

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION

I/P ENGINE, INC.

Plaintiff,

v.

AOL, INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

**GOOGLE'S REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR STAY OF  
REQUIREMENT THAT DEFENDANTS PROVIDE REVENUE INFORMATION AND  
CALCULATIONS OF ONGOING ROYALTY PAYMENTS**

Defendants ask the Court to exercise its broad discretion to stay the reporting obligations in its August 14, 2013 Order concerning damage payments that the parties already agreed do not need to be made while the appeals concerning such payments are pending. I/P Engine fails to rebut the appropriateness of Defendants' reasonable request, which will cause no prejudice to Plaintiff.<sup>1</sup>

In their motion, Defendants cited applicable law concerning stays of accountings. Fed. R. Civ. P. 62(a)(2); *Beaver Cloth Cutting Machines, Inc. v. H. Maimin Co.*, 37 F.R.D. 47, 50-51 (S.D.N.Y. 1964) (granting stay of accounting proceedings upon posting of \$5000 bond by the defendant); *Schlegel Mfg. Co. v. King Aluminum Corp.*, 381 F. Supp. 649, 656 (S.D. Ohio 1974)

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<sup>1</sup> I/P Engine's accusation that Defendants are seeking to "avoid their obligations to pay for [their] infringement" (D.N. 1095, 4) is specious. The parties already have agreed to stay enforcement of Defendants' payment obligations pending the resolution of the related appeals. (D.N. 932, 1085, 1096 & 1097.)

*aff'd and remanded sub nom. Schlegel Mfg. Co. v. U.S.M. Corp.*, 525 F.2d 775 (6th Cir. 1975) (granting stay of accounting pending appeal); Wright & Miller, Fed. Prac. & Proc. Civ. § 2902 (3d ed.) (“Stay of an accounting in a patent-infringement case, upon an appropriate bond, would be consistent with the statutory scheme to avoid a useless waste of time and money.”). This law provides a clear, reasonable basis for staying accounting requirements pending appeals. Plaintiff does not address or even acknowledge any of this relevant law.

Instead, I/P Engine relies on irrelevant cases about entirely different situations, such as *ePlus, Inc. v. Lawson Software, Inc.*, 946 F. Supp. 2d 503 (E.D. Va. 2013), where the defendant sought to stay an injunction of the making, using, or selling of infringing products and services, and coercive portions of a resulting contempt order, and *In re Mahurkar Patent Litig.*, 831 F. Supp. 1354 (N.D. Ill. 1993), concerning an injunction of the sale of infringing products. These decisions have no bearing on Defendants’ requested relief.

Moreover, I/P Engine's own assertions reveal that its demand for certified revenue and damages information has no other purpose than harassment. I/P Engine says it is in “peril” of being uninformed of damages amounts. But Plaintiff admits that the "results of the calculations appear in Defendants' Confidential Opening Brief in their appeal." (D.N. 1095, 3.) Plaintiff also admits “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.” (*Id.*, 4 n.3.) There is no “peril.”

Further, contrary to I/P Engine's unsupported assertion that Defendants' applicable revenue base "can easily be determined," the certification of revenue and damage calculations places a heavy burden on Defendants. It is an expensive and time-consuming process. (Kuethe Dec., D.N. 939.) Likewise, while Google does report its overall financials to the U.S. Securities and

Exchange Commission each quarter, those reports do not concern the detailed revenue breakdowns necessary to calculate the damages in this case or involve the certification of the damages calculations in this case.

Finally, Defendants are not tardy in providing revenue information and damage calculations as Plaintiff suggests. (D.N. 1095, 1.) On August 14, 2013, the Court ordered Defendants to make quarterly payments of ongoing royalties and, at that time, “to certify by penalty of perjury the U.S. revenue attributable to Defendant's use of AdWords in U.S. Dollars and the calculation of the royalty payment.” (D.N. 963, 6.) On January 28, 2014, the Court then set the royalty rate for post-judgment royalties. (D.N. 1088.) Because January 28, 2014 is in the middle of the first quarter of 2014, Defendants' first quarterly calculation is due April 21, 2014.<sup>2</sup> The parties met and conferred to try to resolve both the issue of staying payment obligations and the reporting issue currently before the Court, but they were not able to reach an agreement as to Defendants' reporting obligations. Accordingly, Defendants sought a stay of their reporting obligations in advance of the April deadline. Contrary to I/P Engine's assertion, (D.N. 1095, 1), Defendants have not failed to make any ordered reportings or granted themselves a stay, but, rather, they have sought protection from the Court in a timely manner.

### **Conclusion**

For the foregoing reasons, Defendants respectfully request that this Court grant their Motion to Stay and stay any and all requirements that Defendants provide revenue information or other financial reports concerning post-judgment royalties to Plaintiff or to participate in any related audits until the Federal Circuit has ruled on all pending appeals. (*See* Appeal Nos. 2013-1307, 2013-1313 (Fed. Cir.); Appeal Nos. 2014-1233, 2014-1289 (Fed. Cir.).)

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<sup>2</sup> This represents 20 days after the end of the quarter plus one day to account for the deadline falling on a Sunday.

DATED: April 17, 2014

/s/ Stephen E. Noona

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 17, 2014, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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