IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

ILLINOIS COMPUTER RESEARCH, LLC, Plaintiff, v. **HARPO PRODUCTIONS INC., SONY CORPORATION OF AMERICA, and SONY ELECTRONICS INC.** Defendants.	Civil Action No. 08-CV-7322 Honorable Matthew F. Kennelly United States District Judge Honorable Michael T. Mason United States Magistrate Judge JURY TRIAL DEMANDED

MOTION OF DEFENDANT SONY ELECTRONICS INC. FOR A SUMMARY JUDGMENT OF NON-INFRINGEMENT AND MEMORANDUM OF LAW IN SUPPORT

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INTRODUCTION

This a patent infringement case. Illinois Computer Research, LLC ("ICR") wrongly alleges that Sony Electronics Inc. ("Sony") infringes claims 1, 15 and 17-21 ("the asserted claims") of U.S. Patent No. 7,111,252 ("the '252 patent").[1] The '252 patent (A001-12)[2] is directed to "enhancing the realism of product descriptions over the Internet, to make Internet shopping more like real life shopping." A008 at col. 1, ll. 10-13. In particular, ICR contends that Sony infringes the asserted claims of the patent because, for certain electronic books offered for sale on Sony's eBook Store website (http://ebookstore.sony.com), Sony includes a single image of the book's front cover with a text excerpt from the book.

In so contending, however, ICR stretches its patent claims beyond legally acceptable boundaries. ICR ignores the express language of the asserted claims, including claim language that requires that (1) more than a single page or image of a page of a book be available over a network, and (2) the book pages or images of the pages be sent over the network only if a threshold or limit is not exceeded. Furthermore, ICR ignores that the claims, as ICR reads them, would encompass the prior art websites of Barnes & Noble and others that used precisely what ICR now claims is an infringement of its patent—a single image of a book's front cover along with a text excerpt from the book—long before the application for the '252 patent was filed.

ICR's patent infringement claims are baseless, and should be summarily dismissed as a matter of law. The asserted claims of the '252 patent are plainly not infringed. This case is at an

[1] ICR voluntarily dismissed defendant Sony Corporation of America from the case. *See* D.I. 28, 31, where "D.I." refers to the Court's docket index number.

[2] "A__" refers to page citations from *Appendix in Support of the Motion of Defendant Sony Electronics Inc. for a Summary Judgment of Non-Infringement*, which accompanies this motion.

early stage; grant of a summary judgment of non-infringement now would save the Court as well as the parties a considerable amount of time and resources.

BACKGROUND

A. The Claims of the '252 Patent Require More than a Single Book Page or Image and that those Pages or Images be Sent Over a Network Only if a Threshold is Not Exceeded.

The '252 patent is entitled "Enhancing Touch and Feel on the Internet." It was issued on September 19, 2006 from an application filed February 16, 2000. A001. The patent is directed to "enhancing the realism of product descriptions over the Internet, to make Internet shopping more like real life shopping." A008 at col. 1, ll. 10-13. The "Abstract" states: "The present invention has the good being a book, and the inside and outside covers of the book are displayed and specified pages of the book can be displayed. The user can read from either the label or the covers just like as if the[y] were actually handling the good." A001.

The patent further explains the special application of the patented subject matter for use with books:

> One special application of this system is for use in books…. Bookstores are used by people who browse through the book selection, reading pages, looking at pictures, and trying to get the feel of different books. The present system teaches an interface to the book contents that enables viewing the outside portion of the book, specified pages of the book, and leafing through random pages of the book. An embodiment limits the amount of reading that the user can do, to prevent the entire book from simply being read on line.

A008 at col 2, ll. 16-25. Although the '252 patent asserts general applicability to "any system in which merchandise can be read" (A011 at col. 7, ll. 15-17), all of the patent's claims are limited to reading books (*see* A011-12 at cols. 7-10, claims 1-21).

