Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC, Plaintiff, v. AOL, INC.; APPLE, INC.; eBAY, INC.; FACEBOOK, INC.; GOOGLE INC.; NETFLIX, INC.; OFFICE DEPOT, INC.; OFFICEMAX INC.; STAPLES, INC.; YAHOO! INC.; AND YOUTUBE, LLC, Defendants.	Case No. 2:10-cv-01385-MJP **JOINT STATUS REPORT**

Pursuant to Federal Rule of Civil Procedure 26(f), Local Rule CR 16, and this Court's September 27, 2010 Order (Doc. # 25), the parties hereto submit the following Report of Parties' Planning Meeting:

1. Nature and Complexity of Case: Interval Licensing LLC ("Interval" or "Plaintiff") has asserted four patents – United States Patent Nos. 6,263,507; 6,034,652; 6,788,314; and 6,757,682 – against eleven defendants: Each defendant is alleged to have infringed at least one of the patents, and Interval alleges that each patent is infringed by multiple defendants. Defendants

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have filed motions to dismiss for failure to state a claim and for improper joinder. The motions are noted for November 12, 2010.

Plaintiff's Contention: This case is a patent infringement action of moderate complexity that involves four patents. Although the case involves eleven defendants, that by itself does not increase the complexity of the case for any particular Defendant. Moreover, Interval believes that many of the accused products operate in similar fashion across Defendants. In addition, it is premature for Defendants to speculate about the number of asserted claims given that the schedule under this Court's Standing Order for Patent Cases requires Interval to serve its disclosure of asserted claims and infringement contentions within 10 days of entry of the scheduling order. *See* Doc. # 26. Interval informed Defendants at the Rule 26(f) conference that it would provide detailed infringement contentions by claim and patent pursuant to this Court's Standing Order for Patent Cases, Docket Number 26. Furthermore, Interval informed Defendants that it would be prepared to serve these infringement contentions by November 18, the earliest date the infringement contentions would be due under this Court's Standing Order entered in this case.

Defendants' Contention: This is not an average patent case, nor is it of "moderate complexity." Plaintiff has asserted that eleven separate defendants infringe up to four patents each. There are currently 197 separate claims at issue. Adding to the complexity, as set forth in the pending motions to dismiss, Plaintiff has not yet identified how many different products and/or services of each defendant it is accusing and what the basis for the accusations are. While Defendants asked Plaintiff at the Rule 26(f) conference to provide this information to help create the discovery plan and proposed schedule, Plaintiff refused. If discovery proceeds in view of Plaintiff's complaint, the discovery burden on

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Defendants will be significant because Plaintiff's complaint places no reasonable limitations on the scope of its infringement allegations. In addition, particularly if the Court does not sever the action, Interval's inclusion of eleven unique defendants greatly increases the complexity of the case for each Defendant because, in order to streamline the case for the Court as much as possible, Defendants will be under the significant added burden of having to coordinate responses for 11 separate entities for matters such as claim construction.

2. ADR Method: The parties believe that a party appointed mediator as described in Local Rule 39.1(b)(3) should be the initial method of alternative dispute resolution.

3. ADR Scheduling: Plaintiff believes that non-binding mediation should take place within 30 days after the *Markman* hearing. Defendants believe that non-binding mediation should take place within 30 days after this Court issues its claim construction order, at which point the Court's adopted claim construction should facilitate settlement discussions.

4. Deadline to Join Additional Parties: The parties propose March 4, 2011.

5. Proposed Discovery Plan:

(A) FRCP 26(f) and Local Rule CR 16 Conference: a telephonic meeting was held on October 25, 2010, and was attended by:

PARTY	**NAME**	**FIRM**
Interval	Max Tribble	Susman Godfrey, LLP
Interval	Justin Nelson	Susman Godfrey, LLP
eBay, Staples, Netflix, Office Depot	Chris Carraway	Klarquist Sparkman, LLP
eBay, Staples, Netflix, Office Depot	Kristin Cleveland	Klarquist Sparkman, LLP
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FRCP 26(a)(I) Initial Disclosures: As required by the Court's orders, the parties served Initial Disclosures on November 1, 2010.

(B) Plaintiff's Contention: Discovery will be required on issues related to infringement, enforceability, validity, and damages. Interval believes that discovery should not be conducted in phases, and believes that delaying discovery concerning damages until after the *Markman* hearing would discourage early settlement and simply lead to delay of the trial.

