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 BOOKHAM, INC., a Delaware Corporation

UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN JOSE DIVISION

BOOKHAM, INC., a Delaware  
 corporation,  
  
 Plaintiff,  
  
 v.  
  
 JDS UNIPHASE CORP., a Delaware  
 Corporation;  
 AGILITY COMMUNICATIONS, INC.,  
 a Delaware corporation, and DOES 1-10,  
  
 Defendants.

No. 5:08-CV-01275-RMW

**FIRST AMENDED COMPLAINT FOR  
 INTENTIONAL INTERFERENCE WITH  
 PROSPECTIVE ECONOMIC  
 ADVANTAGE, STATUTORY UNFAIR  
 COMPETITION AND DECLARATORY  
 JUDGMENT OF NON-INFRINGEMENT,  
 INVALIDITY, AND UNENFORCEABILITY**

**DEMAND FOR JURY TRIAL**

Plaintiff, for its complaint herein, alleges as follows:

**THE PARTIES**

**1.** Plaintiff, Bookham, Inc. (“Bookham”) is a corporation organized and existing under the laws of the State of Delaware, with its principal place of business at 2584 Junction Ave., San



1 patent laws of the United States, including Title 35, United States Code. This Court has original  
2 jurisdiction over the subject matter of this action under 28 U.S.C. § 1338.

### 3 VENUE

4 **8.** Venue is proper in this Court under 28 U.S.C. § 1391 because JDSU resides in this  
5 judicial district and because a substantial part of the events giving rise to Bookham's claims  
6 occurred in this judicial district.

### 7 INTRADISTRICT ASSIGNMENT

8 **9.** This patent action is in an excepted category for Local Rule 3-2(c), Assignment of a  
9 Division, and will be assigned on a district-wide basis.

### 10 FACTUAL ALLEGATIONS

11 **10.** JDSU purports to own United States Patent Nos. 6,658,035 (the " '035 patent"),  
12 6,654,400 (the " '400 patent"), and 6,687,278 (the " '278 patent"), collectively referred to as the  
13 "Patents" and attached as Exhibits 1, 2 and 3. Records at the United States Patent and Trademark  
14 Office ("USPTO") list Agility Communications as the present assignee for the Patents.

15 **11.** JDSU acquired Agility Communications in November 2005 and, on information  
16 and belief, acquired at least some rights in the Patents.

17 **12.** JDSU represents that it has the right to enforce the Patents.

18 **13.** JDSU asserts that the technology covered by the Patents is proliferating through the  
19 optics industry.

20 **14.** JDSU asserts that Bookham's tunable laser products, which are used for high-speed  
21 data communications, are covered by the '035 patent.

22 **15.** The '400 and '278 patents are related to the '035 patent and claim related subject  
23 matter to the '035 patent.

24 **16.** JDSU has accused Bookham in writing of infringing the claims of the '035 patent.

25 **17.** JDSU employees or agents have informed Bookham's customers and potential  
26 customers that Bookham's tunable laser products infringe the claims of the '035 patent so that  
27 those customers and potential customers would purchase JDSU tunable laser products instead of  
28 Bookham tunable laser products.

1           **18.**     JDSU has informed Bookham's customers and potential customers that they will  
2     infringe the claims of the '035 patent by purchasing or using Bookham's tunable laser products,  
3     and should, therefore, purchase JDSU's tunable laser products instead.

4           **19.**     JDSU has pressured Bookham's customers and potential customers to purchase its  
5     tunable laser products by claiming that Bookham's tunable laser products may not be available for  
6     sale in the future because they allegedly infringe the claims of the '035 patent.

7           **20.**     After Bookham presented evidence to JDSU demonstrating the invalidity and  
8     unenforceability of the Patents, JDSU continued pressuring Bookham's customers and potential  
9     customers by repeating its infringement threats.

10          **21.**     JDSU's assertions of infringement have damaged Bookham and continue to damage  
11     Bookham. JDSU's repeated threats to Bookham's customers and potential customers have  
12     negatively impacted Bookham's sales and interaction with its customers and potential customers.  
13     Bookham has suffered irreparable injury, including increased transactional costs, damage to its  
14     corporate reputation, and damage to its brand as a result of JDSU's conduct.

15          **22.**     On information and belief, when JDSU made infringement threats regarding  
16     Bookham's tunable laser products, it knew or should have known that the '035, '400, and '278  
17     patents are invalid and/or unenforceable. Specifically, JDSU's employees and agents knew, or  
18     should have known, at least the following:

19                 **(a)**     Thomas Beck Mason, Gregory A. Fish, and Larry A. Coldren are named as  
20     inventors on the '035, '400, and '278 patents.