Here, ICR asserts that Sony infringes claims 1, 15 and 17-21 of the '252 patent. A356. Of these, only claims 1, 15 and 18 are independent claims, which stand on their own and do not

incorporate limitations from other claims. If these three claims are not infringed, neither are the remaining asserted claims that depend from them. *See, e.g., Wahpeton Canvas Co., Inc. v. Frontier, Inc.*, 870 F.2d 1546, 1552 (Fed. Cir. 1989); 35 U.S.C. § 112 ¶ 4.

Each of claims 1, 15 and 18 includes limitations directed to (1) providing multiple pages of a book or multiple images of pages of a book over a network; and (2) sending those pages or images of pages only if a threshold or limit is not exceeded. These claims are set forth below, with the relevant language highlighted:

> 1. A method, comprising:
>
> in a server of a network,
>
> storing **a plurality of images representing pages of a book**, **said images** stored with a resolution effective to enable said book to be read;
>
> responsive to a request over the network, sending one of **said images** to a remote node; and
>
> **determining if the request for pages exceeds a certain threshold, and sending said information only if said threshold is not exceeded**.

> 15. A method of reading a book over the Internet, comprising:
>
> requesting a page of a book on a client of the Internet;
>
> **determining**, in a server of the Internet, **if more than a specified number of pages of said book have been requested** by a specified user; and
>
> sending said page **only if the specified number of pages does not exceed a threshold**.

> 18. An apparatus comprising:
>
> a computer, **providing limited pages of books** that can be viewed over a publicly available network, and including a connection to the network, and which receives information indicative of at least one desired page of a book over the connection to the network; and returns information indicative **of only limited images of pages of the book** based on said information; and
>
> **wherein said computer limits a number of pages that can be displayed.**

A011 at col. 7, ll. 44-53; A011 at col. 8, ll. 54-61; A012 at col. 9, ll. 1-10 (typographical errors corrected, emphasis added).

The three asserted, independent claims of the '252 patent (and, of course, the remaining asserted claims that depend from them) all expressly require *multiple* pages of a book or *multiple* images of pages of a book: *e.g.*, "a plurality of images representing pages of a book" and "said images" (claim 1), "if more than a specified number of pages of said book have been requested" and "only if the specified number of pages" (claim 15), and "providing limited pages of books" and "of only limited images of pages of the book" (claim 18). As the '252 patent explains, prior art websites had the concept of "touch and feel" of physical books, including images of book covers and other information, but that other information was "limited":

> The concept of touch and feel is quite prevalent in a bookstore. Many bookstores are common on the web, such as BarnesandNoble.com and Amazon.com. These provide very convenient browsing for an individual who knows what book they want to buy. The individual can often see a picture of the cover of the book, and read certain reviews about the book. However, the data is often limited.

A010 at col. 5, ll. 12-19.

Indeed, the prior art BarnesandNoble.com website[3] that the '252 patent explicitly references (as well as other prior art sites such as those of 1st Books Library and New Concepts

[3] Barnes & Noble, Inc.'s Internet website, available to the public for purchasing books in May 1997 (*see* A371 at ¶ 5 and A378-79; A394 at ¶ 4; A397-98), is prior art to the '252 patent under 35 U.S.C. § 102(b). At the time of its launch, Barnes & Noble provided webpages that included images of book covers as well as the author, price and other information. A371-72 at ¶ 7 and A381; A394-95 at ¶ 6 and A400. Some of these webpages included a hyperlink titled "Read an Excerpt," which, when selected, would provide another webpage containing a text excerpt from the book of interest. A371-72 at ¶¶ 7-8 and A381-92; A394-95 at ¶¶ 6-7 and A400-411. Barnes & Noble has continued to offer text excerpts. *See*, *e.g.*, A426 (showing a hyperlink inviting users to "read a chapter" of "Blind Man's Bluff").