Defendants' Contention: Given the complexity of the case created by Plaintiff, including eleven defendants, four patents, and almost 200 claims, Defendants request that the Court phase discovery with the initial focus being on claim construction and liability discovery. Specifically, discovery solely related to damages issues should be postponed until after the *Markman* hearing. In order to facilitate settlement, Defendants would be willing to provide summary sales information, but all other discovery related solely to damages should be postponed to allow the parties to focus

on claim construction and liability discovery before the *Markman* hearing. As for subjects of discovery, Defendants generally are likely to need discovery related to claim construction, invalidity, inequitable conduct, patent ownership, development of the alleged inventions, potential prior art, Plaintiff's and inventors' knowledge of prior art, Plaintiff's awareness of Defendants' activities (laches/estoppel), pre-filing investigations, licensing, and alleged notices of infringement. The actual scope of liability discovery is somewhat uncertain because the insufficiency of the Complaint discussed in the pending motions to dismiss has prevented Defendants from knowing the scope of accused products and services.

(C) The parties agree to meet and confer in good faith concerning any changes to be made in the limitations on discovery imposed under the Federal and Local Civil Rules within one week after Interval serves infringement contentions or an amended complaint. Until then, the parties agree that the limitations on discovery imposed under the Federal and Local Civil Rules apply, and also agree that they will not initiate discovery until two weeks after the earlier of service of the infringement contentions or an amended complaint.

(D) The parties agree to meet and confer in good faith regarding any limitations on discovery pursuant to the timeframe discussed in 5.C, above.

(E) The parties request that the Court enter a protective order, to be negotiated between the parties before the beginning of discovery.

6. Date by Which Remainder of Discovery Can Be Completed: The parties did not reach agreement on the date by which the remainder of discovery can be completed.

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(A) Plaintiff's Contention: Interval respectfully requests that the Court adhere to the "Standing Order for Patent Cases," Docket Number 26. Interval believes that (i) fact discovery can be completed by October 17, 2011, assuming that the Court holds a claim construction hearing in or around May 2011; (ii) a *Markman* hearing should be held the week of May 9, 2011 (approximately six months from the estimated date of the issuance of the scheduling order) (iii) opening expert reports should be due 30 days after the Court issues an order construing the claims; (iv) rebuttal expert reports should be due 30 days after service of opening expert reports; and (v) close of expert discovery 30 days after rebuttal expert reports are served, but not later than December 16, 2011. In addition, Interval respectfully suggests that the Court clarify whether non-infringement contentions are due with the Defendants' invalidity contentions, pursuant to LR 121. Defendants' proposed schedule incorporates needless delay into the discovery process. For example, Defendants have criticized Interval for not providing information on asserted claims, and yet they propose that infringement contentions not be due until two months from now. Interval is fully prepared to meet the deadlines in the Court's Standing Patent Order, which requires that infringement contentions be served within 10 days of the issuance of the scheduling order. *See* Doc. # 26. In addition, Defendants' proposed schedule gives them three months to serve preliminary invalidity and non-infringement contentions (which is significantly longer than the 21 day difference in this Court's Standing Order). The Defendants' proposed schedule also significantly protracts the claim construction process.

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Contrary to Defendants' suggestion, the Local Patent Rules are not limited to cases where a single patent is asserted. Instead, "[t]hese rules apply to all civil actions filed in or transferred to this Court which allege infringement of a utility patent or which seek a declaratory judgment that a utility patent is not infringed, is invalid or is unenforceable." (LPR 101). Defendants' proposed schedule would eviscerate the purpose of the Local Patent Rules, which "are designed to streamline the pre-trial and claim construction process, and generally to reduce the cost of patent litigation." *Id.* Although this Court has discretion to modify the deadlines, Interval respectfully submits that a case involving sophisticated parties, experienced counsel, and four patents does not warrant departure from the standard rules. For example, the case in this district *Amazon.com, Inc. v. Discovery Communications, Inc.*, 2:09-cv-681-RSL also involved four patents and yet the court entered a scheduling order with deadlines comparable to those in the Local Patent Rules. *See* Doc. # 1 (Complaint identifying the four patents); Doc. # 24 (scheduling order).

