

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

SOFTWARE RIGHTS ARCHIVE, LLC

v.

**GOOGLE INC., YAHOO! INC., IAC
SEARCH & MEDIA, INC., AOL, LLC,
AND LYCOS, INC.**

Civil Case No. 2:07-cv-511 (CE)

**DEFENDANTS' MOTION FOR STAY OF CASE PENDING RESOLUTION OF
DEFENDANTS' MOTION TO TRANSFER PURSUANT TO 28 U.S.C. § 1404(a)**

Defendants Google Inc., Yahoo! Inc., IAC Search & Media, Inc., AOL LLC, and Lycos, Inc. (collectively, "Defendants") hereby respectfully move for a stay of this case pending resolution of Defendants' Motion to Transfer Pursuant to 28 U.S.C. § 1404(a), filed February 20, 2009 (Docket No.130).¹

In the interest of judicial efficiency, courts are encouraged to resolve a transfer motion before conducting merits-related discovery. *See Esplanar, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir. 1994) ("[Convenience of the witnesses and the location of records and documents] necessarily implicate the ease of conducting merits-related discovery in a location which is near the relevant witnesses and documents. Moreover, if a change of venue motion is granted, the discovery is not denied but merely delayed."). If a case will ultimately be transferred, "[j]udicial

¹ On March 9, 2010, Yahoo! Inc. filed a Motion for Hearing on Motion to Transfer and in the Alternative for Continuance of Claim Construction Deadlines (Dkt. No. 236). On March 16, 2010 (Dkt. No. 241), IAC Search & Media, Inc. and Lycos, Inc. filed a Notice of Joinder in Dkt. No. 236. On March 17, 2010 (Dkt. No. 242), Google Inc. and AOL LLC filed a Notice of Joinder in Dkt. No. 236. Plaintiff Software Rights Archive, LLC responded to Dkt. No. 236 on March 18, 2010 (Dkt. No. 243). Dkt. No. 236 remains pending at the time of the filing of this Motion for Stay.

economy requires that another district court should not burden itself with the merits of the action until it is decided that a transfer should be effected and such consideration additionally requires that the court which ultimately decides the merits of the action should also decide the various questions which arise during the pendency of the suit instead of considering it in two courts.” *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30 (3d Cir. 1970). “[T]he motion to transfer under § 1404(a) should be considered and decided after giving both parties an opportunity to complete their discovery solely with respect to the question of transfer, and then only if the court should deny the motion to transfer should discovery be permitted to go forward.” *Id.* at 31; *see also Esplanar*, 11F.3d at 1291 (holding that the “district court did not abuse its discretion in refusing to allow discovery . . . pending the grant of the Defendants’ change of venue motion regarding these claims”).

Because judicial efficiency weighs in favor of resolving transfer motions prior to discovery on the merits, the Federal Circuit has directed parties to actively pursue resolution of their motions to transfer venue “before the district court invest[s] considerable time and attention on discovery and completing claim construction.” *See In re VTech Commc’ns., Inc.*, Misc. Docket No. 909, 2010 U.S. App. LEXIS 372, at *6 (Fed. Cir. Jan. 6, 2010), attached hereto as Exhibit “A”. In light of the Federal Circuit’s directive in *VTech*, Defendants seek the requested relief at this critical time before the Court becomes invested in the merits of the case.

By way of background, Defendants filed their motion to transfer on February 20, 2009. (Docket No. 130.) The parties completed initial briefing on the motion on May 29, 2009. (Docket No. 148.) Plaintiff Software Rights Archive, Inc. filed a supplemental brief on November 6, 2009 (Docket Nos. 173-175) and Defendant Google Inc. subsequently filed a responsive supplemental brief on November 30, 2009 (Docket No. 177). After again requesting

leave from the Court, Plaintiff Software Rights Archive, Inc. filed a second supplemental brief on December 9, 2009 (Docket Nos. 190, 191, and 195) and Defendant Google Inc. subsequently filed a responsive second supplemental brief on December 22, 2009 (Docket No. 201). Claim construction commenced on April 30, 2010, when the parties exchanged proposed terms pursuant to P.R. 4-1. (*See* Docket Control Order, Docket No. 84.) Claim construction briefing is currently set to commence on August 6, 2010,² followed by the claim construction hearing, currently set for November 10, 2010. (*Id.*)

By refraining from ruling on Defendants' Motion to Transfer Pursuant to 28 U.S.C. § 1404(a), which was filed on February 20, 2009 (Docket No.130), and also by not extending the April 30, 2010, deadline for exchanging claim constructions (*see* Docket Control Order, Docket No. 84) — a deadline that has now passed — the Court appears to have effectively denied Defendants' motion to transfer and, at a minimum, has denied Defendants a timely ruling on that motion. The parties have now exchanged Proposed Terms and Claim Elements for Construction (Docket Nos. 270 and 272), and the Court appears ready to consider discovery issues in advance of ruling on Defendants' transfer motion. Therefore, consistent with the Federal Circuit's directive in *VTech* and before this Court invests time in discovery and claim construction, Defendants seek a stay of all activity pending a ruling on their motion to transfer.

Because Defendants' Motion to Transfer Pursuant to 28 U.S.C. § 1404(a), which was filed on February 20, 2009 (Docket No.130), remains pending, Defendants respectfully request that this case be stayed in its entirety pending resolution of Defendants' Motion to Transfer

² The parties have agreed among themselves to extend this August 6, 2010 deadline to August 20, 2010 and will file an agreed motion to request that the Court extend this August 6 deadline to August 20, 2010 in the future.

Pursuant to 28 U.S.C. § 1404(a), filed February 20, 2009 (Docket No.130). *VTech*, 2010 U.S. App. LEXIS 372, at *6.

Respectfully submitted,

By: /s/ Harry L. Gillam, Jr.

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CERTIFICATE OF CONFERENCE

I hereby certify that counsel for Google conferred with counsel for Plaintiff regarding the relief requested herein. Counsel for Plaintiff stated that Plaintiff opposes the relief requested herein. Accordingly, this motion is presented to the Court for determination.

/s/ Harry L. Gillam, Jr.

CERTIFICATE OF SERVICE

I hereby certify that counsel of record who are deemed to have consented to electronic service are being served this 25th day of May, 2010, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ Harry L. Gillam, Jr.