Publishing)[4] included book cover images with hyperlinks to text excerpts, as shown in the example below:

See A371-72 at ¶¶ 7-8 and A381-92; A394-95 at ¶¶ 6-7 and A400-11.[5] Although these prior art

[4] 1st Books Library's website ("1st Books"), available on the Internet at least as early as April 1998 *(see, e.g.*, A436-58), is prior art under 35 U.S.C. § 102(b). 1st Books provided webpages that included images of book covers as well as the author, price and other information. Some of these webpages included a hyperlink titled "Free Preview," which, when selected, would provide another webpage containing a text excerpt from the book of interest.

New Concepts Publishing's website ("New Concepts"), available on the Internet at least as early as December 1998 (*see, e.g.*, A459-481), is prior art under at least 35 U.S.C. § 102(a). New Concepts provided webpages that included images of book covers as well as the author, price and other information. Some webpages also included text excerpts from the books.

[5] The inventor's failure to inform the Patent Office of the inclusion of text excerpts on BarnesandNoble.com—a feature that the inventor must have known about—is the focus of Sony's inequitable conduct defense. *See* D.I. 39 at 6-8.

websites had images of book covers with hyperlinks to text excerpts, they had "limited information" in that they did not have *multiple* pages of the books or *multiple* images of pages of the books, as the asserted claims of the '252 patent require.

The asserted claims of the '252 patent also all expressly require sending the claimed pages or images of pages *only if a threshold or limit is not exceeded*: *e.g.*, "determining if the request for pages exceeds a certain threshold, and sending said information only if said threshold is not exceeded" (claim 1), "sending said page only if the specified number of pages does not exceed a threshold" (claim 15) and "a computer … which … returns information indicative of only limited images of pages of the book based on said information; and wherein said computer limits a number of pages that can be displayed" (claim 18). As the patent explains, this claimed feature prevents the whole book from being freely available:

> In bookstores, readers can often sit and look at the books or even read from parts of the books. A user with enough determination can sit and read a whole book. Bookstores operate based on the assumption that most people will not read all books in that way. However, it enhances the experience of the bookstore. It allows the user to decide if they like the book or not.
>
> The present embodiment teaches a remote information sales paradigm, which starts by obtaining a digital image of at least parts of the book. Those digital images could be supplied by the publisher or designer and then used to provide information on the book to people reading the book. This allows the user to read parts of the book.
>
> A problem would exist, however, if the entire book was freely available. In that case, any user could download the whole book and then read it on their computer at their leisure. Accordingly, the present system teaches limits on the amount of reading that can be done. A limit is defined that limits the amount of reading that can be done.

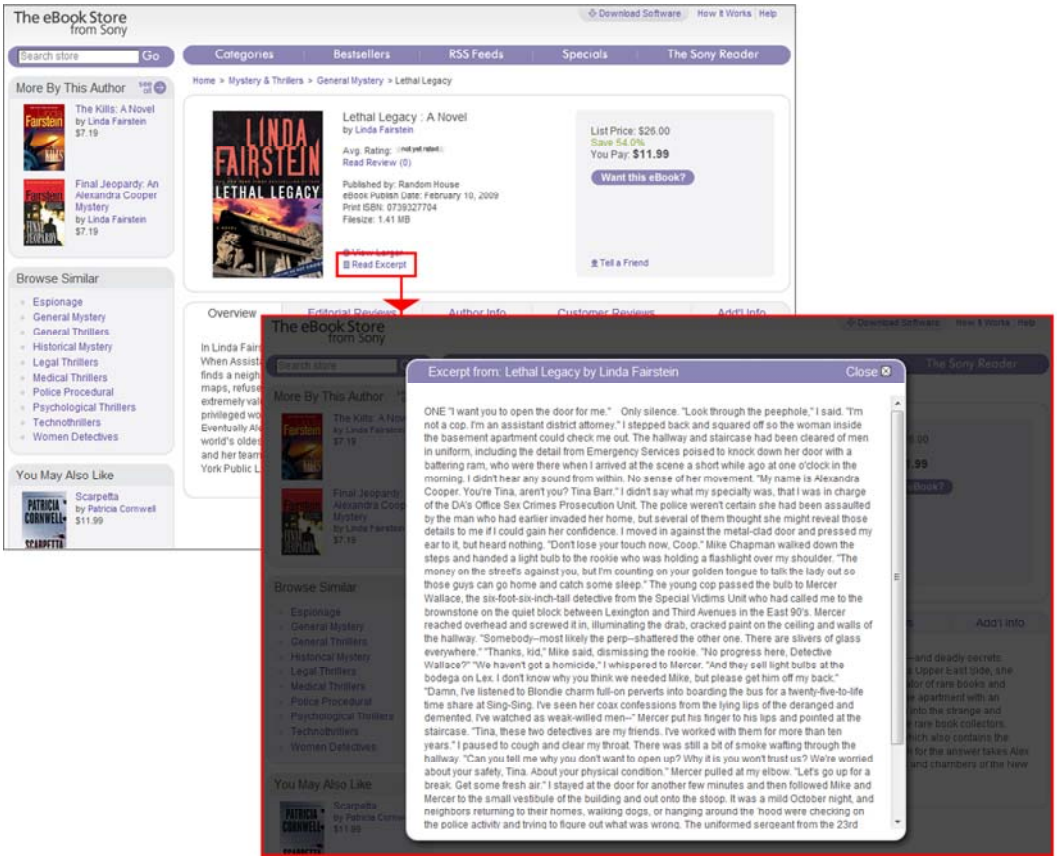
A010 at col. 5, ll. 27-46.

