

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BRIGHT RESPONSE LLC

Plaintiff,

v.

GOOGLE INC., YAHOO!, INC., AOL LLC,
and AMERICA ONLINE, INC.,

Defendants.

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Civil Action No. 2:07-cv-371-CE

**YAHOO! INC.'S MOTION FOR A LIMITED STAY PENDING THE RESOLUTION OF
YAHOO!'S PETITION FOR WRIT OF MANDAMUS TO THE FEDERAL CIRCUIT**

Defendant Yahoo! Inc. (“Yahoo!”) respectfully requests that this Court stay the ordered production of a limited portion of Yahoo!’s Click Protection source code pending the filing and resolution of Yahoo!’s petition for a writ of mandamus in the United States Court of Appeals for the Federal Circuit or, alternatively, for a temporary stay pending Yahoo!’s filing of a request for such stay in the Federal Circuit.

I. INTRODUCTION

On June 8, 2010, this Court ordered Yahoo! to produce additional Click Protection documents, to produce Yahoo!’s Click Protection source code in its entirety, to designate a corporate witness regarding the Click Protection System, and to reorganize the source code it has already produced on Plaintiff. (Dkt No. 355). Yahoo! has complied with this Court’s Order by producing portions of the Click Protection source code, producing documents describing the Click Protection system, designating a corporate witness regarding the Click Protection System,

and producing reorganized source code that had already been produced to Plaintiff.¹ Yahoo! moved for reconsideration of a limited portion of this Court's Order, which this Court subsequently denied. (Dkt. No. 367).

In good faith, Yahoo! intends to seek review by the Federal Circuit via a petition for writ of mandamus of the limited portion of this Court's June 8, 2010 Order that was the subject of Yahoo's motion for reconsideration. Accordingly, Yahoo! requests that this Court stay the order requiring production of that portion of the Click Protection source code pending resolution of Yahoo's writ of mandamus by the Federal Circuit.

II. ARGUMENT

Yahoo! intends to file a petition for a writ of mandamus in the Federal Circuit and seek review of a portion of this Court's June 8, 2010 Order for two reasons: (1) Yahoo! has been ordered to produce the most highly business-sensitive and secretive aspects of its otherwise highly confidential source code for a system that is not an Accused Instrumentality in Plaintiff's infringement contentions against Yahoo!; and (2) Yahoo! has been ordered to produce highly confidential information regarding the Click Protection System which is not relevant to this case, nor could it lead to the discovery of admissible evidence. Thus, because the portion of the ordered production still at issue should never be produced and because the damage and risks inherent in such production can not be adequately undone if such production is determined to be improper, Yahoo! requests that this court stay its order with respect to the production of the remainder of the Click Protection source code pending resolution of Yahoo's petition by the Federal Circuit.

¹ Markedly, although a portion of Yahoo!'s Click Protection source code is available for review, Plaintiff has not sought to review such code.

A district court's jurisdiction is not interrupted when a party files a petition for writ of mandamus. *Woodson v. Surgitek, Inc.*, 57 F.3d 1406, 1416 (5th Cir. 1995). Thus, it is necessary for a petitioning party to file a motion to stay if a party wants to prevent enforcement of the underlying order in the district court pending resolution of a petition for writ of mandamus.

A. This Court Should Stay The Ordered Production of a Limited Portion of the Click Protection Source Code Pending the Outcome of Yahoo!'s Petition to the Federal Circuit

The security of Yahoo!'s highly confidential documents, which are irrelevant to this lawsuit, is directly threatened if Yahoo! is required to comply in full with the June 8, 2010 Order. The disclosure of the details in this confidential source code could compromise a significant portion of Yahoo!'s business. Importantly, although Yahoo! has already produced some of its Click Protection source code, Plaintiff has not reviewed any of it. In particular, Yahoo! has produced some of its data processing system source code to show when the Click Protection System is used and that the Click Protection source code analyzes click and query logs. Yahoo! has also produced the source code that establishes how these click and query logs will be analyzed by the Click Protection System. Further, Yahoo! has produced the Click Protection source code that identifies a click as invalid. Yahoo! has made each of these productions in good faith to show how its systems operate, without revealing the limited portion of the most sensitive parts of its Click Protection source code.

Further, Yahoo! will offer a 30(b)(6) witness who will testify regarding the operation of the Click Protection System. This witness will be able to explain the documents and source code produced on this subject, and will be able to confirm the statements in the Chang Declaration, the operation of all of the Click Protection source code, and the accuracy of the Click Protection documents.

Given Yahoo!'s compliance with a majority of the Court's June 8, 2010 Order, Yahoo! respectfully seeks a stay from one part of that Order: the production of the remainder of Yahoo!'s Click Protection source code that is not needed to show how that code interacts with other systems. Yahoo! believes – in good faith – that justice requires modification of a limited portion of this Court's Order and as such will seek that limited relief from the Federal Circuit.

Alternatively, if this Court is not willing to stay its order pending the filing and disposition of Yahoo's petition to the Federal Circuit, Yahoo requests that this Court at least enter a temporary stay of its order until Yahoo can separately file a motion to obtain such a stay of the order directly from the Federal Circuit. In related contexts, district courts have entered such temporary stays of their own injunction orders in patent cases to maintain the status quo so as to allow the appellate court to make its own decision on the propriety of a stay. Such separate motion to the Federal Circuit would be filed in advance of or in conjunction with the filing of Yahoo's petition.

III. CONCLUSION

Yahoo! respectfully requests that this Court grant its motion to stay the production of the remainder of the Click Protection source code pending the filing of a request for stay in the Federal Circuit and pending resolution of a petition for writ of mandamus in the Federal Circuit. Alternatively, Yahoo requests a temporary stay be entered until the Federal Circuit acts on Yahoo's separate motion for a stay to that court.

Dated: June 18, 2010

Respectfully Submitted,

/s/ Jennifer H. Doan

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on June 15, 2010.

/s/ Jennifer H. Doan

Jennifer H. Doan

CERTIFICATE OF CONFERENCE

Bill Rooklidge and David Pridham conferred today seeking to reach a resolution of the matters discussed in this motion to stay. However, a resolution could not be reached by close of business. The parties intend to continue discussions on Monday, June 21, 2010 in an attempt to resolve these matters. Given that the parties were unable to reach a resolution today; this motion is filed as opposed.

/s/ Jennifer H. Doan

Jennifer H. Doan