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ELECTRONICS AMERICA, INC. (erroneously sued as SAMSUNG ELECTRONICS USA, INC.)

In the United States District Court  
District of Utah, Central Division

ISYS TECHNOLOGIES, INC., a Nevada  
Corporation,  
Plaintiff,

v.

GOOGLE INC., a Delaware Corporation;  
SAMSUNG ELECTRONICS USA, INC., a  
Delaware Corporation; ACER AMERICA CORP.,  
a California Corporation; AMAZON.COM, INC.,  
a Delaware Corporation; and BEST BUY CO.,  
INC., a Minnesota Corporation,  
Defendants.

Case No. 2:11-CV-507 CW

**DECLARATION OF FELIX LIN IN  
SUPPORT OF DEFENDANT GOOGLE  
INC.'S OPPOSITION TO MOTION FOR  
TEMPORARY RESTRAINING ORDER  
AND PRELIMINARY INJUNCTION**

**JUDGE CLARK WADDOUPS**

I, Felix Lin, declare as follows:

1. I am Director, Product Management for the CHROME OS project at Google Inc. (“Google”) and have been employed by Google for over two years. I have personal knowledge of the facts set forth in this declaration. I submit this declaration in support of Defendant Google Inc.’s Opposition to Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction, filed concurrently herewith.

2. I joined Google in 2009 and since then have had responsibility for bringing the CHROME OS operating system to market, as well as the related CHROME web browser and CHROMEBOOK products. I am responsible for product management, manufacturing partnerships, distribution and business development for those projects. When I joined Google in 2009, I undertook to learn the history of the CHROME web browser project at Google, as well as Google’s open source CHROMIUM project. I am knowledgeable about all of those projects.

3. A web browser is the software which computer users utilize to locate and access information on the Internet. In 2006, Google recognized the need for a web browser which would offer enhanced functionality. At the time, even though most computer users were beginning to use their computers largely to access information and programs on the Internet, users still had to use the personal computer’s operating system in order to utilize complex programs such as word processing. Google sought to develop a browser that would allow users to access programs and applications available on the Internet and effectively utilize even very complex programs via the browser alone. In 2008, after two years of substantial effort and investment, Google launched its CHROME browser. At the same time, Google announced a parallel open-source software project under the name CHROMIUM.

4. The CHROME and CHROMIUM browser software is derived from the same source code, with the primary differences between the two products being that (a) CHROME includes certain additional features not found in CHROMIUM, such as automated software updates and

built-in, licensed, 3<sup>rd</sup> party software such as the Adobe Flash player, and (b) unlike CHROME software, Google's CHROMIUM software is made available for further development, use and distribution through an "open source" program. Attached hereto as Exhibit A are true and correct copies of relevant webpages from Google's Chromium.org site.

5. "Open source" refers to a method of software development in which code is made available to third party developers via license and those developers are invited to participate in further development of the code. The entity initiating the open source project retains ownership of the initial code and also to the name of the open source project.

6. Software developers wishing to participate in the CHROMIUM software project may only distribute or make use of the source code according to the terms of the relevant open source licenses. Most of the source code in the CHROMIUM project is made available under the Berkeley Source Distribution ("BSD") license. Attached hereto as Exhibit B is a true and correct copy of the Terms and Conditions governing use of the CHROMIUM software. As the open-source program behind the CHROME software, the objective is to build a faster, safer and more stable way for users to experience the web. As licensed, developers have access to the CHROMIUM source code, which enables them to develop additional features in the browser software, participate in discussion groups, improve the software by finding and reporting bugs, and submit patches for known bugs. Not only is there a self-policing element in the open source community, but Google reviews the results of that community effort both to monitor the CHROMIUM product and to improve the CHROME product. Using this development approach, releases for the CHROMIUM source code have included versions of the browser that are compatible with the Windows, MAC OS X, and Linux platforms.

7. In its effort to ensure the continuous improvement of its CHROMIUM software, Google established "Bug Life Cycle and Reporting Guidelines" for individuals and developers to report bugs as they work on the software in the open source environment. (*See Ex. A.*)

8. Additionally, Google has implemented a program whereby certain dedicated developers in the open source community become "reviewers" and others become "committers," and these

parties are responsible for, among other tasks, the review of code, ensuring that code contributed to the open source code base is of high-quality, and resolution of any issues associated with the software. (*See id.*).