Thus, in order to provide an experience like that of browsing books in a physical bookstore while preventing the customer from reading the whole book without purchasing it,

each asserted claim of the '252 patent expressly includes limitations directed to (1) providing multiple pages of a book or multiple images of pages of a book over a network, and (2) sending those pages or images of pages only if a threshold or limit is not exceeded.

B. Sony's eBook Store Website Includes Only a Single Image of the Book Cover and a Text Excerpt from the Book.

Sony offers e-books for sale on its website at http://ebookstore.sony.com. For some books, Sony includes a single image of the book's front cover and a text excerpt from the book:



A488-89 at ¶¶ 3-6 and A490-95.

Sony's eBook Store website does not infringe the '252 patent as ICR asserts for at least two separate and independent reasons: First, the website does not include multiple pages or images of a pages for any one book. Second, the website does not enforce a page or image

threshold—there is simply a single book cover image with a single text excerpt—just like the prior art.

ARGUMENT

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (2008).

A determination of infringement (or lack thereof) of a United States patent is a two-step process. *See, e.g., PC Connector Solutions LLC v. SmartDisk Corp.*, 406 F.3d 1359, 1362 (Fed. Cir. 2005). First, the Court must ascertain the scope of the claims as a matter of law. Claims are interpreted in view of the intrinsic evidence, *i.e.*, the claims themselves, the specification and the prosecution history. *Id.* Claim terms are generally given their ordinary and customary meaning unless the inventor clearly imparts a special meaning to a term. *Id.* at 1363. Construction of the claims need not be an exhaustive process, "[a]s long as the trial court construes the claims to the extent necessary to determine whether the accused device infringes." *Ballard Med. Prods. v. Allegiance Healthcare Corp.*, 268 F.3d 1352, 1358 (Fed. Cir. 2001) (affirming summary judgment of noninfringement where the district court did not provide a complete claim construction because disputed terms were properly construed to exclude the structures that were used in the accused device).

Second, a determination is made as to whether the properly construed claims cover the accused device, either literally or under the doctrine of equivalents. *PC Connector Solutions*, 406 F.3d at 1362. This second step is a question of fact. *See id.* When there are no genuine issues of material fact in dispute between the parties, however, grant of summary judgment is proper. *See id.* at 1364; *Ballard Med. Prods.*, 268 F.3d at 1362.

