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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ORACLE USA, INC., et al.,

Plaintiffs,

No. C 07-1658 PJH

v.

**ORDER**

SAP AG, et al.,

Defendants.

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The court is in receipt of a motion filed by plaintiffs Oracle USA, Inc., et al. (“Oracle”) for a stay of all proceedings in this court pending resolution of Oracle’s motion for an order certifying the September 1, 2011 order granting judgment as a matter of law for interlocutory review pursuant to 28 U.S.C. § 1292(b), and any subsequent appellate proceedings, and an accompanying request for an order shortening time to hear the motion for a stay. Defendants SAP AG (“SAP”) do not oppose the motion for an order shortening time, although it appears that SAP may oppose the motion for a stay.

The court finds that the motion to stay is premature, as no decision has yet been made on the motion for leave to file a request for interlocutory appeal. Accordingly, the motion is DENIED, and the noticed hearing date (September 28, 2011) is VACATED.

Moreover, the only “proceeding” pending in this court (apart from the motion for certification of the request for interlocutory review) is the deadline imposed in the September 1, 2011 order for Oracle to accept or reject the remittitur.

1           The court has no objection to extending the deadline for Oracle to accept or reject  
2 the remittitur, and does so now. The deadline shall be extended until after this court has  
3 fully considered Oracle's request for an order certifying a request for interlocutory review,  
4 and has determined what if any question(s) may be certified; and for an additional 30 days  
5 beyond the date the Ninth Circuit either approves or denies any such application.

6           Further, in the event that the September 1, 2011 order was not entirely clear as to  
7 the reasons for granting judgment as a matter of law, the court offers the following  
8 clarification. The court did not hold as a matter of law – as is suggested by Oracle's motion  
9 for § 1292(b) certification – that copyright damages based upon the amount a willing buyer  
10 would reasonably have paid a willing seller under a hypothetical license are available only if  
11 the copyright owner provides evidence of actual licenses it entered into or would have  
12 entered into for the infringed works, and/or actual “benchmark” licenses entered into by any  
13 party for comparable use of the infringed or comparable works.

14           Rather, the court held, first, that the Copyright Act allows recovery of either statutory  
15 damages, or “actual damages suffered by [the copyright owner] as a result of the  
16 infringement,” plus “any profits of the infringer that are attributable to the infringement and  
17 are not taken into account in computing the actual damages.” See 17 U.S.C. § 504(a), (b).  
18 And with regard to “actual damages suffered by [the copyright owner] as a result of the  
19 infringement,” the court held that evidence provided by Oracle was not sufficient to support  
20 an award of hypothetical license damages because it failed to provide objective evidence of  
21 what a willing buyer would have paid, and because it failed to provide evidence sufficient to  
22 allow the jury to assess fair market value without undue speculation.

23           In that context, the court noted that under Ninth Circuit case law, one way to  
24 establish an objective, non-speculative license price is by providing evidence of licenses  
25 previously negotiated for comparable use of the infringed work, and benchmark licenses for  
26 comparable uses of comparable works. See September 1, 2011, Order at 10-15.

27           In light of the above, Oracle may wish to reframe the question or questions as to  
28 which it seeks leave to file a motion for interlocutory review. Any revised motion shall be

1 filed no later than September 23, 2011. SAP's opposition, if any, shall be filed no later than  
2 October 7, 2011, and may include an alternative formulation of the question or questions  
3 that to be submitted for the requested interlocutory review. Any reply to the opposition  
4 shall be filed no later than October 14, 2011. The court will decide the motion on the  
5 papers. Accordingly, the January 11, 2011 hearing date is VACATED.

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**IT IS SO ORDERED.**

Dated: September 16, 2011



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PHYLLIS J. HAMILTON  
United States District Judge