegations of patent misuse were "routine patent licensing and enforcement practices" and insufficient as a matter of law to establish patent misuse. (*Id.* at 1.) As part of that motion, Microsoft did not seek or obtain any stay of discovery and did not disclose that it was unilaterally withholding all discovery relating to patent misuse. On June 16, Barnes & Noble filed a response to Microsoft's motion to strike. (6/16/11 B&N Resp. Mot. to Strike (Mot. Docket No. 769-002).) In its Response to the motion to strike, Barnes & Noble argued that it was inappropriate to strike its patent misuse defense because no discovery had yet taken place in the Investigation and Microsoft's motion "distort[ed] and artificially segment[ed] Barnes & Noble's [patent misuse] allegations". (*Id.* at 1.)

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On June 30, 2011, Microsoft sent a letter responding to Barnes & Noble's June 3, 2011 letter and acknowledged for the first time that Microsoft had been unilaterally withholding discovery related to patent misuse and stated that it would not provide any such discovery "unless and until Judge Essex's ruling on Microsoft's motion to strike the defense requires Microsoft to do so". (Pet. Ex. C (6/30/11 Letter from D. Goettle to P. Richter), at 1.) Barnes & Noble wrote the ALJ, noting that Microsoft's position violated his Ground Rules which provide that "[n]o motion stops discovery except a timely motion to quash a subpoena". (Ground Rule 3.8; *see also* Pet. Ex. D (7/18/11 Letter from P. Barbur to Judge Essex).)

During a teleconference on July 19, 2011, the ALJ ruled that Microsoft had "a duty to provide the discovery". (Pet. Ex. E (7/19/11 Hr'g Tr.) at 12:1–3.) The ALJ cautioned Microsoft that to "simply say that you're not going to provide discovery pending the outcome of a motion, that is not in the rules". (*Id.* at 9:17–20.) The ALJ instructed Microsoft to begin producing documents related to patent misuse: "Microsoft, until such time as I order discovery to cease, I want you to be providing it. We have not ruled yet regarding the misuse defense, so I don't expect you to just unilaterally say you're not going to provide discovery on those topics". (*Id.* at 20:15–19.)

Then, on October 3, 2011, the ALJ denied Microsoft's motion to strike Barnes & Noble's patent misuse defense. (Pet. Ex. F (Order No. 13).) In his Order, the ALJ found that Barnes & Noble's patent misuse defense "calls for the kind of in-depth analysis of heavily disputed areas of law and fact that other courts and Commission precedent has cautioned against". (*Id.* at 4 (citing *Certain Recordable Compact Discs & Rewritable Compact Discs*, Inv. No. 337-TA-474, 2002 WL 31863435, at 12–13 (Dec.

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11, 2002) (“It is not the task of the Administrative Law Judge to rule at this juncture without being informed of the facts revealed through discovery whether the affirmative defense justifies unenforceability of the patents-in-suit.”).)

C. Microsoft’s Delay in Producing Documents Relating to Patent Misuse Requires an Extension of the Period for Discovery Relating to Patent Misuse.

Even though the ALJ ordered Microsoft to immediately begin producing documents after the July 19 teleconference, by early October, Microsoft had only produced a small fraction of the requested documents related to patent misuse, and had completely failed to produce several categories of documents that were crucial to Barnes & Noble’s patent misuse defense. Then, with approximately three weeks left until the end of fact discovery on November 14, 2011, Microsoft dumped over 1.1 million pages of documents on Barnes & Noble—more documents than Microsoft produced from the start of discovery through the end of September—which Barnes & Noble could not have realistically reviewed prior to taking the depositions of Microsoft’s witnesses. (Pet. Ex. G (10/20/11 Letter from P. Barbur to Judge Essex), at 1, 3.) Because of this delayed production of patent misuse documents, and with impending depositions, Barnes & Noble sought and obtained (over Microsoft’s objection) a 30-day extension of the period for fact and expert discovery relating to patent misuse. (Pet. Ex. H (10/21/11 Hr’g Tr.) at 25:24–25.) As the ALJ noted, “certainly [Microsoft] didn’t find all those documents one day and have to give them over a million pages the next day because that’s when [Microsoft] found them. [Microsoft was] saving them up”. (*Id.* at 25:20–23.)



[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] And there were numerous other instances where Microsoft's counsel impeded Barnes & Noble from obtaining relevant information related to the Patent Analysis Group's conclusions and underlying analyses regarding Android based on the assertion of privilege. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

E. Microsoft Moves for Summary Determination on Barnes & Noble's Patent Misuse Defense.

Although the ALJ extended the period for fact and expert discovery relating to patent misuse, Microsoft would not agree to any corresponding extension of the deadlines for filing and briefing motions for summary determination. Thus, on December 7, 2011, with fact discovery still ongoing and expert discovery not even having commenced, Microsoft filed its motion for summary determination of Barnes & Noble's first affirmative defense of patent misuse. In its motion, Microsoft asserted that "Barnes & Noble has now received over two million pages of documents, deposed numerous top Microsoft executives, and submitted several expert reports in response to its patent misuse defense". (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def. (Mot. Docket No. 769-043), at 1.) But Microsoft cited virtually none of that evidence in its motion and instead argued—just as it had argued in connection with its motion to

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strike—that Barnes & Noble’s allegations could not establish patent misuse purely “as a matter of both statutory and common law”. (*Id.*)

On December 19, 2011, Barnes & Noble filed its response to Microsoft’s motion for summary determination motion. In addition to noting that Microsoft was essentially just repeating the losing legal arguments Microsoft had made in connection with its motion to strike, Barnes & Noble pointed to the substantial factual record that had been developed relating to Microsoft’s Android licensing program and its anticompetitive effects.<sup>6</sup> (B&N Resp. to Microsoft Mot. for Summ. Det. of B&N First Affirm. Def. (“B&N Resp.”) (Mot. Docket No. 769-043).) As Barnes & Noble noted, that factual record—although ignored by Microsoft—included numerous genuine issues of material fact that could not be determined at the summary determination stage. In particular, Barnes & Noble pointed to the following material facts:

- Microsoft demands (under threat of litigation) that OEMs take a license from it that requires the OEMs to pay a hefty license fee to Microsoft for every Android device the OEMs sell *regardless of whether those devices actually infringe any Microsoft patents* and Microsoft’s Android licenses require licensees to pay license fees not just for devices implementing current versions of Android but also devices incorporating future versions of Android regardless of whether those future versions incorporate

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<sup>6</sup> Barnes & Noble also argued that Microsoft’s motion was premature because the factual record was not complete and Microsoft filed its motion for summary determination just after it had produced hundreds of thousands of pages of additional documents and before numerous crucial depositions had taken place. In fact, Microsoft produced more than 20,000 additional pages of documents *after* it filed its motion for summary determination.