I. The Accused Website Does Not Provide Multiple Pages of a Book Over a Network.

Each of the independent claims that ICR asserts Sony infringes requires providing multiple pages of a book over a network, *e.g.*, claim 1: "in a server of a network, *storing a plurality of images representing pages of a book*"; claim 15: "determining, in a server of the Internet, if more than a specified number of *pages of said book have been requested* by a specified user"; claim 18: "a computer, *providing limited pages of books* that can be viewed over a publicly available network . . . and returns information indicative of only *limited images of pages of the book.*"

The Sony eBook Store does not provide this claimed feature—it uses only a single image of the book cover and a text excerpt from the book; it does not display or have available multiple book pages as the asserted claims require. When a user navigates to the webpage for an individual book at the Sony website, an image of the cover of the book is shown along with other information about the book such as the author, the publisher, and the price. *See, e.g.*, A488 at ¶ 4 and A491. Some of the individual book webpages also include a "Read Excerpt" hyperlink that, when selected, displays a text excerpt from the book. A488-89 at ¶¶ 4-6 and A490-95.[6] The text excerpt is not a page or image of a page from the book and includes no correspondence to the page breaks in the book.[7] It is displayed simply as text characters typed out on the screen. After

[6] Like any website, the source code for the pages of the Sony website (http://ebookstore.sony.com) can be viewed while browsing the website (*e.g.*, by right clicking on the background and selecting "View Source" in Microsoft's Internet Explorer 7 web browser). Viewing the source code for book webpages on the Sony website shows that the entire text of the book excerpts on the site are part of the code of the book webpages and are merely revealed when the "Read Excerpt" hyperlinks are selected. *See, e.g.*, A489 at ¶ 10 and A500-01.

[7] For example, comparison of the text excerpt for "Lethal Legacy" on the Sony website (A492-95) to pages from a physical copy of the book (A485-87) shows that the text excerpt ends in mid-page.

reading the text excerpt, the user may close the excerpt window; no additional text excerpts may be requested or retrieved, *i.e.*, if the "Read Excerpt" hyperlink is selected again, the same text excerpt is displayed. A488-89 at ¶¶ 5-8 and A492-95.

There can be no literal infringement based on the language of the claims.

There can be no literal infringement of claims 1 and 18 because the Sony website provides only a single image of the book cover and a single text excerpt; while claim 1 requires "storing a *plurality of images* representing *pages of a book*," that is, more than one image representing more than one page of the book; and claim 18 requires "providing limited pages of books that can be viewed over a publicly available network" and "return[ing] information indicative of only limited *images of pages*," that is, more than one image representing more than one page of the book.

Claim 15, while not expressly limited to images of pages of a book, includes the requirement of multiple pages of a book by reciting the step of "determining, in a server of the Internet, if more than a specified number of *pages of said book* have been requested by a specified user." As used in the '252 patent, "pages" refers to how pages are organized in the physical book and not merely to the text contained on pages of the book. The '252 patent repeatedly describes the invention as replicating the experience of actually handling a physical book. *See, e.g.*, A001 at Abstract ("The present invention has the good being a book, and the inside and outside covers of the book are displayed and specified pages of the book can be displayed. The user can read from either the label or the covers just like as if the[y] were actually handling the good."); A008 at col., 2, ll. 19-23 ("The present system teaches an interface to the book contents that enables viewing the outside portion of the book, specified pages of the book, and leafing through random pages of the book."); *see also* Fig. 4 and A010 col. 6, ll. 1-42.

"Pages" referring to the organization of the physical pages rather than mere text is also consistent with the use of "pages" in the other claims, *i.e.*, the claim language "images representing pages of a book" and "images of pages" would make no sense if "pages" referred merely to text. *PODS, Inc. v. Porta Stor, Inc.*, 484 F.3d 1359, 1366-67 (Fed. Cir. 2007) (finding no infringement because there is a "presumption that the same terms appearing in different portions of the claims should be given the same meaning unless it is clear from the specification and prosecution history that the terms have different meanings at different portions of the claims"). Thus there can be no literal infringement of claim 15 because the Sony website provides only a single image of the book cover and a single text excerpt that does not correspond to the physical pages of the book.