9. Since their initial release in September 2008, a number of updated versions of both the CHROME and CHROMIUM web browser software products have been developed, improved, and made available to the public.

10. In addition to development of the CHROME web browser, Google has also developed a new computer operating system. Google wanted to develop an operating system that would meet the needs of users active on the Internet and would be fast, powerful and secure. In July 2009, Google announced its CHROME OS and a few months later, in November 2009, also released its CHROMIUM operating system to the CHROMIUM open source community. The relationship between the operating systems is the same as that between the web browsers: CHROMIUM OS serves as the open source project behind CHROME OS.

11. Since their introduction, the speed, simplicity and security of the CHROME and CHROMIUM web browser software has garnered widespread attention and use. Worldwide usage of the CHROME browser has more than doubled in the past year, increasing from 70 million users in 2010 to 160 million active users this year. The CHROME web browser now accounts for nearly 13% of worldwide web browser usage.

12. Since its initial release, Google has continuously used the mark CHROMIUM in connection with its open source browser and operating system software. Google has used the “TM” symbol and listed CHROMIUM as a Google brand under its “Guidelines for Third Party Use of Google Brand Features.” Attached hereto as Exhibit C is a true and correct copy of the “Guidelines for Third Party Use of Google Brand Features.”

13. In 2009, Google began developing a new computer hardware product, a laptop computer that would run CHROME OS. Google now has more than two hundred employees devoted full time to the development of CHROME OS . At the outset, the Google team spent many months identifying the performance objectives, features and user experience that it desired to achieve

with the new computer product. Subsequently, the team began exploratory discussions with numerous third party manufacturers of integrated circuits, displays, keyboard and myriad other components needed to build the new product. Google also identified Defendants Acer America Corporation (“Acer”) and Samsung Electronics America, Inc. (“Samsung”) as partners with whom it would work to further develop and manufacture the product. Throughout this timeframe, Google redefined and refined the product, continuously pushing itself and its partners and suppliers to provide the highest performance components and features achievable at the desired price point for the product. In addition, Google’s partners and suppliers devoted substantial resources to creating and improving on components for the product. In parallel to these product development efforts, Google devoted substantial resources to the promotion and marketing of the product, including purchasing advertising time on television as well as advertising in print and digital media. Taken together, Google’s investment in development of its CHROMEBOOK product exceeds tens of millions of dollars.

14. Google ultimately chose CHROMEBOOK as the category name for laptops that are designed for and that come pre-loaded with the CHROME OS operating system. When Google adopted the CHROMEBOOK mark, it had no intent to derive any benefit from the reputation or goodwill of the CHROMIUMPC product.

15. On May 11, 2011, after two years of development and significant financial and personnel investment, Google announced the availability of CHROME OS on two versions of a CHROMEBOOK laptop to be manufactured by Acer and Samsung. Both versions are scheduled to begin shipping on June 15, 2011 with an average cost of approximately \$400 per unit.

16. The CHROMEBOOK product is scheduled to officially launch on June 15, 2011. If Google is unable to launch on that date, it will suffer substantial financial loss and irreparable harm. An injunction will prevent Google from making direct sales of the CHROMEBOOK product and prevent Google’s partners Acer and Samsung from making sales of the CHROMEBOOK product. Due to competition with other products, delaying sales will likely result in lost sales to alternatives. As a further consequence, the marketing momentum created by

Google's promotional efforts to date will be lost. Google believes that there is significant consumer anticipation for CHROMEBOOK computers implementing Google's CHROME operating system. For example, 1,000 allocated CHROMEBOOK computers sold out in approximately four hours on Gilt Group online. Google's failure to offer the product to the general public as promised will, in addition to causing Google and its partners to lose sales, undoubtedly irreparably harm Google's reputation and goodwill in the marketplace among those consumers, as well as among its partners and enterprises anticipating delivery of the product. Besides Acer and Samsung, other PC manufacturers are preparing to launch, but have not yet publicly announced commercial availability for those products. The uncertainty about Google's ability to ship CHROME OS and market CHROMEBOOK computers will have a direct adverse affect on project schedules, budgets and manufacturing allocations. Also, if Google is unable to ship product on June 15, its ability to market its product at a profitable price point will be severely diminished. Computer products depreciate very quickly as, once a product is announced, other manufacturers can imitate the product and quickly offer similar products at lower price points because they have not had to incur the substantial developmental and marketing expense incurred in creating the original product. As such other products enter the marketplace, the original product often cannot command the desired price point and the company's ability to recoup its investment is jeopardized. In addition, Google has already planned advertising and promotional efforts over the next months to accompany the introduction of its product. If this advertising must be stopped, Google will lose its investment in that advertising and promotion. In addition, continued advertising and promotion of a product that is not available will undoubtedly be frustrating to consumers and that too will redound to Google's detriment.