21                 **(b)**     On August 6, 1998, Thomas Beck Mason, Gregory A. Fish, Steven P.  
22     DenBaars, and Larry A. Coldren jointly published an article titled "Ridge Waveguide Sampled  
23     Grating DBR Lasers with 22-nm Quasi-Continuous Tuning Range" in Volume 10, Issue No. 9 of  
24     the journal Photonics Technology Letters (hereafter the "Mason Publication").

25                 **(c)**     The Mason Publication discloses optimized waveguide structures and  
26     improved regrowth techniques that enabled the authors to extend the tuning range of conventional  
27     ridge waveguide DBR laser diodes to greater than 6 nm and, in SGDBR configuration, to greater  
28     than 22 nm.

1           **(d)**     According to the Mason Publication, these tuning ranges were the “largest  
2 ever reported for a ridge waveguide structure.”

3           **(e)**     The broadly tunable laser disclosed in the Mason Publication is depicted in  
4 Figure 1B of the ‘035, ‘400, and ‘278 patents.

5           **(f)**     Multiple claims in each of the ‘035, ‘400, and ‘278 patents recite as a claim  
6 element the broadly tunable laser disclosed in the Mason Publication.

7           **(g)**     On information and belief, Steven P. DenBaars is a co-inventor of the  
8 broadly tunable laser assembly that is disclosed in the Mason Publication and recited as an element  
9 in the claims of the ‘035, ‘400, and ‘278 patents.

10          **(h)**     On information and belief, Mason, Fish, and/or Coldren knew at the time  
11 they filed the applications that matured into the ‘035, ‘400, and ‘278 patents that Steven P.  
12 DenBaars was a co-inventor of the inventions claimed therein.

13          **(i)**     The ‘035, ‘400, and ‘278 patents are therefore invalid under 35 U.S.C. § 1 *et*  
14 *seq.*

15          **(j)**     Additionally, Bookham is informed and believes and, based thereon, alleges  
16 that the named inventors of the ‘035, ‘400, and ‘278 patents and/or their attorneys, employees and  
17 agents, with intent to deceive, failed to disclose material prior art to the USPTO during the  
18 prosecution of the applications which issued as the ‘035, ‘400, and ‘278 patents.

19          **(k)**     The earliest application date of the ‘035, ‘400, and ‘278 patents is  
20 September 2, 1999.

21          **(l)**     The Mason Publication qualifies as a prior art printed publication to the  
22 Patents under 35 U.S.C. § 102(b), because it was published in this country more than one year  
23 prior to September 2, 1999, the earliest application date for the ‘035, ‘400, and ‘278 patents. The  
24 Mason Publication also qualifies as prior art under 35 U.S.C. § 102(a).

25          **(m)**     On information and belief, the authors of the Mason Publication also  
26 presented the Mason Publication and distributed copies of the publication at the International  
27 Semiconductor Laser Conference ’98 in Nara, Japan, and elsewhere.

28          **(n)**     The information disclosed in the Mason Publication is not cumulative to

1 information made of record during prosecution of the applications that issued as the '035, '400,  
2 and '278 patents.

3 (o) The Mason Publication is material prior art under 37 C.F.R. § 1.56 at least  
4 because, when combined with other art, it establishes a prima facie case of unpatentability of one  
5 or more claims contained in each of the '035, '400, and '278 patents. A reasonable examiner  
6 would have considered the information disclosed in the Mason Publication to be important in  
7 deciding whether to allow one or more claims in the applications for the '035, '400, and '278  
8 patents to issue.

9 (p) The named inventors of the '035, '400, and '278 patents and/or their  
10 attorneys, employees and agents knew that the Mason Publication was material prior art to the  
11 inventions claimed in the applications that issued as the '035, '400, and '278 patents at the time  
12 they filed their patent applications and while those applications were pending before the USPTO.

13 (q) On information and belief, despite their knowledge of the Mason  
14 Publication and its materiality to the subject matter of the '035, '400, and '278 patents, and despite  
15 their duty to disclose material information to the USPTO, the named inventors and/or their  
16 attorneys, employees, and agents knowingly and intentionally withheld the Mason Publication  
17 from the USPTO, with the intent to deceive the USPTO regarding the patentability of the claims of  
18 the '035, '400, and '278 patents. As a result, the '035, '400, and '278 patents are unenforceable  
19 for inequitable conduct.