There can be no literal infringement because of the inventor's disclaimer during prosecution.

There also can be no literal infringement of the asserted claims because during prosecution of the application that led to the '252 patent, the inventor disclaimed systems that include only a single page of a book. In arguing over a prior art rejection of claim 1 (claim 85 in the application), the inventor distinguished his claimed system from that described in a prior art patent to Rhodes, because the Rhodes system only stored *a single book page*:

> *Rhodes teaches nothing about the claimed feature of "'storing a plurality of images representing pages of the book . . .* sending one of said images to a remote node" (emphasis added). *Rhodes teaches only a single book page, here the cover*, being stored for each book. He teaches nothing about sending one of multiple images to a remote node.

A218 (underline in original, italics added).[8]

[8] This argument was also adopted in regard to claims 15 and 18 (claims 105 and 121 in the original application). *See* A221.

Having expressly disclaimed systems involving only a single page or image, ICR's claims cannot now be construed to cover the Sony website's use of a single image (*i.e.*, the book cover). *See, e.g., Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1375 (Fed. Cir. 2008) (claim scope disavowed during prosecution cannot be recaptured through claim construction); *Ballard Med. Prods.*, 268 F.3d at 1362 (affirming summary judgment of noninfringement where inventor disclaimed structure used in accused device).

There can be no infringement under the doctrine of equivalents.

Similarly, because of the arguments made during prosecution, ICR cannot use the doctrine of equivalents to cover systems involving only a single image or page. *Elkay Mfg. Co. v. Ebco Mfg. Co.*, 192 F.3d 973, 981 (Fed. Cir. 1999) (finding no infringement under the doctrine of equivalents as a matter of law because during prosecution the patentee distinguished its claims from the features alleged to be equivalent in the accused devices); *see also Freedman Seating Co. v. American Seating Co.*, 420 F.3d 1350, 1358 (Fed. Cir. 2005) (finding no equivalents because such a finding would entirely vitiate the claim limitation at issue).

There can also be no finding of infringement under the doctrine of equivalents because "the doctrine of equivalents cannot allow a patent to encompass subject matter existing in the prior art . . . Nor may it allow coverage of obvious, or 'trivial,' variations of the prior art." *K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1366-67 (Fed. Cir. 1999) (affirming summary judgment of no infringement under the doctrine of equivalents, stating that to "hold otherwise would allow the [asserted] patent, through the doctrine of equivalents, to cover subject matter that could not have been legally patented in the first instance"). Here, as discussed above in sections A and B, the prior art websites of Barnes & Noble, 1st Books Library, and New Concepts Publishing include the same functionality that is being accused of infringement on the Sony website. The

asserted claims of the '252 patent cannot cover the Sony website under the doctrine of equivalents because then they would also cover these prior art websites.

Thus, there is no infringement of any of the asserted claims of the '252 patent[9] by the Sony website at least because it does not meet the limitations of the asserted claims that require multiple "pages of a book" or multiple "images of pages," either literally or by equivalents. *See International Rectifier Corp. v. IXYS Corp.*, 361 F.3d 1363, 1369 (Fed. Cir. 2004) (a finding of infringement requires that every claim limitation or its equivalent be found in the accused device).

II. The Accused Website Does Not Perform Any Determination to Limit the Pages or Text Excerpts Sent to a User.

Each of the independent claims asserted by ICR also requires making a determination if a request for pages has exceeded a threshold and sending the pages only if the threshold is not exceeded, *e.g.*, claim 1: "*determining if the request for pages exceeds a certain threshold*, and sending said information only if said threshold is not exceeded"; claim 15: "determining, in a server of the Internet, if more than a specified number of pages of said book have been requested by a specified user; and sending said page *only if the specified number of pages does not exceed a threshold*"; claim 18: "a computer … which … returns information indicative of only limited images of pages of the book based on said information; and *wherein said computer limits a number of pages that can be displayed*."

