

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
TYLER DIVISION

Eolas Technologies Incorporated

§

§

v.

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Case No. : 6:09-cv-446 [LED]

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Adobe Systems Inc., et al,

§

Jury Demanded

**GOOGLE INC. AND YOUTUBE, LLC NOTICE OF JOINDER  
TO ADOBE'S MOTION FOR CASE MANAGEMENT CONFERENCE  
AND IDENTIFICATION OF RELATED ISSUES TO BE ADDRESSED**

Google Inc. and YouTube, LLC (collectively “Google”) hereby joins Adobe Systems Inc.’s (“Adobe”) Opposed Motion Requesting Case Management Conference to Address Plaintiff Eolas’s Infringement Contentions Or, In the Alternative, To Strike Those Contentions And Motion For Expedited Consideration (Dkt. 367), which is set for a hearing on August 31, 2010 (Dkt. 371).

There are a number of critical threshold issues in this case that should be addressed and resolved *before* the case proceeds through discovery and claim construction. Through this joinder, Google respectfully requests that the Court address the following items at the August 31, 2010 Case Management Conference: (1) the deficient infringement contentions that Eolas served on Google and YouTube, and Eolas’ allegations against products covered by the Microsoft license; (2) the lack of certified or complete copies of the file histories of the asserted patents; (3) the pending motion for transfer of venue; and (4) whether a stay of discovery and claim construction is appropriate until these issues are resolved.

**(1) Eolas Served Deficient Infringement Contentions on Google and YouTube**

Plaintiff’s insistence on pushing forward with discovery and claim construction before providing the defendants with comprehensible patent infringement contentions (“PICs”) is a classic example of putting the cart before the horse. As this Court has remarked on numerous occasions, “the Patent Rules are designed to streamline the discovery process.” *American Video Graphics, L.P. v. Electronic Arts, Inc., et al.*, 359 F. Supp. 2d 558, 560 (E.D. Tex. 2005) (Davis, J.) (citing *STMicroelectronics, Inc. v. Motorola, Inc.*, 308 F. Supp. 2d 754, 755 (E.D. Tex. 2004)). “They provide structure to discovery and enable the parties to move efficiently toward claim construction and the eventual resolution of their dispute. The Patent Rules demonstrate high expectations as to plaintiffs’ preparedness before bringing suit, requiring plaintiffs to

disclose their preliminary infringement contentions *before discovery has even begun.*” *Id.* (emphasis added). Clear and coherent infringement allegations are of vital importance in a case such as this, which involves two patents, 22 defendants, 61 asserted claims, and over 23,000 pages of claim charts that allege infringement for hundreds of products and services. The current infringement contentions leave defendants in the dark regarding the scope of the allegations and the specific functionalities being accused, rendering this entire case unmanageable for the parties and the Court. If this problem is not fixed now, every stage of this litigation will be plagued with confusion, inefficiencies and preventable motion practice, and the defendants (including Google) will effectively be denied due process by the chaos that such a large case necessarily brings without clear positions being advanced by a patentee.

***a. Eolas Fails to Provide Specificity Despite the Publicly Available Information***

This is not a case where the plaintiff is unable to proffer compliant infringement contentions because it lacks information about the accused products. “When information is publicly available, the Patent Rules require plaintiffs to set forth specific theories of infringement at the outset of the case.” *Orion IP, LLC v. Staples, Inc.*, 407 F. Supp. 2d 815, 817 (E.D. Tex. 2006) (Davis, J.) (citing *Am. Video Graphics*, 359 F. Supp. 2d at 560). “[I]n software cases, the Court has recognized the pragmatic limitation on detailed Rule 3-1 Disclosures *when plaintiffs do not have the necessary access to non-public software*, which is needed to make detailed infringement contentions.” *Id.* (emphasis added) (citing *Am. Video Graphics*, 359 F. Supp. 2d at 560). As Eolas reluctantly admits, most of the accused products in this case are Internet web pages, and the allegedly infringing HTML and JavaScript code is viewable simply by visiting the accused websites. (*See Ex. 1.*<sup>1</sup>) In addition, other accused products like Google’s ChromeOS,

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<sup>1</sup> All references to “Ex. \_.” are Exhibits attached to the Declaration of Mark H. Francis (“Decl.”), submitted with this brief.