Microsoft's patents [REDACTED]

[REDACTED]

7

[REDACTED]

Ex. 114, Snow Dep. Tr. at 75:17–83:8 (describing uncertainty created by licensing terms); Ex. 5, Feuer Dep. Tr. at 164:13–18 (“[The licensing agreement, taken as a whole] would have affirmatively imposed incredibly-high costs, as well as incredible uncertainty, such that we might not make certain products because it would be uneconomic, and because of the uncertainty with respect to actions that Microsoft might take against us.”);

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- Both the patents-in-suit and the five other patents Microsoft asserted against Barnes & Noble during licensing negotiations (but on which it did not sue) concern only trivial and outmoded features relating to implementations of the Android operating system. (Pet. Ex. O (RX-2876C), at 0551 (“None of the[] five patents [that Microsoft showed Barnes & Noble on December 16, 2010], or the five patents-in-suit, either collectively or individually, has a scope sufficient to cover the entirety of the functionality of the Android platform.”); MSFT Ex. 7 (10/21/11 Opening Expert Report of Dr. Benjamin F. Goldberg), ¶¶ 29 & n.2, 33–34, 39, 45, 172 (concluding that the claims of the patents that Microsoft sued on are “trivial” and have “no significance to an electronic book reading device like the Nook”); MSFT Ex. 9 (11/21/11 Further Expert Report of Dr. Benjamin F. Goldberg), ¶ 16 (“As was the case with the ’372, ’522, ’780, ’551, and ’233 patents discussed in previous reports, it is my opinion that the claims of the ’517, ’352, ’536, and ’853 patents are trivial in the sense that they are directed to minor, insubstantial user interface or outdated file system features, and are unrelated to OS design as a

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whole.”.) None of these patents covers the core functions of Android; thus, even if these patents were valid and infringed (which they are not), it would be easy for OEMs such as Barnes & Noble to work around these patents and sell Android devices that do not infringe these patents. (Pet. Ex. N (RX-2760C), at 0034 (“And even if Barnes & Noble could in fact identify and work around all the relevant Microsoft patents, there is still a risk that Microsoft might have a different view and might assert additional patents in litigation.”).)

- Nonetheless, Microsoft asserts (falsely) that its patents cover every implementation of Android [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]
- On that basis, Microsoft threatens to sue OEMs which sell *any* Android device—regardless of whether those devices in fact infringe any Microsoft patents—unless they take a license from Microsoft [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]

[REDACTED]

- Although Microsoft has never made public which of its “over 65,000 patent assets” it believes are infringed by Android [REDACTED]

[REDACTED]

[REDACTED]—Microsoft approaches companies such as Barnes & Noble with only a “sample” of patents that allegedly are infringed by Android. Moreover, Microsoft affirmatively asserts that it is impossible for OEMs to work around Microsoft’s patents because Microsoft will sue

on other, unidentified patents if the OEMs work around the “sample” patents.<sup>8</sup>

- Many OEMs have agreed to the kind of license Microsoft demands, agreeing to pay substantial license fees to Microsoft for every Android device they sell, regardless of whether such devices actually infringe any Microsoft patents. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Two OEMs—Barnes & Noble and Motorola—refused to enter into this kind of license agreement and were sued. [REDACTED]

[REDACTED]

- As a result of Microsoft’s licensing demands for Android, OEMs are being driven away from Android.<sup>9</sup> In the short term, Microsoft’s conduct during

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<sup>8</sup> [REDACTED]

[REDACTED] Ex. 5, Feuer Dep. Tr. 61:5–11 (“And what they basically told us was, it doesn’t matter if you have defenses, whether you don’t infringe, whether our patents are invalid, you’re going to need to take a license, because there’s no way that you can get out of our grasp, that we have so many patents that we could overwhelm you.”).

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licensing negotiations raises costs for OEMs that use the rival Android operating system. In the long term, Microsoft's licenses make investment in Android more risky and reduce the incentives to innovate in Android.<sup>10</sup>

- Microsoft has resorted to these anticompetitive tactics because it perceives mobile devices as a threat to its PC operating system monopoly and because it has failed to innovate and keep up with other developers in the mobile and tablet spaces. [REDACTED]

[REDACTED]

[REDACTED]

9 [REDACTED]

Ex. 20, Gopalakrishnan Dep. Tr. at 177:6-9 (“So basically as a technical person and as a business person, what this is basically telling me is [‘] don’t use Android [‘].”);

[REDACTED]

<sup>10</sup> See, e.g., Pet. Ex. T, Bresnahan Dep. Tr. 141:14-23; *id.* at 190:24-194:14. Barnes & Noble’s expert witness on anticompetitive effects, Dr. Timothy F. Bresnahan, was not deposited until two weeks after the briefing on Microsoft’s summary determination motion had closed.

[REDACTED]

These facts, along with the other material facts set forth in Barnes & Noble's response to Microsoft's motion for summary determination, as well as the facts set forth in Barnes & Noble's Pre-Hearing Brief, were simply not addressed by the ALJ in his Initial Determination. As set forth below, the ALJ's failure to consider these material facts is erroneous and contrary to Commission law.

F. Microsoft's Witness Statements for the Hearing Rely on the Conclusions of Its Patent Analysis Group.

On January 20, 2012, Microsoft served Barnes & Noble with its rebuttal witness statements related to Barnes & Noble's patent misuse defense. Within those witness statements, particularly the fact witness statements of Messrs. Carl Brandt, David

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[REDACTED]

Kaefer and Horacio Gutierrez, as well as the expert witness statement of Mr. David Kaplan, Microsoft affirmatively points to and relies on analyses conducted by Microsoft’s Patent Analysis Group. Specifically, Microsoft relies on the alleged conclusion of its Patent Analysis Group that Android infringes multiple Microsoft patents—the exact same conclusion about which Microsoft’s counsel would not allow Mr. Brandt to testify. [REDACTED]

[REDACTED]

Similarly, the witness statement of Microsoft’s expert, Mr. Kaplan, explicitly relies on the conclusion of a “technical analysis” of Android conducted by Microsoft as to whether Android devices with less functionality infringe fewer Microsoft patents—the exact same conclusion about which Microsoft’s counsel would not allow Mr. Ward to testify. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Because, contrary to the positions it had taken during depositions, Microsoft indicated for the first time that it intended to rely on the conclusions of its Patent Analysis Group relating to Android, Barnes & Noble requested that Microsoft produce all documents concerning the analyses underlying those conclusions. (*See* Pet. Ex. AA (1/27/12 Letter from P. Barbur to Judge Essex); *see also* Pet. Ex. BB (1/23/12 Letter from P. Barbur to J. Jurata).) As Barnes & Noble noted, by affirmatively relying on the conclusions of its Patent Analysis Group related to Android, Microsoft had waived any privilege relating to the analyses underlying those conclusions. (*Id.*) Microsoft, however, refused to produce those documents and Barnes & Noble requested the intervention of the ALJ.

On January 30, 2012, a day before issuing his decision on Microsoft's motion for summary determination as to Barnes & Noble's patent misuse defense, the ALJ held a teleconference to resolve the issue. The ALJ did not address the legal authority cited by Barnes & Noble but nonetheless said he did not think that Microsoft's privilege had been waived. The ALJ also found that the legal conclusions of the Microsoft's witnesses are not admissible and that Barnes & Noble's request for the Patent Analysis Group's analyses was untimely. (Pet. Ex. CC (1/30/12 Hr'g Tr.) at 34:17–

37:20.) In sum, the ALJ concluded, “So we’re going to go to trial Monday [February 6, 2012]. There will be no more discovery. And I find there has not been waiver of privilege”. (*Id.* at 37:17–20.)