17. Upon information and belief, Google's manufacturing partners for the CHROMEBOOK laptops, Defendants Samsung and Acer, have also invested heavily and incurred substantial costs in anticipation of the June 15<sup>th</sup> launch date. Further upon information and belief, (a) manufacturing facilities and line capacity have been reserved; (b) if the manufacturers are unable

to ship on that date, they will incur significant costs as well as potentially lose line capacity; (c) raw manufacturing materials, much of which are perishable, will also be lost if the CHROMEBOOK laptops do not begin to ship on June 15<sup>th</sup>; (d) manufacturers facing uncertainty over the June 15<sup>th</sup> shipping date will have to choose between forgoing production of new units or risking the accumulation of product that they may never be able to sell; (e) each unit of the CHROMEBOOK computer starts to lose value the day it is manufactured, rendering the accumulation of product costly even if it is ultimately sold; and (f) each day of lost sales represents a lost opportunity to generate a return on product design and development costs.

18. Google also invested significant time and resources to develop sales and distribution arrangements with Defendants Best Buy and Amazon, each of which will market and sell the new CHROMEBOOK laptops. Upon information and belief, each manufacturer has produced tooling and allocated production capacity of tens of thousands of devices per week bearing the CHROMEBOOK mark and thousands of units bearing the CHROMEBOOK mark have already been shipped to retailers to fulfill customer pre-orders in anticipation of first product availability. Google is ordering tens of thousands of devices for sale by Google's direct sales organization to fulfill demand from schools, government agencies and enterprises which have been pilot testing prototype CHROMEBOOK devices. Delaying the delivery of CHROMEBOOK orders to schools and government institutions during the summer will likely result in lost sales, or a minimum delay of nearly a year, due to the timing of annual budget and technology rollout schedules by these organizations.

19. The preparation and marketing for the launch of the CHROMEBOOK computers has been a large and well-coordinated effort amongst advertisers, distributors, retail stores, event planners and a host of other parties in the distribution channel, all of which will grind to a halt and be irreparably damaged if the CHROMEBOOK laptops cannot be shipped on June 15<sup>th</sup>.

20. Upon information and belief, in late 2010, the PTO published Plaintiff's CHROMIUMPC trademark application for opposition. In an effort to arrive at a compromise

concerning Plaintiff's use of the CHROMIUMPC mark, Google requested and was granted an extension of time to oppose, instead of opposing the application outright.

21. Upon information and belief, the parties subsequently engaged in discussions and, in March 2011, Google requested and was granted a second extension until May 22, 2011 (to which Plaintiff expressly consented), in order to continue with efforts to resolve the matter with Plaintiff.

22. Upon information and belief, on or about May 18, 2011, prior to Plaintiff's May 20, 2011 press release, representatives from Google and Plaintiff spoke via telephone, at which time Google made clear to Plaintiff that it could not run Google's CHROME OS software on its CHROMIUMPC product without a license from Google. This is the case because (1) the CHROME operating system incorporates third party proprietary technology whose distribution is contractually limited and (2) the CHROME operating system is cryptographically signed by Google, making it impossible for a third party to implement without Google's cooperation. Google further indicated that it was unlikely to grant such a license given the infringing nature of the CHROMIUMPC mark.


23. Plaintiff has not been granted a license to install CHROME OS on its hardware, and to my knowledge, Plaintiff never sought a license from Google to run the CHROME OS software. Plaintiff could not obtain the CHROME OS software from any party other than Google.

24. Upon information and belief, prior to filing this lawsuit, Plaintiff never made a claim that Google's planned use of its CHROMEBOOK mark would infringe on Plaintiff's alleged rights in the CHROMIUMPC mark.



I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 13<sup>th</sup> day of June, 2011.

  
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Felix Lin

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