Chrome Browser and Android operating system are entirely open source code that is publicly available for download. (See Ex. 2.) Eolas' refusal to provide adequate contentions in the face of abundant public information about the products it accuses of infringement is a deliberate attempt to shift the burden of proof from Eolas to Google and the other defendants.

***b. Eolas Fails to Map Claim Elements to Particular Functionalities***

Eolas repeatedly fails to comply with P.R. 3-1(c), which requires that a plaintiff provide “[a] chart identifying specifically where each element of each asserted claim is found within each Accused Instrumentality . . .” (emphasis added). First, the asserted claims repeatedly use terms like *execute, parse, identify, respond, initiate processing, utilize, display, identify, locate, automatically invoke, execute, enable, and create*. (See, e.g., Ex. 3.) Nevertheless, Eolas' PICs fail to reference the publicly available source code from, e.g., Chrome, Android or many of the websites that allegedly performs these actions in the context of the claims.

Moreover, a closer look of the claim charts reveals that they are contradictory and confusing throughout:

(i) Eolas' infringement contentions in large part mimic the claim language, instead of identifying the particular components or functionalities in the accused products that are accused of infringement. For example, with respect to the allegations against AdSense,

Eolas claims that:

Google's AdSense program itself and/or Google's AdSense server (and/or the combination thereof) each operate in a *hypermedia network environment* that includes *client workstations* executing *browsers*. Google's servers format the communications so that the *browser* on the *client workstation* identifies an *embed text format* which corresponds to a *first location in the document*, where the *embed text format* specifies the location of at least portion of an *object*. Examples of an *embed text format* identified by the *browser* on the *client workstation* which corresponds to a *first*

*location in the document, where the embed text format specifies the location of at least portion of an object.*

(Ex. 4 (claim language italicized).) Eolas thus mimics its claim language but does not specifically and distinctly identify how these claim elements are infringed. See *Connectel, LLC v. Cisco Sys.*, 391 F. Supp. 2d 526 at 527-28 (E.D. Tex. 2005) (Davis, J.) (“Compliance with Patent Rule 3-1 therefore demands PICs that set forth ‘particular theories of infringement with sufficient specificity to provide defendants with notice of infringement beyond that which is provided by the mere language of the patent claims themselves.’” (quoting *STMicroelectronics*, 308 F. Supp. 2d at 755)).

(ii) After Eolas mimics the claim language, it sometimes quotes big blocks of HTML or JavaScript code, but does not explain how the code relates to the alleged infringement. See *EON Corp. IP Holdings, LLC v. Sensus USA Inc.*, No. 6:09-cv-116, 2010 U.S. Dist. LEXIS 4973 at \*11-12 (E.D. Tex. January 21, 2010) (“Simply block quoting references, however, does not necessarily advise a defendant of where a plaintiff believes asserted elements are found in an instrumentality. Similarly, although citing documents has a role and may further notice, it does not, in and of itself, fulfill the notice function. [A patentee] must put forward its position as to where it believes particular limitations are met by the accused instrumentalities”).

(iii) The boilerplate claim charts also fail to recognize or account for the fact that, while many accused products provide flash video on web pages, they do so using a number of different techniques. For example, a flash file (“.SWF”) can be identified by HTML code, or by JavaScript source code embedded in the HTML file, or in a separate JavaScript “.JS” file referenced by the HTML file. Eolas fails to acknowledge or explain

how different implementations all somehow meet the claim language. Instead, Eolas essentially argues “you use flash, so you infringe.”

(iv) The PICs are in further non-compliance with P.R. 3-1(c) by failing to clearly or coherently identify how different components in the accused websites (like HTML and JavaScript) meets each specific claim term. For example, in a single claim chart, Eolas irrationally appears to identify JavaScript as corresponding to the claims’ “*embed text format*” (Ex. 4), and also identifies JavaScript as an “*object external to the distributed hypermedia document*” (Ex. 5 (identifying a JavaScript .JS file)), and then also identifies JavaScript as an “*executable application external to the first distributed hypermedia document*” (Ex. 6). Is JavaScript the embed text format which “specifies the location of at least portion of an object,” or is it the object itself, or is it the “executable application associated with the object”? (*See generally* Ex. 3.) JavaScript cannot possibly be all three, yet Eolas is somehow taking the ridiculous position that these critical claim terms are all the same thing. Understandably, opposing parties may operate with different claim constructions before a Court’s Markman Order, but a party cannot allege infringement based on a claim construction so unreasonable that it does not satisfy the basic tenets of Rule 11 of the Federal Rules of Civil Procedure.