G. The ALJ Makes an Initial Determination Regarding Barnes & Noble’s Patent Misuse Defense.

The next day, January 31, 2012, the ALJ issued Order No. 32, the Initial Determination granting Microsoft’s motion for summary determination of Barnes & Noble’s First Affirmative Defense of Patent Misuse. (Order No. 32.) The ALJ’s decision begins with a discussion of certain background facts (*id.* at 2–6) and states that the Order is based on “undisputed facts” (*id.* at 9). However, the analysis in the Order does not focus on the facts but rather on the law and what the ALJ characterizes as Barnes & Noble’s “allegations” and “theory”. (*Id.*) Thus, the ALJ’s decision discusses certain legal limitations that have been imposed on the patent misuse defense generally, as well as what the ALJ characterizes as “incoherence” in patent misuse law. (*Id.*) The ALJ refers to patent misuse as a “schizophrenic doctrine that vacillates between IP and antitrust law”. (*Id.* (quoting Christina Bohannon, *IP Misuse as Foreclosure*, 96 Iowa L. Rev. 475, 476 (2011); *USM Corp. v. SMS Tech., Inc.*, 694 F.2d 505, 512 (7th Cir. 1982); *Princo*, 616 F.3d at 1328–29).) However, the ALJ’s decision simply does not address the central factual basis for Barnes & Noble’s patent misuse defense as set forth above.

Rather, the ALJ’s decision mischaracterizes the allegations and the evidence underlying Barnes & Noble’s patent misuse defense, concluding that “most” of Barnes & Noble’s “allegations” (a) “bear no relation to the patents-in-suit or their licensing” and (b) are “generalized allegations of commercial misconduct”. (Order No. 32, at 9.) The ALJ’s decision examines certain aspects of Microsoft’s Android licensing

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program—such as charging high license fees and telling OEMs that they cannot work around Microsoft’s patents—and concludes that these are just examples of “hard bargaining”. (*Id.* at 11.) The ALJ’s decision briefly acknowledges what is described as Barnes & Noble’s “assert[ion]” that the patents-in-suit relate to trivial design choices and implementation details (*id.* at 12) but does not examine this assertion in the context of Microsoft’s demands that OEMs enter into a license that requires them to pay a fee on every Android device they sell regardless of whether it infringes any Microsoft patents. Rather, the ALJ’s decision examines this assertion only in the context of restrictions in Microsoft’s Android license that would *exclude* certain Android devices. (*Id.* at 13–14.)

In other words, the ALJ’s decision assumes that the trivial nature of Microsoft’s patents is relevant to determining whether Microsoft is justified in excluding certain kinds of devices from the scope of the license—including on the basis that they are not really “Android” devices—such that OEMs do not need to pay Microsoft for such devices and receive no license. Respectfully, this puts the issue exactly backwards: the triviality of Microsoft’s patents is relevant because Microsoft’s license *requires* OEMs to pay Microsoft for *every* Android device they sell regardless of whether they practice these trivial patents; that Microsoft excludes certain devices on the basis that they are not really “Android” devices has nothing to do with Barnes & Noble’s arguments relating to the triviality of Microsoft’s patents.

### III. STANDARD OF REVIEW.

Under Commission Rule § 210.43(b)(1), the Commission may grant a petition for review if Barnes & Noble demonstrates:

- (i) That a finding or conclusion of material fact is clearly erroneous;

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- (ii) That a legal conclusion is erroneous, without governing precedent, rule or law, or constitutes an abuse of discretion; or
- (iii) That the determination is one affecting Commission policy.

19 C.F.R. § 210.43(b)(1); *see id.* § 210.43(d)(2).

Because the ALJ's decision makes no factual findings and instead proceeds on the basis of "undisputed facts" as well as Barnes & Noble's "allegations" and "theory" (Order No. 32, at 9), the Commission may grant Barnes & Noble's petition if it finds any of the ALJ's legal conclusions to be erroneous. Review of Barnes & Noble's petition is *de novo*. *See Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991) (holding that conclusions of law are reviewed *de novo*).

Once the Commission decides to review an initial determination, its reconsideration of any legal conclusions is *de novo* and it may "affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part", as well as "make any findings or conclusions that in its judgment are proper based on the record in the proceeding". *Certain Bar Clamps, Bar Clamp Pads, & Related Packaging Display, and Other Materials*, Inv. No. 337-TA-429, 2001 WL 869143, at \*2 (Aug. 1, 2001) (quoting 19 C.F.R. § 210.45(c)). That is, while a petitioner must show that a legal conclusion was erroneous, once it has made that showing, there is "no limitation on the Commission's scope of review once it decides to review a decision of an administrative law judge". *Certain Bulk Bags & Process for Making Same*, Inv. No. 337-TA-338, 1992 WL 811432, at \*1 (Aug. 28, 1992).

As set forth below, the ALJ's Initial Determination granting Microsoft's motion for summary determination is based on legal conclusions that are erroneous under Rule 210.43(b)(1) and that affect Commission policy.

IV. ARGUMENT.

A. The ALJ's Initial Determination Failed to Properly Apply the Standard of Review for a Summary Determination Motion.

It is well-established that patent misuse is a “fact-intensive” defense.

*B. Braun Med., Inc. v. Abbott Labs., Inc.*, 124 F.3d 1419, 1426 (Fed. Cir. 1997); *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1001–02 (Fed. Cir. 1986) (“To sustain a misuse defense involving a licensing arrangement not held to have been *per se* anticompetitive by the Supreme Court, a factual determination must reveal that the overall effect of the license tends to restrain competition unlawfully in an appropriately defined relevant market.”); *Certain Recordable Compact Discs & Rewritable Compact Discs*, 2002 WL 31863435, at \*5 (patent misuse allegations require “a thorough exposition of the relevant facts and law”). The ALJ acknowledged as much in his October 3, 2011 Order denying Microsoft’s motion to strike Barnes & Noble’s patent misuse defense, finding that patent misuse “calls for the kind of *in-depth analysis of heavily disputed areas of law and fact* that other courts and Commission precedent has cautioned against” (Pet. Ex. F (Order No. 13), at 4 (emphasis added).)

It is also well-established that summary determination is only proper where there is “no genuine issue as to any material fact”. 19 C.F.R. § 210.18(b) (Summary determination may only be granted “if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a summary determination as a matter of law”). Moreover, all evidentiary questions must be “resolved in favor of the nonmovant” to the extent there is any “doubt” with respect to the evidence presented. *Certain Dynamic Random Access Memory Devices & Products*

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*Containing Same*, Inv. No. 337-TA-595, 2008 WL 164309, at \*1 (Jan. 14, 2008); *see also Xerox Corp. v. 3Com Corp.*, 267 F.3d 1361, 1364 (Fed. Cir. 2001) (“When ruling on a motion for summary judgment, all of the nonmovant’s evidence is to be credited, and all justifiable inferences are to be drawn in the nonmovant’s favor.”); *EMI Group N. Am., Inc. v. Intel Corp.*, 157 F.3d 887, 891 (Fed. Cir. 1998) (The trier of fact should “assure itself that there is no reasonable version of the facts, on the summary judgment record, whereby the nonmovant could prevail . . .”).<sup>12</sup>

Here, the ALJ did not conduct a “fact-intensive” inquiry of Barnes & Noble’s patent misuse defense and did not read Barnes & Noble’s allegations and the evidence supporting them fairly and with all inferences drawn in Barnes & Noble’s favor. In this regard, the ALJ did not follow his own October 3, 2011 Order which denied Microsoft’s motion to strike and found that Barnes & Noble’s patent misuse defense “calls for the kind of in-depth analysis of heavily disputed areas of law and fact that other courts and Commission precedent has cautioned against”. (Pet. Ex. F (Order No. 13), at

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<sup>12</sup> Furthermore, in order to determine whether any “genuine issues” of material fact exist in an investigation, “it is essential that the factual record be complete prior to filing a motion for summary determination”. *See Certain Cold Cathode Fluorescent Lamp (“CCFL”) Inverter Circuits & Products Containing the Same*, Inv. No. 337-TA-666, 2009 WL 1949113, at \*2 (Jul. 2, 2009) (finding that good cause existed for permitting motions for summary determination to be filed out of time pursuant to 19 C.F.R. § 210.18(a)); *see also Certain Adjustable Keyboard Support Systems & Components Thereof*, Inv. No. 337-TA-670, 2009 WL 3865362, at \*6 (Nov. 4, 2009) (denying respondents’ motion for summary determination based, in part, on the fact that there was not a complete factual record); *Certain Light Emitting Diodes & Products Containing Same*, Inv. No. 337-TA-512, 2004 WL 3093048, at \*2–3 (Nov. 10, 2004) (denying motion for summary determination because there were genuine issues of material fact and respondent argued that the motion was premature because complainant had not produced all relevant discovery documents). Nevertheless, as noted above, Microsoft filed its motion for summary determination prematurely, prior to the close of fact discovery and before the start of expert discovery.

