UNITED STATES INTERNATIONAL TRADE COMMISSION
WASHINGTON, DC 20436

In the Matter of **CERTAIN AUDIOVISUAL COMPONENTS AND PRODUCTS CONTAINING THE SAME**	**Investigation No. 337-TA-837**

BARNES & NOBLE'S STATEMENT ON THE PUBLIC INTEREST

Pursuant to the Commission's Notice of Request for Statements on the Public Interest and 19 C.F.R. § 210.50(a)(4), Barnes & Noble, Inc. respectfully submits this statement. Complainants LSI Corporation and Agere Systems LLC (collectively, "LSI") seek remedies that are inappropriate in light of the business model they have adopted—namely, to extract fees from existing producers of consumer electronics goods despite having contributed nothing to those products. Nothing, that is, but baseless patent assertions that only drive up consumer costs. As a result, any exclusion order and/or cease and desist order would be contrary to the public interest. Indeed, any remedial order would perversely reward conduct that affirmatively harms the public interest.

A. With Respect to the Asserted Patents, LSI Is a Patent Assertion Entity

With respect to the subject matter of this Investigation, LSI operates as a patent assertion entity. It does not make products or offer services that practice the asserted patents. Rather, its sole purpose is to hold up companies for the "right" to avoid infringement lawsuits on those patents—in exchange for egregiously high fees. LSI's business model does not encourage the adoption of the technology of the asserted patents; instead, that model simply seeks to extract

payments from the companies that already contribute valuable products and services to U.S. consumers.

Barnes & Noble has had first-hand experience with LSI's actions in this regard. Barnes & Noble is currently involved in an action against LSI that is pending in the United States District Court for the Northern District of California (Case No. 11-cv-02709).[1] The origin of this litigation and LSI's conduct therein both provide insight into LSI's pernicious business model of holding up truly innovative companies.

LSI first approached Barnes & Noble in 2010, contending that Barnes & Noble should license LSI's patents. Barnes & Noble analyzed the patents identified by LSI, determined that LSI's contentions lacked merit, and presented to LSI substantial, legitimate non-infringement, invalidity, and unenforceability positions with regard to the asserted patents. Undeterred by the lack of merit in its claims, LSI continued to threaten litigation unless and until Barnes & Noble took a license on egregious terms (which LSI demanded be subject to a Nondisclosure Agreement). Faced with this Hobson's choice between paying hold-up fees or facing expensive litigation in LSI's venue of choice, on June 6, 2011, Barnes & Noble brought an action for declaratory judgment regarding the ten patents that LSI had asserted.

Thus began the next phase of LSI's strategy: maximizing the cost of litigation for Barnes & Noble. LSI has pursued (and continues to pursue) this strategy in several ways, one of which is to assert as many patent infringement claims as possible, regardless of their merit.

For example, after Barnes & Noble filed its declaratory judgment complaint in California regarding the ten patents that LSI had asserted, LSI filed a parallel complaint alleging infringement in U.S. District Court in Pennsylvania. In the Pennsylvania case, LSI added

[1] The same patents asserted by LSI in this Investigation are at issue in the Barnes & Noble case.

infringement allegations regarding an eleventh patent in an attempt to convince the courts that the Pennsylvania case was different and should not be dismissed in favor of the first-filed California action. Once LSI's transparent attempt to move the litigation away from the forum most convenient (and least expensive) for Barnes & Noble failed, LSI dropped its allegation of infringement of the eleventh patent. In other words, LSI had added a claim of infringement that it recognized was meritless for the sole purpose of attempting to increase the burden and expense associated with Barnes & Noble's defense.

Indeed, prior to claim construction, LSI dropped its infringement allegations related to five additional patents of the original ten that it had asserted against Barnes & Noble. As described above, LSI had used those patents in an attempt to extract egregious license fees from Barnes & Noble under the threat—and actuality—of expensive litigation. But when it came time to even begin the process of proving its infringement allegations, and after Barnes & Noble had already incurred considerable expense, LSI was forced to concede the merit of Barnes & Noble's legitimate positions with respect to those patents.