(v) The infringement contentions also hinge on Eolas’ apparent position that the flash player is an “*executable application external to the first distributed hypermedia document*” (*See, e.g.,* Ex. 7.) Yet, public Adobe documentation states that, “[m]ost often, Flash Player runs as a browser plug-in. When Flash Player operates in this mode, *it does not launch any new processes on the end user’s computer.*” (*See* Ex. 8 at 6.) Thus, there

is no executable application other than the browser itself. Again, what possible Rule 11 basis does Eolas have for allegations directly contradicted by public documentation?

(vi) Different browsers handle HTML differently. For example, upon receipt of HTML files, some browsers create *new* files or data structures based on the HTML which are used to generate the webpage content to be displayed. (*See* Ex. 9.) Eolas fails to identify which specific HTML processing techniques are allegedly infringing and how they correspond to the claim language. Likewise, different browsers also support JavaScript differently. Some browsers may interpret and process readable JavaScript text, while other browsers will actually compile the JavaScript code and execute it. (*See* Ex. 10.) Here too, Eolas fails to identify which specific JavaScript processing techniques are allegedly infringing and why. These distinctions are extremely important for accused browsers like Google's Chrome and Apple's Safari.

In sum, Eolas has made vast accusations against defendants, but their infringement contentions reveal serious flaws and contradictions that Eolas is covering up with ambiguity, convoluted arguments, and mimicking its claim language. Defendants are severely prejudiced in their efforts to litigate this case when the plaintiff makes reckless infringement accusations against countless companies and products but refuses to justify its allegations with clear and coherent theories of infringement.

***c. Eolas Fails to Identify Whether Alleged Infringements are Direct or Indirect***

Eolas' PICs refuse to explain whether the alleged infringement is direct or indirect and the bases for those allegations. For every single chart, Eolas demurs that its infringement theory is "Direct/Indirect (*i.e.*, contributory infringement and/or inducement)/DOE." (Ex. 11 at 2-3.) This issue is complicated by the fact that the claims often require the participation of many different actors, referring to a *client workstation*, a *network server*, a *network environment*, an

*end user, an application program, a browser application, an external application, etc.* In addition, the claims require these actors to take many actions, such as *receive, identify, locate, execute, respond, display, enable, utilize, invoke, interact, initiate, process, etc.* Yet, Eolas fails to clearly identify who these actors are and what action each actor is alleged to perform.

***d. Eolas Fails to Identify Whether Alleged Infringements are Literal or present under the Doctrine of Equivalence***

P.R. 3-1(d) expressly requires Eolas to set forth “[w]hether each element of each asserted claim is claimed to be literally present or present under the doctrine of equivalents in the Accused Instrumentality.” Eolas hedges on *every* single element of *every* asserted claim and says that it is asserting literal infringement, but “any element found not to be literally infringed is infringed under the doctrine of equivalents.” (Ex. 11 at 3.) This representation ignores the patent rules and this Court’s requirement that a plaintiff take a position on what theory of infringement it is asserting for each particular element. *See Davis-Lynch*, No. 6:07-cv-559, 2009 U.S. Dist. LEXIS 1644 at \*18 (finding that a patentee “failed to comply with Rule 3-1(d)” because its PICs “state that there is both literal infringement and infringement through the doctrine of equivalents” and “must clarify its position on this issue”).

***e. Blatant Factual Errors Demonstrate a Lack of Pre-filing Diligence***

The Patent Rules require more than a cursory investigation of the accused products, and at a minimum, the Federal Rules of Civil Procedure require an adequate pre-suit investigation, including examination of publicly-available material. *See View Eng’g, Inc. v. Robotic Vision Sys.*, 208 F.3d 981, 986 (Fed. Cir. 2000). Eolas has no good faith basis for accusing Google of “selling” many of the accused instrumentalities (Ex. 11 at 3) when it is plainly evident that software like Android, Chrome Browser, Chrome OS and many web services *are not sold to*



consumers. (*See, e.g.*, Ex. 12 (Google Chrome is “free”); Ex. 13 (“Android is an open-source software stack for mobile devices”).)