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4.) Rather than examining the extensive and contested factual record, the ALJ’s decision focused almost entirely on what the ALJ said were “*undisputed facts*” as well as Barnes & Noble’s “allegations” and “theory” (Order No. 32, at 9 (emphasis added).) But the most salient facts here are the *disputed* facts and while the ALJ cites to each party’s statement of *disputed* facts as part of his recitation of the *undisputed* facts (*id.* at 2–3), the ALJ’s decision does not meaningfully examine the 34 pages of disputed material facts found in Barnes & Noble’s Response to Microsoft’s Statement of Undisputed Material Facts (Pet. Ex. DD (Mot. Docket No. 769-043)) or the 70 pages of additional disputed facts Microsoft itself offered in seeking leave to submit a reply to Barnes & Noble’s statement of disputed facts (Pet Ex. EE (Mot. Docket No. 769-059)).

In particular, the ALJ’s decision simply does not address the central basis for Barnes & Noble’s patent misuse defense—namely, that Microsoft’s Android licensing program has improperly leveraged patents covering at most trivial and outmoded design choices and implementation details in order to require OEMs to take licenses (and pay substantial licensing fees to Microsoft) for every Android device they sell, regardless of whether those devices infringe any of Microsoft’s patents.

B. The ALJ Erred in Finding That Microsoft’s Conduct in Connection With Its Android Licensing Program Does Not Constitute Patent Misuse as a Matter of Law.

Patent misuse is characterized as a patentee’s act of “impermissibly broaden[ing] the ‘physical or temporal scope’ of the patent grant with anticompetitive effect”. *Princo Corp.*, 616 F.3d at 1328 (internal quotations omitted) (citing *Windsurfing Int’l, Inc.*, 782 F.2d at 1001); *see also B. Braun Med., Inc.*, 124 F.3d at 1426. Although “[a] patentee has the exclusive right to manufacture, use, and sell his invention”, the law is clear that “there are established limits which the patentee must not exceed in

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employing the leverage of his patent[s] to control or limit the operations of the licensee”. *Zenith Radio Corp.*, 395 U.S. at 135–36 (internal citations omitted); *see also Princo Corp.*, 616 F.3d at 1331 (“What patent misuse is about, in short, is ‘patent leverage’, *i.e.*, the use of the patent power to impose overbroad conditions on the use of the patent in suit that are ‘not within the reach of the monopoly granted by the Government.’” (quoting *Zenith Radio Corp.*, 395 U.S. at 136–38)). That is, “[t]he doctrine of patent misuse is [] grounded in the policy-based desire to ‘prevent a patentee from using the patent[s] to obtain market benefit beyond that which inheres in the statutory patent right’”. *Princo Corp.*, 616 F.3d at 1328 (quoting *Mallinckrodt, Inc. v. Medipart, Inc.*, 976 F.2d 700, 704 (Fed. Cir. 1992)).

Accordingly, as Microsoft and Barnes & Noble both agreed in briefing before the ALJ, patent misuse generally requires a two-part inquiry: *first*, has the patentee impermissibly broadened the physical or temporal scope of—*i.e.*, “leveraged”—the patent grant; and, *second*, has the patentee done so in a manner that has anticompetitive effects. (1/17/12 B&N Pre-Hr’g Br., at 288; Microsoft Pre-Hr’g Br., at 306.) The ALJ’s Initial Determination does not address anticompetitive effects at all and instead focuses solely on whether Microsoft’s conduct constituted actionable leveraging of its patents. Put another way, the ALJ made no finding that summary determination was appropriate on the “anticompetitive effects” prong of patent misuse and, as discussed above (*see supra* at Part II.E), Barnes & Noble came forth with substantial evidence showing that Microsoft’s Android licensing program is harming and will continue to harm competition for both mobile electronic devices and PCs. And while Microsoft

certainly disputed this evidence, Microsoft never argued that the parties’ factual disputes relating to anticompetitive effects could be resolved on summary determination.<sup>13</sup>

Accordingly, we focus—as did the ALJ—on the first prong of the test for patent misuse.

1. Microsoft’s Android Licensing Program Impermissibly Expands the Scope of the Patents-in-Suit.
  - a. The evidence establishes patent leveraging under *Princo* and *Zenith*.

One of the few pronouncements that the Supreme Court has made regarding the patent misuse defense was in *Zenith*, a decision that was cited by the Federal Circuit’s *en banc* decision in *Princo* as a definitive statement on patent misuse

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<sup>13</sup> In its motion for summary determination, Microsoft did make a half-hearted, two-page argument that there is “no evidence” of anticompetitive effects. (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 29–31.) However, this was a purely legal argument that Barnes & Noble’s evidence of anticompetitive effects was not legally cognizable because Barnes & Noble had not, as a “prerequisite”, established that the anticompetitive effects “flow[ed]” from the leveraging of market power in a defined, relevant market. (*Id.* at 30.) As discussed below (*see infra* at Part IV.B.1.b), that argument is simply wrong: in establishing patent misuse, there is no requirement to show that the patentee has leveraged market power, only that the patentee has leveraged the patent. *Zenith*, 395 U.S. at 136.

In addition, the Federal Circuit has acknowledged that there are certain forms of *per se* patent misuse, such as requiring the payment of royalties after the expiration of a patent, as to which no showing of anticompetitive effects is required. *Virginia Panel Corp. v. MAC Panel Co.*, 133 F.3d 860, 869 (Fed. Cir. 1997) (citing *Brulotte v. Thys Co.*, 379 U.S. 29, 33 (1964)). The Federal Circuit has never stated whether conditioning a license on payment of royalties for devices that do not practice the patents-in-suit—the situation the Supreme Court confronted in *Zenith*—is also *per se* patent misuse that does not require the showing of anticompetitive effects. (Certainly, the Supreme Court in *Zenith* proceeded as if no showing of anticompetitive effects is required.) The Commission need not resolve that question here because, as noted, even if a showing of anticompetitive effects is required, there are disputed material facts relating to that issue.

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“as applied to patent licensing agreements”.<sup>14</sup> 616 F.3d at 1327 (citing *Zenith*, 395 U.S. at 136). *Zenith* was also cited in the ALJ’s Initial Determination. (Order No. 32, at 8.) There is no question that *Zenith* is binding authority here.