20 (r) Each of the named inventors, including Coldren in particular, is a prolific  
21 author in the same field of endeavor as the Patents. On information and belief, the named  
22 inventors authored or co-authored other prior art publications that were relevant to the patentability  
23 of the Patents that also were not disclosed to the USPTO during prosecution of the Patents.

**FIRST CLAIM FOR RELIEF**

**INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE**

**UNDER CALIFORNIA COMMON LAW**

**23.** Bookham incorporates paragraphs 1-22 as though set forth fully and completely herein.

**24.** On information and belief, JDSU intentionally interfered with prospective economic relations between Bookham and its customers and potential customers.

**25.** On information and belief, JDSU has engaged in unfair, unlawful, or fraudulent business practices, and in untrue or misleading advertising by accusing Bookham's tunable laser products of infringing the claims of the '035 patent, which JDSU knows, or should know, is invalid and unenforceable.

**26.** Bookham has been injured as a result of JDSU's unfair, unlawful, and fraudulent business practices and untrue or misleading advertising, and will continue to be injured until JDSU is enjoined from tortiously interfering with Bookham's existing and potential business relationships.

**27.** Bookham is entitled to an injunction enjoining JDSU from continuing its intentional interference with Bookham's prospective economic advantage and an award of compensatory and punitive money damages.

**SECOND CLAIM FOR RELIEF**

**STATUTORY UNFAIR COMPETITION UNDER CALIFORNIA BUSINESS AND PROFESSIONAL CODE**

**§ 17200, ET SEQ.**

**28.** Bookham incorporates paragraphs 1-22 as though set forth fully and completely herein.

**29.** On information and belief, JDSU has engaged in unfair, unlawful or fraudulent business practices, and in untrue or misleading advertising by accusing Bookham's tunable laser products of infringing the claims of the '035 patent, which JDSU knows, or should know, is invalid and unenforceable.

**30.** On information and belief, JDSU's unlawful conduct has resulted in JDSU's unjust

1 enrichment.

2 **31.** Upon information and belief, JDSU is likely to continue its allegations of patent  
3 infringement unless enjoined by this Court.

4 **32.** Bookham has suffered reputational and monetary damages as a result of JDSU's  
5 unlawful conduct.

6 **33.** Bookham is entitled to an injunction enjoining JDSU from making any threats of, or  
7 charging or asserting or instituting any action for, infringement of the claims of the Patents against  
8 Bookham, or anyone in privity with Bookham, including its suppliers, successors, assigns, agents,  
9 customers, and/or potential customers, as well as restitution damages for the harm JDSU has  
10 inflicted.

### 11 **THIRD CLAIM FOR RELIEF**

#### 12 **DECLARATORY JUDGMENT OF NONINFRINGEMENT OF**

#### 13 **U.S. PATENT NOS. 6,658,035, 6,654,400, AND 6,687,278**

14 **34.** Each of paragraphs 1-22 is incorporated herein by reference.

15 **35.** There is an actual and justiciable controversy between Bookham and JDSU as to  
16 whether the use, making, sale, offering for sale, or importation of the Bookham tunable laser  
17 products infringes any valid or enforceable claim of the '035, '400, and '278 patents.

18 **36.** JDSU has accused Bookham's tunable laser products of infringing the claims of the  
19 '035 patent.

20 **37.** The '400 and '278 patents are related to the '035 patent and claim related subject  
21 matter to the '035 patent.

22 **38.** Bookham currently manufactures the Bookham tunable laser products for sale and  
23 use in the United States and offers for sale and sells tunable laser products in the United States.

24 **39.** Bookham's tunable laser products do not infringe any valid, enforceable claim of  
25 the '035, '400 and '278 patents.

26 **40.** JDSU's allegations of patent infringement have caused, and will continue to cause,  
27 damage to Bookham.

28 **41.** Upon information and belief, JDSU is likely to continue its allegations of patent

1 infringement.

2 **42.** Bookham is entitled to a declaratory judgment of noninfringement of the claims of  
3 the '035, '400, and '278 patents.

4 **FOURTH CLAIM FOR RELIEF**

5 **DECLARATORY JUDGMENT OF INVALIDITY OF**

6 **U.S. PATENT NOS. 6,658,035, 6,654,400, AND 6,687,278**

7 **PURSUANT TO 35 U.S.C. §§ 101, 102, 103, 112 AND/OR 116**

8 **43.** Each of paragraphs 1-22 is incorporated herein by reference.

9 **44.** There is an actual and justiciable controversy between Bookham and JDSU as to  
10 whether each and every claim of the '035, '400, and '278 patents is valid.