As another example, Eolas accuses Google of infringement because its Android operating system allegedly includes flash technology. (*See generally* Ex. 14.) Eolas provides no factual basis for this allegation and it is quite evident that no flash technology is included in Google’s Android operating system. To the extent that any flash technology might be used on an Android-based device, it is created and installed by *third-parties* such as Adobe and HTC, not Google. (*See* Ex. 15.) Had Eolas complied with its obligations under the patent rules and actually looked at the public source code for Android, it would become evident that there is no flash player software in the Android source code. In sum, Eolas does not appear to have any Rule 11 basis for certain allegations, such as with respect to Google’s Android operating system.

***f. Eolas’ Refuses to Dismiss Allegations Against Products or Services Implemented with the Previously-Licensed Microsoft Products***

As discussed at length by other defendants (Dkts. 367, 372, 389), the asserted patents are subject to a Microsoft license and therefore can not be asserted against uses that involve licensed products such as Microsoft’s Internet Information Services (“IIS”) web-server software, .NET framework code interpreters, Windows operating systems and Internet Explorer browsers.

Eolas ignored defendants communications about the license issue for *over five months* after serving its infringement contentions, but suddenly on August 23, 2010 – just days before Eolas must explain itself at the Court’s Case Management Conference – Eolas sent a letter to defendants suggesting it was not asserting *some* patent claims against *some* Microsoft products that read on *some* claim terms. (*See* Ex. 16.) In other words, Eolas only agreed that two claim terms (“browser application” and “network server”) would not be correlated with Microsoft

products, and even then, only with respect to some of the claims.<sup>2</sup> (*See id.*) Moreover, Eolas only dropped its infringement allegations against “Microsoft Internet Explorer” and “Microsoft server software,” but not against countless other Microsoft products. (*See id.*) As with its infringement contention claim charts, Eolas refuses to take a straight-forward position with respect to the Microsoft license.

According to many published Internet usage statistics (collected by Wikipedia), Internet Explorer commands a majority of the browser market (~ 53%) and nearly all computers run Microsoft Windows (~ 89%). (*See Exs. 17, 18.*) Eolas is therefore breaching the Microsoft license by suing Microsoft’s downstream developers and customers (*i.e.*, the defendants) for activities covered by that license. And while Eolas may argue the license issue is merely a damages topic (*i.e.*, whether to exclude or include market share attributed to Microsoft software), this is a red herring and it fails to recognize some key points:

- (1) The resolution of this issue would make it much easier for defendants to settle the case – considering that 89% of U.S. users run the Microsoft Windows operating system, discounting their activities could make the prospects of settlement much more likely.
- (2) It appears that a number of defendants use Microsoft web hosting software or other Microsoft technology for at least some of their products, which would clean up the case by disposing of some defendants and other defendants’ products. For example, it appears that the accused functionality in the Google Chrome Web Browser is implemented by the “WebKit engine,” which is different for each operating system – the

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<sup>2</sup> Eolas is still asserting claims 20, 24, 28, 32, 40 and 44 of the ‘985 patent (and their dependant claims) when the “browser application” limitation is satisfied by Microsoft Internet Explorer; it is still asserting claim 1 of the ‘906 patent against defendants when the “network server” is satisfied by Microsoft server software; and it is still asserting claims 1, 16, 24, 28, 36 of the ‘985 patent (and their dependant claims) when the “network server” is satisfied by Microsoft server software. (*See id.*)

Windows version of Chrome must therefore interact with the Windows operating system in order for the browser to function. (*See* Ex. 19.)

(3) Microsoft's Internet Explorer handles flash technology differently than other browsers. (*See* Ex. 8 at 3-4.) Recognition of the Microsoft license would narrow discovery by focusing on non-Microsoft implementations of flash.

Overall, Eolas wants to keep defendants hostage in this case and is unjustly attempting to prevent a dismissal of many infringement allegations that fall within the Microsoft license.

***g. Eolas' Refuses to Clarify its Confusing Allegations***

Eolas took the shotgun approach in its infringement allegations and accused over 24 Google products in 3,511 pages of claim charts comprising ambiguous and largely repetitive allegations that fail to provide Google with notice as to what *functionality* is accused.