The patentee in *Zenith* had a “policy of insisting upon acceptance of its standard five-year package license agreement”, which required licensees to pay royalties for all of their television and radio sales, “irrespective of whether the licensed patents were actually used in the products manufactured”. 395 U.S. at 134. The Seventh Circuit in *Zenith* had stricken a clause from the district court’s injunction—a clause which prohibited the patentee from conditioning its license agreement on the payment of royalties for devices not covered by the licensed patents—on the ground that such conditioning of the license was not patent misuse. *Id.* at 133–34. The Supreme Court reversed in no uncertain terms: “We hold that conditioning the grant of the patent license upon payment of royalties on products which do not use the teaching of the patent does amount to patent misuse”. *Id.* at 135. The Supreme Court found that this kind of license impermissibly “leverage[d]” the patents “to control or limit the operations of the licensee”. *Id.* at 136.

The facts here are indistinguishable from those in *Zenith*. As Barnes & Noble has shown (*see supra* at Part II.E), Microsoft has a policy of requiring that every OEM selling Android devices enter into a [REDACTED] contract with Microsoft under

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<sup>14</sup> Although the Supreme Court considered the patent misuse defense more recently in *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 179 (1980) (looking at issue of the scope of the patent misuse doctrine in light of the contributory infringement doctrine and language of 35 U.S.C. § 271(d)) and *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 31 (2006) (looking at issue of whether a patent confers market power upon the patentee in the tying context), neither of those decisions directly address the issues that are set forth in the ALJ’s Initial Determination and this petition for review.

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which the OEM is required to pay a substantial royalty to Microsoft for every Android device it sells, *regardless of whether such devices actually practice any Microsoft patents*. The license Microsoft requires even specifically applies to devices using future versions of Android that have not yet been released. Under threat of litigation, and without Microsoft ever disclosing the patents it will sue on or that it believes are infringed by the OEM's Android device, many OEMs have already signed these kinds of licenses. The two OEMs which refused to sign Microsoft's license—Motorola and Barnes & Noble—have been sued by Microsoft for infringement of the patents Microsoft is seeking to license.

Barnes & Noble has also shown that the five patents-in-suit (as well as the six patents, including the one overlapping patent (No. 6,339,780), Microsoft originally asserted against Barnes & Noble during licensing negotiations) cover at most trivial and outmoded implementation details that are not important to Barnes & Noble's Nook devices or, indeed, to any devices based on the Android operating system. (*See supra* at Part II.E.) Thus, drawing all reasonable inferences in Barnes & Noble's favor, Microsoft's public assertion that every Android device infringes Microsoft patents is false and Microsoft has no basis for insisting that OEMs pay Microsoft a royalty for every Android device.

Accordingly, on the basis of the evidence relating to Microsoft's Android licensing program and relating to the patents-in-suit alone, Barnes & Noble has established patent leveraging, and the Commission should reverse the ALJ's grant of summary determination against Barnes & Noble. The Commission need not reach or consider any of the other evidence presented by Barnes & Noble, including the evidence

concerning patents other than the patents-in-suit. Although the ALJ addressed that evidence first in his Initial Determination—and although Barnes & Noble believes that such evidence is both relevant and admissible to show, among other things, the anticompetitive intent and effects of Microsoft’s Android licensing program<sup>15</sup>—it is simply not necessary to consider this evidence in order to conclude that the ALJ erred in failing to consider the central thrust of Barnes & Noble’s patent misuse defense: namely, that Microsoft has improperly leveraged patents covering trivial and outmoded implementation details in order to extract licensing fees for all Android devices, including those that do not practice these patents.

- b. There is no need to establish market power relating to the patents-in-suit in order to prove patent leveraging.

Although the ALJ’s decision does not address it, Microsoft’s summary determination motion offered an alternative ground for concluding that Microsoft has not leveraged the patents-in-suit; Microsoft argued that the patents-in-suit relate to the “mobile market”, that Microsoft does not have market power in the “mobile market” and that, therefore, as a matter of law, Microsoft cannot have “leveraged” the patents-in-suit in a way that would support a patent misuse defense. (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 23–34.) Microsoft argued that “leveraging” for purposes of patent misuse necessarily means leveraging of market power over the patented

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<sup>15</sup> *Princo* did not preclude allegations related to patents other than the patents-in-suit as long as there is a “link” between the patents-in-suit and the putative conduct. *Princo*, 616 F.3d at 1331–32. The evidence, and Barnes & Noble’s allegations, make out such a “link” because Microsoft’s use of the patents-in-suit, along with the patent arrangements with Nokia and MOSAID, as well as Microsoft’s attempts to acquire certain Novell and Nortel patents, are all part of a broader scheme to assert control over and weaken the Android operating system.

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technology above and beyond the power the patent itself conveys. Microsoft contended that no other form of “leveraging” would be sufficient. (*See id.* at 23 (“Without market power, there is no way to ‘leverage’ the patent beyond what the patent right alone provides.” (citation omitted)).) Because Barnes & Noble anticipates that Microsoft might raise this argument again in opposition to the petition for review, and because this argument is so clearly wrong, we respond briefly.

To begin with, it is telling that Microsoft does not even purport to cite any cases actually holding that leveraging of market power over the patented technology is required in order to establish patent misuse. Nor could it, since no such case exists. Rather, Microsoft simply points to three cases in which the patentee allegedly did have market power and the party asserting patent misuse relied on the existence of that alleged market power in support of its defense. But the fact that the existence and leveraging of market power *can* support patent misuse hardly proves that this is *the only way* to establish patent misuse. Indeed, in one of the cases cited by Microsoft, the Federal Circuit explicitly referred to the use of “market power in the relevant market” as just one “example” of impermissible patent leveraging—and went on to cite another “example” of leveraging involving no claim of market power, namely, “employing the patent beyond its 17-year term”. *B. Braun Med., Inc.*, 124 F.3d at 1426. Moreover, both *Braun* and the other principal case cited by Microsoft—*Certain Set Top Boxes & Components Thereof*, Inv. No. 337-TA-454 (Docket No. 146925) at 150–54, 182–84 (Nov. 8, 2002)—involved patent misuse defenses based on an illegal tying arrangement. Thus, it is no surprise that those cases involved allegations of market power because market power is required in

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order to establish unlawful tying. *Princo Corp.*, 616 F.3d at 1330 (citing *Ill. Tool Works Inc.*, 547 U.S. at 41 (collecting legislative history)).

Relying on the *dissent* in *Princo*, Microsoft also suggests that the Federal Circuit’s decision in that case endorsed the notion that the existence of market power over the patented technology is a prerequisite to establishing patent misuse. (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 23.) That is nonsense. What *Princo* in fact clearly holds is that patent misuse concerns the leveraging of *patents*, not the leveraging of market power: “What patent misuse is about, in short, is ‘patent leverage’, *i.e.*, use of the *patent power* to impose overbroad conditions on the use of the patent[s] in suit that are ‘not within the reach of the monopoly granted by the government.’” *Princo*, 616 F.3d at 1331 (emphasis added). The Supreme Court’s holding in *Zenith* is similar; making no reference at all to market power, the Supreme Court held that “there are established limits which the patentee must not exceed in employing the *leverage of his patent* to control or limit the operations of the licensee”. 395 U.S. at 136 (emphasis added).<sup>16</sup>