But LSI's shell game of driving up litigation costs for Barnes & Noble with baseless patent assertions was not finished. Prior to briefing on claim construction, LSI added claims of infringement of five more patents, increasing the number of asserted patents back to ten. Then, several weeks later when its supplemental infringement contentions came due, LSI dropped one of the additional patents. LSI has now asserted ***sixteen*** different patents against Barnes & Noble, has forced Barnes & Noble to incur costs defending against infringement allegations related to those sixteen patents, and only then dropped its meritless allegations related to seven of those patents (so far).

The revolving door of baseless allegations in the case against Barnes & Noble is just one

example of LSI's clear strategy to maximize the costs incurred by companies that have refused to take a license to patents that are invalid, unenforceable, and/or not infringed. LSI has also sought vastly overbroad discovery from Barnes & Noble into irrelevant matters, has repeatedly burdened both Barnes & Noble and the district court with motion practice relating to those requests, and has sought to impose undue and excessive burdens of discovery at times calculated to maximize disruption to Barnes & Noble's business (*i.e.*, during product launches and holiday periods).

LSI has very clearly adopted a business model that is predicated on extracting license fees from unsuspecting targets—often true innovators—that far exceed any reasonable value of the patents. It does so by threatening litigation, ignoring reasoned non-infringement and invalidity defenses, and once litigation has commended, using the legal process not to prove the merits of its case (note the seven asserted patents dropped to date) but instead to maximize litigation costs for targets that do not acquiesce to its hold-up scheme. LSI does all of this despite the fact that is does not make a single product or sell any service that practices the asserted patents.

B. A Remedial Order Here Would Increase the Asymmetric Bargaining Advantage of Patent Assertion Entities

Although there is a legitimate interest in protecting intellectual property rights, that interest does not extend to granting patent assertion entities like LSI the right to gain undue leverage by obtaining an exclusion order at the Commission. It is not in the public interest to issue an exclusion order when monetary damages would be adequate compensation to complainants like the ones in this Investigation. This fact is apparent from LSI's own business model with respect to the subject matter of this Investigation, which seeks solely to monetize patents: exclusion of the accused products would be contrary to LSI's financial interests but for

the would-be "hold-up" value the prospect of such exclusion provides. LSI has no products that practice the asserted patents to protect with an exclusion order. If an exclusion order were to issue, LSI could use that order to demand even more aggressive licensing terms—thereby permitting LSI to artificially and wrongfully inflate the value of its patents.

Issuance of an exclusion order in this Investigation would also run contrary to the interests and industries the statute was designed to protect. The legislative history of Section 337 shows that it was designed to protect companies that are exploiting the asserted patent through manufacturing or through licensing directed to bringing products to market. *See* S. Rep. No. 100-71, at 129 (1987); H.R. Rep. No. 100-40, at 157 (1987); *Certain Coaxial Cable Connectors and Components Thereof and Products Containing Same*, Inv. No. 337-TA-650, Comm'n Op. at 47 (Apr. 14, 2010). LSI's primary business involves seeking out potential licensees that manufacture and sell products that are already in the marketplace. This is not the type of activity that Section 337's legislative history contemplates. This fact provides additional support for why it would be against the public interest to issue remedial orders in this Investigation.

C. Conclusion

For all of these reasons, any exclusion order or cease and desist order in this Investigation would be contrary to the public interest. The harm to U.S. consumers and competitive conditions in the U.S. economy that would result from the issuance of a remedial order here outweighs the interest in protecting LSI's alleged intellectual property rights; indeed, the issuance of any remedial order would only buttress a business model that does nothing to encourage innovation and harms the true innovators that drive the U.S. economy.

Dated: November 1, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sung Bin Lee, hereby certify that on this November 1, 2013 copies of the foregoing document were served upon the following parties as indicated:

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