There can be no literal infringement based on the language of the claims.

Based on the ordinary meaning of the claim language, the Sony website does not perform any determination regarding whether a threshold has been exceeded in the amount of information

[9] Claims 17 and 19-21 depend from claims 15 and 18, respectively, and thus include all of the limitations of their respective independent claims.

that may be sent to a user of the website. A489 at ¶ 9. As discussed above, the Sony eBook Store provides a single image of the book cover and a single text excerpt from the book together in a single webpage.[10] A488-89 at ¶¶ 4-7 and A492-95. No additional text excerpts from the book can be requested or retrieved. A488-89 at ¶ 8.

There can be no literal infringement because of the inventor's disclaimer during prosecution.

Furthermore, during prosecution of the application that led to the '252 patent, the inventor distinguished his invention from the Rhodes prior art patent by arguing that the claims required the determination of a threshold limitation:

> The rejection admits that Rhodes does not teach determining if the request for pages is over a threshold and sending the pages if only a threshold is not exceeded. Naturally, Rhodes does not teach this, since Rhodes allows only one single page to be sent; there is no sense in counting the pages when you know that only one page can be sent.

A218 (underline in original).[11] Sony does not literally infringe claims 1, 15 or 18 because its website does not determine if a threshold has been exceeded or enforce a limit on the pages displayed, and the inventor disclaimed systems like that of Sony where there is only a single transmission of book data. *See, e.g.*, *Computer Docking Station Corp.*, 519 F.3d at 1375; *Ballard Med. Prods.*, 268 F.3d at 1362.

There can be no infringement under the doctrine of equivalents.

There also can be no infringement under the doctrine of equivalents because, in addition to being used to distinguish over the Rhodes patent, the threshold/limit requirement was added to claims 1 and 18 (original claims 85 and 121) through amendment to overcome an earlier prior art

[10] As discussed in note 6, supra, the text excerpt is initially hidden by the user's browser but the source code of the webpage includes all of the text of the excerpt. *See* A489 at ¶ 10; A500-01.

[11] This argument was also adopted in regard to claims 15 and 18 (claims 105 and 121 in the original application). *See* A221.

rejection (*see* A186; A191-92; A193-94; A199).[12] *Voda v. Cordis Corp.*, 536 F.3d 1311, 1325-26 (Fed. Cir. 2008) (reversing a finding of infringement under the doctrine of equivalents because a patentee's narrowing amendment is presumed to disclaim the territory between the original and amended claim); *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., Ltd.*, 535 U.S. 722, 740-41 (2002); *see also Freedman Seating Co.*, 420 F.3d at 1358 (doctrine of equivalents cannot be used to vitiate a claim limitation). Also, as discussed above in section I, there can be no infringement under the doctrine of equivalents because such a finding would cover the prior art. *K-2 Corp.*, 191 F.3d at 1366-67.

Thus, Sony does not infringe any of the asserted claims of the '252 patent at least because its website does not meet the limitations of the asserted claims that require determining a threshold or limit on the pages displayed, either literally or by equivalents. *International Rectifier Corp.*, 361 F.3d at 1369.

CONCLUSION

Summary judgment of non-infringement is warranted here on two separate and independent grounds: First, Sony's accused website does not include multiple pages or images of pages for any one book and, second, it does not have a page or image threshold. Accordingly, Sony respectfully requests that the Court enter summary judgment that Sony does not infringe any of the asserted claims of the '252 patent.

June 26, 2009

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[12] Similar arguments were made regarding claim 15 (original claim 105) which already included the threshold requirement. *See* A198.

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of June, 2009, the foregoing Motion Of Defendant Sony Electronics Inc. For A Summary Judgment Of Non-Infringement And Memorandum Of Law In Support, and the accompanying Appendix In Support Of The Motion Of Defendant Sony Electronics Inc. For A Summary Judgment Of Non-Infringement (Vols. I-IX) were filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system upon all counsel of record.

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