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<sup>16</sup> To be sure, patent misuse cases often do address market power in the context of determining whether the challenged leveraging of patents has anticompetitive effects (*i.e.*, the second prong of the *Princo* test)—for the simple reason that monopoly power can act as a surrogate for showing a decrease in output and an increase in price. See *Dickson v. Microsoft Corp.*, 309 F.3d 193, 206 (4th Cir. 2002); *Maris Distrib. Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207, 1211 (11th Cir. 2002); *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998); *Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); see also *Virginia Panel Corp.*, 133 F.3d at 869 (“Under the rule of reason, ‘the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint’s history, nature, and effect.’” (citation omitted)); *Minebea Co., Ltd v. Papst*, 444 F. Supp. 2d 68, 216 (D.D.C. 2006). (“[T]he issue of market power in the relevant market is certainly among

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Here, Barnes & Noble alleges and has adduced evidence establishing that Microsoft's Android licensing program leverages the patents-in-suit by requiring OEMs to take licenses that require the payment of royalties on all Android devices regardless of whether they practice any Microsoft patents. Barnes & Noble has further explained that Microsoft was able to leverage the patents in this way by: (a) falsely claiming that all Android devices infringe Microsoft patents when in fact Microsoft has at most only patents that cover trivial and outmoded implementation details; (b) asserting that OEMs cannot work around Microsoft's patents because Microsoft will disclose only "sample" patents its says are infringed and then come forward with other patents if OEMs try to work around the "sample" patents; (c) threatening to sue OEMs on both the sample patents and other undisclosed patents unless the OEMs agree to a license under which they are required to pay a royalty for every Android device they sell regardless of whether those devices infringe any Microsoft patents; and (d) as was the case with Barnes & Noble, actually suing on patents that were never previously disclosed to OEMs during negotiations. (B&N Resp., at 5–13, 24–25, 28–32.) Nothing more is required.

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the variety of pertinent factors for the Court to consider under *Virginia Panel* in determining whether [the licensor's] conduct was anticompetitive in a patent misuse case." (citing 133 F.3d at 869)). As Barnes & Noble has demonstrated, Microsoft has a well-established monopoly in PC operating systems and is perpetuating its ability to decrease output and raise prices by leveraging its patents to maintain that monopoly. However, as noted above, the ALJ's decision did not discuss the anticompetitive effects prong of *Princo* or whether Microsoft's patent leveraging has had or will continue to have anticompetitive effects. Further, the supposed lack of anticompetitive effects was not the basis for Microsoft's summary determination motion in the first place.

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### 2. Microsoft's Conduct Is Not Protected by Any Statutory Safe Harbor.

The ALJ's Initial Determination quotes 35 U.S.C. § 271(d), the portion of the Patent Act in which Congress has imposed certain limitations on the affirmative defense of patent misuse. (Order No. 32, at 8.) However, the ALJ's decision does not actually discuss any of the provisions of section 271(d), much less rely on them in granting summary determination to Microsoft.<sup>17</sup> Microsoft, on the other hand, characterizes the subsections of section 271(d) as "safe harbors" (6/6/11 Microsoft Mot. to Strike, at 4–7) and relies on three of these subsections to argue that Microsoft's Android licensing program is absolutely immune from scrutiny (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 11-22). Because, again, we anticipate that Microsoft will repeat these arguments in opposing this petition for review, and because Microsoft's arguments are so clearly wrong, we respond briefly.

*Subsection 271(d)(3).* Microsoft first points to subsection 271(d)(3) (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 12–18), which provides that it is not patent misuse for a patent holder to have "sought to enforce his patent rights against infringement or contributory infringement". This provision has no application here because Barnes & Noble's patent misuse defense is not based on Microsoft having sought to enforce its rights under the patents-in-suit—for example by asserting that those patents cannot be practiced without a license or by demanding a license to those patents. Barnes & Noble challenges Microsoft's Android licensing program under which

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<sup>17</sup> Other than quoting the statute, the ALJ only cites subsection 271(d)(4) in passing for the proposition that "the patent laws even permit unilateral refusals to license patents". (Order No. 32, at 12.)

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Microsoft has leveraged the patents-in-suit to demand license agreements that require OEMs to pay licensing fees for products that do *not* infringe the patents-in-suit (or any other Microsoft patents).

To the extent Barnes & Noble understands Microsoft’s argument relating to subsection 271(d)(3), Microsoft seems to be suggesting that the word “enforce” in subsection 271(d)(3) encompasses “leveraging” patents beyond their lawful scope because every act of leveraging patents involves seeking to “enforce” them to one degree or another. But that clearly proves too much because that would mean that subsection 271(d)(3) had eliminated the patent misuse defense altogether, which was clearly not Congress’s intent. *See, e.g., Dawson Chem. Co.*, 448 U.S. at 201 (“In our view, the provisions of § 271(d) effectively confer upon the patentee, as a lawful adjunct of his patent rights, a *limited* power to exclude others from competition . . . .” (emphasis added)); *id.* at 206–12 (noting that in the 1951 legislative hearings, Giles Rich, a “prominent patent lawyer”, “assured” the congressional subcommittee on patents that subsection (d) “was implicitly limited by the restrictive definition of contributory infringement in subsection (c)”, and “[i]f [a patentee] has gone beyond those and done other acts which could be misuse, then the misuse doctrine would be applicable”); *id.* at 213 (“[The responsible congressional Committees] were told that Congress could strike a sensible compromise between the competing doctrines of contributory infringement and patent misuse”, not eliminate patent misuse altogether); *see also Certain Recordable Compact Discs & Rewritable Compact Discs*, Inv. No. 337-TA-474, 2004 WL 1435791, at \*7–9 (Mar. 11, 2004).

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It is important to bear in mind what Barnes & Noble does *not* assert here. Barnes & Noble does not assert that it would have been patent misuse if Microsoft had come to Barnes & Noble (or other OEMs) and identified certain patents that it believed were infringed, demanded that Barnes & Noble take a license covering all of Barnes & Noble products that practiced those patents and sued for infringement if Barnes & Noble refused to take such a license but nonetheless sold products that infringed Microsoft's patents. That is not what happened. Rather, as discussed above, Microsoft deliberately shrouded in secrecy the patents it believed were infringed and then demanded a license covering all Android devices—regardless of whether they practice any Microsoft patents and notwithstanding that Microsoft's patents cover such trivial and outmoded implementation details that it would be easy to create and sell Android devices that do not practice Microsoft's patents.

*Subsection 271(d)(4).* Microsoft next points to subsection 271(d)(4) (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 18–19), which provides that it is not patent misuse to “refus[e] to license” a patent. However, Barnes & Noble has never asserted that Microsoft “refused” to license the patents-in-suit. To the contrary, Barnes & Noble argues that Microsoft's Android licensing program constitutes patent misuse because Microsoft *demande*d licenses but did so on terms that impermissibly leveraged the patents-in-suit because the licenses require that OEMs pay royalties on Android devices regardless of whether they practice the patents-in-suit.

*Section 271(d)(5).* Finally, Microsoft relies on subsection 271(d)(5) (Microsoft Mot. for Summ. Det. of B&N First Affirm. Def., at 19–21), which provides that it is not patent misuse if a patent owner:

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“condition[s] the license of any rights to the patent or the sale of the patented product on the acquisition of a license to the rights in another patent or the purchase of a separate product, unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.”

This provision obviously focuses on situations (like those discussed above, *see supra* at Part II.B.1.b) in which a patent misuse claim is premised on an illegal tying arrangement—that is, conditioning a license to the patent-in-suit on either taking a license to another patent or purchasing a separate product—and makes clear that such a claim can only succeed if the patent owner has market power over the patented technology. This provision also has no application here because, as described above, Barnes & Noble is not basing its patent misuse claim on an illegal tying arrangement.

