

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

I/P ENGINE, INC.,	)	
	)	
Plaintiff,	)	
v.	)	Civ. Action No. 2:11-cv-512
	)	
AOL INC. et al.,	)	
	)	
Defendants.	)	

**PLAINTIFF I/P ENGINE, INC.’S OPPOSITION TO DEFENDANTS’ MOTION FOR  
STAY OF REQUIREMENT THAT DEFENDANTS PROVIDE REVENUE  
INFORMATION AND CALCULATIONS OF ONGOING ROYALTY PAYMENTS**

It has been 73 days since this Court awarded I/P Engine post-verdict damages and ordered Defendants to provide quarterly reports for Defendants’ willful infringement. D.I. 963, 1086 and 1088. Defendants should have provided a report for the five outstanding quarters ending December 31, 2013. But they failed to do so. Under Fed. R. Civ. P. 62(a), Defendants are *not* entitled to a stay *as a matter of right* where an appeal is taken from an “order that directs an accounting in an action for patent infringement.”<sup>1</sup> Yet Defendants have granted themselves a stay by refusing to produce any reports as of this date. Only now that the report for the first quarter of 2014 is coming due are Defendants finally making a formal request that this Court stay their reporting obligations.<sup>2</sup> D.I. 1093 (“Motion”).

<sup>1</sup> An accounting in patent infringement cases “refers to infringement damages pursuant to 35 U.S.C. § 284.” *Special Devices, Inc. v. OEA, Inc.*, 269 F.3d 1340, 1343 n.2 (Fed. Cir. 2001). Here, pursuant to § 284, this Court awarded I/P Engine post-verdict damages and ordered Defendants to provide quarterly reports. D.I. 963, 1086 and 1088.

<sup>2</sup> I/P Engine has already reasonably agreed to stay the enforcement of Defendants’ payment obligations of the post-verdict damages judgment pending the resolution of the related appeals, and for thirty (30) days thereafter.

While it is within the discretion of this Court to grant or deny such a stay, Defendants must first demonstrate that: (1) the stay applicant has made a *strong* showing that they are likely to succeed on the merits; (2) the stay applicant will be *irreparably* injured absent a stay; (3) issuance of a stay will not substantially injure the other parties interested in the proceeding; and (4) it is in the public's interest. *ePlus, Inc. v. Lawson Software, Inc.*, 946 F. Supp. 2d 503, 507 (E.D. Va. 2013) (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987) (emphasis added)). Defendants, however, do not even attempt to argue these factors in their Motion, much less demonstrate that they weigh in favor of granting a stay. A review of the first two factors alone demonstrates that Defendants are not entitled to a stay and that their Motion should be denied.

First, Defendants are unlikely to succeed on the merits – with regard to infringement, the jury found that Defendants infringed *all* asserted claims of both patents, this Court affirmed that finding, subsequently held that Defendants' purported design-around also infringed, and found their post-verdict infringement to be willful; with regard to validity, the jury, using a special verdict form, found that *all* asserted claims were not invalid, this Court affirmed that finding, and found the claims to be non-obvious. Additionally, *all* asserted claims of both patents have survived reexamination based on the same prior art that was overcome at trial.

Second, Defendants cannot demonstrate that they will be irreparably harmed as a result of complying with this Court's Order because calculating post-verdict damages is straightforward. This Court has already done the heavy lifting by establishing the royalty rate (6.5%) and apportionment factor (20.9%). The only unknown variable is Defendants' U.S. revenues, which can be easily determined – as Google's 30(b)(6) designee testified. *See* Datta, Depo. Tr. (2012-06-12), 57:6-18 and 58:1-6. Google could have simply multiplied its applicable quarterly

revenue (which it has on hand) by the apportionment factor and royalty rate. But instead Defendants are wasting time and judicial resources arguing for a stay.

Defendants' position is even shakier given that Defendants have already done the calculations. The results of the calculations appear in Defendants' Confidential Opening Brief in their appeal of this Court's supplemental and post-verdict damages awards (filed April 7, 2014). This fact undercuts any argument that calculating post-verdict damages is "expensive and time-consuming" (D.I. 1093 at 3) and would irreparably harm Defendants. Plainly, there is no justification to impose a delay on I/P Engine – the prevailing and injured party. *See In re Mahurkar Patent Litig.*, 831 F. Supp. 1354, 1397 (N.D. Ill. 1993), *aff'd*, 71 F.3d 1573 (Fed. Cir. 1995) (refusing to stay enforcement of injunction pending appeal because prevailing plaintiff entitled to immediate relief and defendants failed to show likelihood of success on appeal).

In their Motion, Defendants articulate two arguments in support of their request for a stay: (1) that the ordered accounting only assures that payments are correct and if no payments are required, then there is no need for the accounting, and (2) that I/P Engine would not be deprived of anything if this Court granted the requested stay. D.I. 1093 at 3. Neither argument addresses the relevant *Hilton* factors or supports granting a stay. The accounting allows I/P Engine to not only verify payment amounts, but to immediately value its judgment.

Defendants also argue that their reporting obligations should be delayed because providing such information is burdensome since it is "highly confidential." D.I. 1093 at 3. But this Court entered a protective order in this case for this exact purpose – producing highly confidential information. In fact, all of the financial information Defendants produced in this case is under the entered Protective Order. Defendants therefore cannot now arbitrarily refuse to produce such information just because they do not want I/P Engine to have current revenue

information. Moreover, Google publicly reports its financials to the U.S. Securities and Exchange Commission each quarter, and thus it seems practical that Google has already completed much of the necessary work.

While I/P Engine agrees that no supersedeas bond is necessary,<sup>3</sup> Defendants are unfairly forcing I/P Engine to operate in the dark and are depriving I/P Engine of its rightful ability to assess the value of its own claim. Without Defendants providing their revenues, I/P Engine is incapable of accurately calculating post-verdict damages itself. If Defendants provided their revenues, I/P Engine would at least be able to formulate settlement strategies from an informed position – a course of action that Defendants have thus far made unnecessarily difficult.

Considering Defendants continue to willfully infringe and simultaneously continue to avoid their obligations to pay for that infringement, I/P Engine is entitled to at least know the value of its judgment. I/P Engine has already been injured by Defendants' infringement; there is no reason it should sustain the additional peril of being uninformed. Furthermore, I/P Engine should not assume that additional burden simply for the convenience of a willful infringer.

Accordingly, I/P Engine respectfully requests that Defendants' Motion be denied and, within 20 days of this Court's denial, that Defendants be ordered to produce the quarterly reports detailing the outstanding post-verdict damages through the first quarter of 2014.

Dated: April 10, 2014

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<sup>3</sup> I/P Engine acknowledges that there is minimal risk that Google – the party satisfying the entire judgment against Defendants – will become insolvent prior to the resolution of the pending appeals, and therefore does not request that Defendants post a supersedeas bond.

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**CERTIFICATE OF SERVICE**

I certify that on this 10th day of April 2014 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification to the following:

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