11 **45.** Bookham contends that one or more claims of the '035, '400, and '278 patents is  
12 invalid for failure to comply with the requirements of 35 U.S.C. §§ 101, 102, 103, 112 and/or 116.

13 **46.** On information and belief, JDSU contends that each claim of the '035, '400, and  
14 '278 patents is valid and enforceable.

15 **47.** The assertions made by JDSU that Bookham is infringing the claims of the '035  
16 patent have caused, and will continue to cause, irreparable harm to Bookham.

17 **48.** Bookham is entitled to a declaratory judgment of invalidity of the claims of the  
18 '035, '400, and '278 patents.

19 **FIFTH CLAIM FOR RELIEF**

20 **DECLARATORY JUDGMENT OF UNENFORCEABILITY OF**

21 **U.S. PATENT NOS. 6,658,035, 6,654,400, AND 6,687,278**

22 **AND RELATED PATENTS AND PATENT APPLICATIONS**

23 **49.** Each of paragraphs 1-22 is incorporated herein by reference.

24 **50.** There is an actual and justiciable controversy between Bookham and JDSU as to  
25 whether the '035, '400, and '278 patents and/or related patents and patent applications are  
26 unenforceable, in whole or in part, due to inequitable conduct before the USPTO by persons  
27 involved in the prosecution of the '035, '400, and '278 patents and related patents and patent  
28 applications.

**51.** Bookham contends that the claims of the ‘035, ‘400, and ‘278 patents and related patents and patent applications are unenforceable because the applicants for the ‘035, ‘400, and ‘278 patents or their agents knowingly and intentionally failed to comply with 37 C.F.R. § 1.56 during the prosecution of the applications that led to the issuance of the ‘035, ‘400, and ‘278 patents, related applications, and applications upon which priority is claimed.

**52.** Under the doctrine of infectious unenforceability, the inequitable conduct committed by persons involved in the prosecution of the ‘035, ‘400, and ‘278 patents and related patents and patent applications infects and renders unenforceable all related patents and patent applications.

**53.** Bookham is entitled to a declaratory judgment of unenforceability of the claims of the '035, '400, and '278 patents.

**54.** Under the doctrine of infectious unenforceability, Bookham is entitled to a declaratory judgment of unenforceability of the claims of each patent and patent application that is related to, or that claims priority from, the '035, '400, or '278 patents.

## PRAYER FOR RELIEF

**WHEREFORE**, Bookham prays that:

(a) Agility, JDSU, its officers, agents, servants, employees, attorneys, assignees, and those persons in active concert or participation with them, be enjoined from making any threats of, or charging or asserting or instituting any action for, infringement of the '035, '400, and '278 patents against Bookham, or anyone in privity with Bookham, including its suppliers, successors, assigns, agents, customers, and/or potential customers;

(b) Agility and JDSU be ordered to pay restitution damages for the harm they have caused Bookham;

**(c)** Bookham recover compensatory damages against Agility and JDSU;

**(d)** Bookham recover punitive damages against Agility and JDSU;

(e) A declaratory judgment be entered that manufacturing, using, offering for sale, selling, or importing the Bookham tunable laser products does not infringe, induce the infringement of, or contribute to the infringement of any claim of the ‘035, ‘400, and ‘278 patents;

1           **(f)**     A declaratory judgment be entered that each claim of the '035, '400, and '278  
2 patents is invalid;

3           **(g)**     A declaratory judgment be entered that each claim of the '035, '400, and '278  
4 patents is unenforceable;

5           **(h)**     A declaratory judgment be entered that, according to the doctrine of infectious  
6 unenforceability, the claims of each patent and patent application that is related to, or that claims  
7 priority from, the '035, '400, or '278 patents is unenforceable;

8           **(i)**     This case be declared an exceptional case under 35 U.S.C. § 285, and that Bookham  
9 be awarded its attorney's fees in this action; and

10          **(j)**     Bookham be awarded all other and further relief as the Court deems just and proper  
11 in this case.

12 Dated: June 30, 2008

COOLEY GODWARD KRONISH LLP

13  
14 By: /s/ Wayne O. Stacy  
15 Wayne O. Stacy

16 Attorneys for Plaintiff  
17 BOOKHAM, INC.  
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**JURY DEMAND**

Plaintiff respectfully requests a jury trial on all issues triable thereby.

Dated: June 30, 2008

COOLEY GODWARD KRONISH LLP

By: /s/ Wayne O. Stacy  
Wayne O. Stacy  
Attorneys for Plaintiff  
Bookham, Inc.

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