Moreover, many of the Google products alleged to infringe the Eolas patents (including AndroidOS, Chrome and ChromeOS, Google Video, Picasa, Analytics, Voice, Latitude, News, Services, Sketchup, Orkut, Google.com, and Episodic) are only alleged of infringement insofar as they use flash. The core functionalities or services actually provided by these products were not accused and some of these accused websites use flash *only in one instance*, such as on a tutorial or support page. (*See, e.g.*, Ex. 20 (Tutorials for Picasa, SketchUp and Orkut); Ex. 21 (tutorial on Google.com).) Moreover, Eolas fails to distinctly explain how each of these products infringe, with charts only illustrating that they *use* flash, but not how they implement flash or why that implementation allegedly infringes the patents. "A party may not blindly accuse every product a defendant produces and expect to narrow its claims at its own convenience." *Davis-Lynch, Inc. v. Weatherford Int'l, Inc.*, No. 6:07-cv-559, 2009 U.S. Dist. LEXIS 1644, at \*6 (E.D. Tex. January 12, 2009) (citing *Am. Video Graphics*, 359 F. Supp. 2d at

560). Despite the guidelines of the Patent Rules, Eolas has done just that – blindly accusing numerous Google products without any clear or coherent explanation.

Many defendants have communicated with Plaintiff by phone and letter to protest the infringement contentions and, failing to receive any substantive response from Eolas, were forced to bring these issues to the Court. (*See* Dkts. 367, 372, 389.) It may be to Eolas’ tactical advantage to keep its infringement allegations so entirely vague that they remain a moving target that changes every time defendants attempt to mount an effective defense on the merits, but this strategy violates the Patent Rules and the long chain of supporting case law promulgated by this Court. Eolas has essentially claimed that “everything infringes” and leaves it to this Court to sort it out later, when the very purpose of infringement contentions is to sort it out *now*. *See Connectel*, 391 F. Supp. 2d at 527 (“Specific theories create a specific trajectory for the case. When parties accuse hundreds of products of infringing hundreds of claims, and only narrow those accusations after discovery, the case staggers for months without clear direction. However, when parties formulate, test, and crystallize their infringement theories before stating their preliminary infringement contentions, as the Patent Rules require, the case takes a clear path, focusing discovery on building precise final infringement or invalidity contentions and narrowing issues for Markman, summary judgment, trial, and beyond”).

## **(2) Certified Copies of the File Histories for the Asserted Patents Cannot be Obtained**

It is questionable whether this case can proceed to claim construction without a complete intrinsic record for the parties and the Court to consider. It appears that the complete file history for the asserted U.S. Patent No. 5,838,906 (“the ‘906 patent”) includes approximately 640 non-patent literature pages in the initial application, 810 non-patent literature pages in the first re-examination, and 153,000 non-patent literature pages in the second re-examination (which

resulted in amended claims asserted in this lawsuit). In addition, it appears that the complete file history for U.S. Patent No. 7,599,985 (“the ‘985 patent”) contains in excess of 638,000 non-patent literature pages. There was also an interference proceeding involving the ‘906 patent. Estimates of the complete file histories range near a million pages. Having received only about 9,500 pages of production with Eolas’ Patent Rule 3-2(b) and (c) Disclosures, Google requested immediate production of the complete file histories. (*See* Ex. 22.) In response, Eolas produced some additional documents and professed to have produced all file history materials “in its possession,” claiming that the USPTO “refused to provide” a certified copy of the file history of the second re-examination of the ‘906 patent and the file history of the ‘985 patent. (*See* Ex. 23.) Not only could Eolas not produce *certified* file histories, it has sidestepped defendants’ every inquiry as to whether it produced *complete* file histories. (*See id.*)<sup>3</sup> Most likely, Eolas has no idea what portions of the file histories it is missing, although clearly is missing something.

Having received no further cooperation from Eolas, one of the defendants attempted to obtain certified (or at least complete) copies of the file histories, but has not yet been able to do so. Given the huge intrinsic record spanning nearly two decades, it is crucial that a certified file history be available to the parties and the Court, otherwise it would impossible to determine if key intrinsic evidence is missing or if the available materials are authentic. Eolas’ inability to furnish certified copies of the file histories raises such a major evidentiary issue regarding the lack of a comprehensive and authenticated intrinsic record that it requires the Court’s immediate attention, as a reliable intrinsic record is essential for the upcoming claim construction briefing.