Again, the gravamen of Barnes & Noble’s patent misuse claim is that Microsoft has improperly leveraged the patents-in-suit (which cover only trivial and outmoded implementation details) by demanding that OEMs take a license requiring them to pay licensing fees to Microsoft for every Android device regardless of whether those devices actually practice any Microsoft patents. That is not a tying claim because Barnes & Noble is not arguing that Microsoft has improperly tied a license to the patents-in-suit to licensing other patents or purchasing other products.<sup>18</sup>

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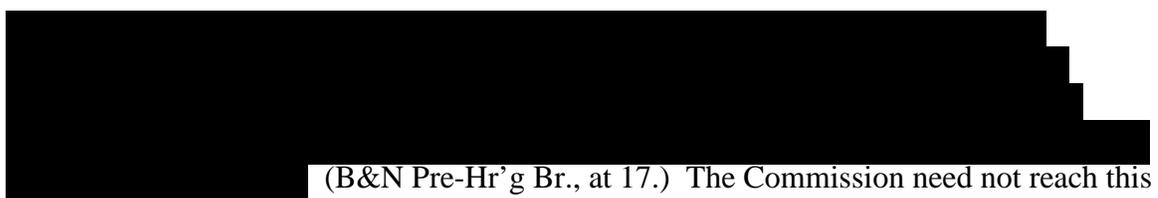
<sup>18</sup> In opposing Microsoft’s motion for summary determination, Barnes & Noble did argue that Microsoft has “in effect” tied an Android license to a license to Microsoft’s own Windows mobile operating system [REDACTED] (B&N Resp. at 32.) However, as the ALJ’s decision seems to acknowledge (Order No. 32, at 11 n.3), Barnes & Noble is simply making an analogy and seeking to draw parallels between Microsoft’s conduct in connection with the Android licensing program and prior Microsoft conduct that has been condemned by regulators and the courts. (B&N Resp. at 32–33.) [REDACTED]

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C. The ALJ Erred in Denying Barnes & Noble Critical Discovery Concerning Which Patents Microsoft Asserts Are Infringed by Android.

As discussed above, the central premise of Barnes & Noble's patent misuse claim is that Microsoft has patents that at most cover trivial and outmoded design choices and implementation details and which are insufficient to support any claim that all Android devices infringe Microsoft patents or require a license from Microsoft. Moreover, the only Microsoft patents as to which there is any detailed evidence in the record are the six patents Microsoft asserted against Barnes & Noble in licensing discussions prior to suing for infringement and the five patents on which Microsoft actually sued (with one patent falling into both categories). As to each of these patents, Barnes & Noble has presented evidence—evidence which at this stage must be accepted as true—that the patents cover only trivial design choices and implementation details and do not relate to the core of the Android operating system. (*See supra* at Part II.E.) Accordingly, drawing all justifiable inferences in Barnes & Noble's favor, Barnes & Noble has established that it would be easy to work around these patents and sell Android devices that do not infringe any Microsoft patents.

The record is also clear that Microsoft has blocked all discovery relating to its analyses and conclusions concerning exactly which other patents Microsoft thinks are



(B&N Pre-Hr'g Br., at 17.) The Commission need not reach this argument because Barnes & Noble has established independent grounds for reversing the ALJ's Initial Determination. *See, e.g., Certain Integrated Circuits, Processes for Making Some, & Products Containing Same*, Inv. No. 337-TA-450, 2003 WL 22162514, Commission Determination (July 23, 2003) (reversing ALJ's initial determination of obviousness on independent, alternative grounds raised by complainant/appellant).

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infringed by Android and why. Microsoft has broadly asserted that all this information is protected by the attorney-client privilege. (*See supra* at Part II.F.)

It thus came as a great surprise to Barnes & Noble when, on the eve of trial, Microsoft came forth with witness statements asserting for the first time that Microsoft's Patent Analysis Group has conducted an analysis and concluded that Android infringes numerous *other* Microsoft patents. [REDACTED]

[REDACTED] This is plainly an effort to supplement the record to suggest that Microsoft does have a basis for claiming that all Android devices infringe Microsoft patents and require a license. However, as noted above, Microsoft blocked all discovery concerning the analysis underlying this asserted conclusion on the grounds of attorney-client privilege.

The law is clear that a party cannot use privilege "as both a sword and a shield", selectively disclosing or relying on some aspects of otherwise privileged communications or analyses but then preventing a litigation adversary from the discovery necessary to test those assertions. *See, e.g., In re Seagate Tech., LLC*, 497 F.3d 1360, 1372 (Fed. Cir. 2007) (en banc); *In re EchoStar Commc'ns Corp.*, 448 F.3d 1294, 1302 (Fed. Cir. 2006); *Certain High-Brightness Light Emitting Diodes & Products*, Inv. No. 337-TA-556, 2006 WL 2109523, at n.1 (July 24, 2006).

Indeed, the sword-and-shield doctrine applies whenever a party selectively relies on certain aspects of privileged communications or analyses. *See, e.g., Certain High-Brightness Light Emitting Diodes & Products*, 2006 WL 2109523, at n.1 (noting that if "any litigant were attempting to rely on some tests, but conceal related,

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unfavorable tests under the work product doctrine, there is no question that all tests would be discoverable and their production compelled”); *see also Frontier Refining v. Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998) (“[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion.”); *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), cert. denied, 502 U.S. 813 (1991) (“A defendant may not use the privilege to prejudice his opponent’s case or to disclose some selected communications for self-serving purposes.”); *Ampex Corp. v. United States*, 207 Ct. Cl. 1014, 1975 WL 3230, at \*1 (Ct. Cl. 1975) (“There are situations, however, where the attorney has participated in the acts which are the essence of the controversy and where it would be unfair to allow the plaintiff to introduce only selective evidence and bar the defendant from inquiring as to other relevant circumstances involved in the same transaction.” (citing *Trans World Airlines, Inc. v. Hughes*, 332 F.2d 602, 615 (2d Cir. 1964), cert. dismissed, 380 U.S. 248, 249 (1965))). That is, the privilege will be waived where the disclosing party “present[s] a one-sided story to the court”. *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991).

The underlying rationale for not permitting parties to use the attorney-client privilege as both a sword and shield is one of fairness; courts recognize it is simply not fair to allow a party to selectively rely on some aspects of privileged communications or analyses but block inquiry into other aspects of the communications or analyses on the same subject. *See, e.g., Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *Bilzerian*, 926 F.2d at 1292 (finding that litigant implicitly waived the attorney-

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client privilege when “assert[ing] a claim that in fairness require[d] examination of protected communications”). Accordingly, the remedy imposed when a party attempts to use privilege as both a sword and shield is always the same: the privilege is deemed waived as to all communications relating to the same subject matter. *See In re Seagate*, 497 F.3d at 1372 (“The widely applied standard for determining the scope of a waiver . . . is that the waiver applies to all other communications relating to the same subject matter.” (quoting *Fort James Corp. v. Solo Cup Co.*, 412 F.3d 1340, 1349 (Fed. Cir. 2005))); *see also In re EchoStar*, 448 F.3d at 1301 (“To prevent [] abuses, we recognize that when a party defends its actions by disclosing an attorney-client communication, it waives the attorney-client privilege as to all such communications regarding the same subject matter.”); *Intex Recreation Corp. v. Team Worldwide Corp.*, 439 F. Supp. 2d 46, 50 (D.D.C. 2006) (“The use of the phrase ‘subject matter of the case’ rather than ‘subject matter of the opinion’ suggests that the Federal Circuit contemplated a broad waiver rather than the limited waiver envisioned by [plaintiff].”); *Micron Separations, Inc. v. Pall Corp.*, 159 F.R.D. 361, 363 (D. Mass. 1995) (“[T]he scope [of waiver] must of necessity be somewhat broad and is, in fact, a ‘subject matter’ waiver—*i.e.*, a waiver of all communications on the same subject matter.”).<sup>19</sup>

Here, having put at issue the conclusions of its Patent Analysis Group relating to Android, Microsoft cannot at the same time assert that the “analysis” supporting these “conclusions” is somehow privileged. That would create exactly the

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<sup>19</sup> The same broad waiver applies to the work product doctrine. *See In re EchoStar*, 448 F.3d at 1303 (finding that the “overarching goal of waiver” of work-product protection “is to prevent a party from using the advice he received as both a sword, by waiving privilege to favorable advice, and a shield, by asserting privilege to unfavorable advice”).