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<sup>3</sup> Google notes that to the extent Eolas failed to retain file history materials previously in its possession or the possession of its counsel, that may constitute the spoliation of evidence.

### **(3) The Transfer Motion is Still Pending**

The Moving Defendants filed a motion to transfer on February 10, 2010, over six months ago. (Dkt. 214.) Plaintiff's initial response was due on February 25, 2010 but it requested and received a two week extension of time to respond on March 11, 2010. (Dkts. 218, 219.) On March 11, 2010, Plaintiff requested and received an extension of another week to respond on March 18, 2010. (Dkts. 236, 237.) On March 18, 2010, Plaintiff requested a *third* extension of time to respond, this time for three months. (Dkt. 241.) The Court granted Plaintiff an extension until June 1, 2010. (Dkt. 265.) On June 28, 2010, in lieu of filing its surreply, Plaintiff moved for a *fourth* extension of time and held off on filing its surreply until July 9, 2010. (Dkts. 346, 359.)

In the interest of judicial efficiency, courts are encouraged to resolve transfer motions before conducting merits-related discovery. *See Esplanar, Inc. v. Marsh*, 11 F.3d 1284, 1291 (5th Cir.), *cert. denied*, 513 U.S. 926 (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 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 (emphasis added); *see also Esplanar*, 11 F.3d at 1291.

Because judicial efficiency weighs in favor of resolving transfer motions prior to discovery on the merits, the Federal and Fifth Circuits have 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. Dkt. No. 909, 2010 U.S. App. LEXIS 372, at \*6 (unpublished) (Fed. Cir. Jan. 6, 2010); *see also Petet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) (“Parties seeking a change of venue should act with reasonable promptness” (citations omitted)). In light of these directives, and now that plaintiff has finally completed its briefing, this issue is ripe for immediate adjudication by the Court.

#### **(4) A Brief Stay of Discovery and Claim Construction is Necessary**

The numerous threshold issues present in this case strongly favor a stay of discovery and claim construction until Eolas serves compliant infringement contentions, the Microsoft license issue is resolved, certified or at least *complete* file histories are obtained, and the Court rules on the pending transfer motion. “The district court has the inherent power to control its own docket, including the power to stay proceedings.” *Soverain Software LLC v. Amazon.com, Inc.*, 356 F. Supp. 2d 660, 662 (E.D. Tex. 2005) (Davis, J.). “The power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). “How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Id.* at 254-55. Unlike stays granted for longer, more indefinite timeframes (like for re-examination proceedings), a stay in this instance would last only until the resolution of a few threshold issues in this case. Thus, it is a

short, non-prejudicial delay in discovery that will ultimately enable the parties and the Court to engage in a far more efficient discovery and claim construction process.

With regard to the transfer motion in particular, burdensome discovery is now commencing, despite the Federal Circuit's admonition in *VTech* to address transfer issues before general discovery and claim construction get underway. In addition, despite causing the many delays that prevented adjudication of the transfer motion before discovery began, Plaintiff now brazenly argues that this Court should deny the Transfer Motion because discovery has begun. *Eolas' Sur Reply in Opposition to ... Motion to Transfer...* at 2 (Dkt. 359) (“[g]iven the stage of this proceeding, resolution of this dispute should not be delayed by a transfer”). Eolas should not be permitted to create a string of unnecessary delays so it can then argue before this Court or the Federal Circuit that the case has advanced too far into discovery to permit transfer to a more appropriate forum. The lack of a stay at this juncture would therefore be highly prejudicial to defendants and Plaintiff's own arguments underscore the urgent need for a stay until this Court rules on the Transfer Motion.

### **Conclusion**

This case will be enormously complex and time consuming for the parties and the Court. But before this Court and the parties invest any more time or resources in discovery and claim construction, Google respectfully submits that it would be most effective and efficient to address and resolve the aforementioned issues at the Court's Case Management Conference on August 31, 2010.



Dated: August 26, 2010

Respectfully submitted,

By: /s/ Scott T. Weingaertner, with permission  
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GOOGLE INC. AND YOUTUBE, LLC

### **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on August 26, 2010. Any other counsel of record will be served by First Class U.S. mail on this same date.

/s/ Michael E. Jones