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kind of unfairness that the sword and shield doctrine is intended to prevent. Barnes & Noble is entitled to test Microsoft's assertions about the "conclusions" of its Patent Analysis Group with appropriate discovery. As the cases make clear, the appropriate remedy is to find that Microsoft has waived the attorney-client privilege for all communications concerning the same "subject matter" as addressed in Microsoft's witness statements—namely, the conclusions of Microsoft's Patent Analysis Group concerning infringement of Microsoft patents by Android-based devices. Microsoft should thus be required to produce all documents concerning these conclusions of the Patent Analysis Group, including all the analyses underlying those conclusions. It was clear error for the ALJ not to have ordered this discovery when Barnes & Noble requested it.

In response to Barnes & Noble's request for discovery, Microsoft argued that Barnes & Noble waited too long to raise the issue because, in light of Microsoft's conduct at depositions, Barnes & Noble supposedly should have anticipated that Microsoft would affirmatively rely on the "conclusions" of its Patent Analysis Group. (Pet. Ex. FF (1/30/12 Letter from R. Rosenfeld to Judge Essex).) That is absurd. In fact, Microsoft specifically and repeatedly instructed its witnesses *not* to answer questions going to the "conclusions" and "analysis" of its Patent Analysis Group. (*E.g.*, Ex. 29, Brandt Dep. Tr. at 65:10–25 (instructing the witness not to disclose the "underlying conclusion" of the Patent Analysis Group); Ex. 33, Kaefer Dep. Tr. at 38:16–22 (instructing the witness not to testify about the "conclusion" of the Patent Analysis

Group).<sup>20</sup> It was not until witness statements were submitted two weeks before trial that Microsoft used the privilege as a sword by affirmatively relying on the alleged conclusions of the Patent Analysis Group.

Microsoft also argued that, because Microsoft has presented claim charts to Barnes & Noble and other OEMs that reflect the conclusions of its Patent Analysis Group, the conclusions of the Patent Analysis Group are not privileged in the first place and Microsoft can rely on them in its witness statements without waiving any privilege. (Pet. Ex. FF (1/30/12 Letter from R. Rosenfeld to Judge Essex), at 3–4.) That is also absurd. It is one thing to rely on attorney-client communications or attorney work product when making allegations against third parties. It is quite another thing to ask this Commission to accept at face value that certain otherwise-privileged conclusions are true while denying the other side any opportunity to take discovery to test those conclusions.

Accordingly, the Commission should direct the ALJ on remand to require Microsoft to produce all documents relating to its Patent Analysis Group's analyses of which Microsoft patents are infringed by Android devices. Once it has an opportunity to review those documents, Barnes & Noble should also be permitted, as appropriate, to take depositions on the same subject.

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<sup>20</sup> At the time Barnes & Noble raised the issue with the ALJ and requested that he order discovery, trial on Barnes & Noble's patent misuse defense was also imminent. With the ALJ having granted summary determination, that is no longer the case. Thus, there should be no issue on remand in permitting Barnes & Noble to take the requested discovery without affecting the ultimate hearing date for Barnes & Noble's patent misuse defense.

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D. The ALJ's Initial Determination Affects Commission Rules and Policy Related to Patent Misuse Defenses.

The ALJ's decision here seems to be grounded in the ALJ's views about the "incoherence" and "schizophrenic" nature of the patent misuse defense. (Order No. 32, at 9.) Perhaps because of this perceived confusion in the law, the decision appears to cabin patent misuse to certain "specific ways" of leveraging patents that have already been accepted by the Courts as improper. (*Id.* (quoting *Princo*, 616 F.3d at 1329).) The decision does *not* apply the principles enunciated in *Princo* and other leading cases to the facts pleaded and established through discovery by Barnes & Noble. Accordingly, the Commission should use this case to clarify how ALJs should approach patent misuse defenses.

Although the Federal Circuit in *Princo* noted the "narrow scope" of the patent misuse defense, 616 F.3d at 1329, the Court never stated that patent misuse, a doctrine grounded in equity, may only be established if the patentee's conduct falls squarely in certain established boxes. Rather, the Federal Circuit set forth both a standard for determining patent misuse and a policy rationale underlying that standard. The standard is whether the patentee has impermissibly broadened the physical or temporal scope of the patent by imposing improper restrictions on licenses or sales. *See* 616 F.3d at 1328. The policy rationale is preventing patentees from using a patent to obtain market benefit beyond what inheres in the statutory patent grant. *See id.* (quoting *Mallinckrodt*, 976 F.3d at 704).

Here, Barnes & Noble has alleged and set forth facts that fall squarely within both the Federal Circuit's standard and its policy rationale. Barnes & Noble has shown that Microsoft is leveraging trivial patents that do not cover every implementation

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of Android into license agreements that require OEMs to pay a license fee for all Android-based devices regardless of whether they infringe any Microsoft patents. Barnes & Noble has also shown that, through this conduct, Microsoft is seeking to obtain “market benefit”—*i.e.*, the benefit of having patents that do read on every Android-based device—beyond the scope of the patents’ statutory rights. Having made these showings, Barnes & Noble should not be denied a hearing on the merits because of confusion concerning the proper bounds of patent misuse.

V. CONCLUSION.

For the foregoing reasons, Barnes & Noble respectfully requests that the Commission review and reverse the ALJ’s Initial Determination regarding Barnes & Noble’s affirmative defense of patent misuse and remand that defense for a hearing on the merits. Further, Barnes & Noble requests that, in light of its reliance on the conclusions of its Patent Analysis Group relating to Android, Microsoft be ordered to provide discovery concerning the analyses underlying those conclusions.

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Dated: February 8, 2012

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **RESPONDENTS BARNES & NOBLE, INC.'S AND BARNESANDNOBLE.COM LLC'S PETITION FOR REVIEW OF ORDER NO. 32: INITIAL DETERMINATION GRANTING MICROSOFT'S MOTION FOR SUMMARY DETERMINATION OF RESPONDENTS' FIRST AFFIRMATIVE DEFENSE OF PATENT MISUSE (PUBLIC VERSION)** were served upon the following parties as indicated on this 8th day of February, 2012.

James R. Holbein, Secretary  
**U.S. International Trade Commission**  
500 E Street, S.W., Room 112  
Washington, D.C. 20436

- Via Hand Delivery
- Via Overnight Courier Delivery
- Via First Class Mail
- Via Facsimile
- Via Electronic Service

Honorable Theodore R. Essex  
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