(B) Defendants' Contention: This case is complex. Plaintiff sued eleven separate defendants and has not identified the accused products or which of the nearly 200 claims it is asserting. As such, this case cannot be force-fit into the standard default schedule that Plaintiff proposes. For example, Defendants' burden in developing their invalidity contentions is significantly greater than the ordinary case due to the number of asserted patents and the lack of information regarding Plaintiff's allegations. Similarly, the file histories of the four asserted patents are particularly

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lengthy and complex. And, discovery will almost certainly take more time given that there are nineteen named inventors, almost all of them outside of this District. Defendants also note that the *Amazon.com, Inc. v. Discovery Communications, Inc.*, 2:09-cv-681-RSL case cited by Plaintiff involved a single defendant, a single accused product, and closely related patents - and thus cannot be viewed as comparable to this case. *See* Doc. # 1.

Defendants propose the following schedule, which is necessary to allow the Defendants to conduct a sufficient investigation and defense. Defendants' proposed schedule sets deadlines for the Disclosure of Asserted Claims and Preliminary Infringement Contentions, Disclosure of Preliminary Invalidity Contentions, and *Markman*-related dates that provide the Court the opportunity to address Defendants' pending motions without prejudicing Defendants' ability to prepare their case.

Event	Defendants' Proposed Schedule
Disclosure of Asserted Claims and Preliminary Infringement Contentions	12/10/10
Disclosure of Preliminary Invalidity Contentions	3/11/11 (three months after Plaintiff's Disclosure of Asserted Claims and Preliminary Infringement Contentions)
Terms for Construction	5/25/11
Preliminary Claim Chart	7/14/11
Claim Construction-related Expert Report Deadline (if necessary)	7/21/11
Claim Construction Rebuttal Expert Report Deadline (if necessary)	8/4/11
Joint Claim Chart and Prehearing Statement	8/15/11
Opening Briefs	9/7/11
Response Briefs	10/5/11
Markman Hearing	Week of 10/24/11
Deadline for early Mediation	30 days after *Markman*

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	Order
Close of Fact Discovery	12/19/11
Opening Expert Reports (Burden of Proof)	1/20/12
Rebuttal Expert Reports	2/24/12
Completion of Discovery	4/27/12
Deadline for Filing Dispositive Motions	6/1/12
Case Ready for Trial	8/30/12

7. Magistrate Judge: Interval consents that a full-time Magistrate Judge may conduct all proceedings. At least one Defendant does not consent.

8. Bifurcation:

(A): Plaintiff's Contention: Interval opposes bifurcation and phasing, and believes that any bifurcation and phasing would needlessly increase the cost and length of discovery and the trial

(B) Defendants' Contention: As set forth above, Defendants propose that discovery be phased, with discovery related solely to damages being postponed until after the *Markman* hearing. Defendants also believe that liability and damages should be bifurcated for discovery and trial. Given the complexity of the case as discussed above, Defendants will have the burden to invalidate a large number of claims in multiple patents, and defend against a presently unknown number of accused products. Therefore, bifurcation will make the case more manageable and efficient by preserving party resources and the resources of this Court absent a finding of liability.

9. Pre-Trial Statements and Orders: The parties were not able to agree on ways to shorten or simplify the Pre-Trial Statements or Pre-Trial Order at this time. The parties agree that Pre-Trial Statements and Orders called for by Local Rules CR 16(e), (h), (i), and (l), and 16.1 should not be dispensed with in whole or in part.

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10. Suggestions for Shortening or Simplifying the Case: The parties agreed to discuss at a future date limitations on asserted claims and on the number of prior art references in the interest of efficiency.

Plaintiff's Contention: Interval believes that it is premature to limit the number of asserted claims before infringement contentions and invalidity contentions are served, and also believes that any narrowing of claims is without prejudice.

Defendants' Contention: Defendants believe that the most reasonable way to simplify this case is for Plaintiff to limit the number of asserted claims for litigation to a manageable number before the claim construction process begins. Thus, Defendants believe that Plaintiff should be required to select, at least 4 months before the *Markman* hearing, no more than 20 claims to litigate going forward. Plaintiff should be prohibited from changing the selection without leave of Court upon a showing of good cause. Defendants also believe that with bifurcation of liability and damages, the case can be simplified by reasonably limiting the types of information discoverable in the liability phase.

11. Trial Date: The parties were not able to agree on the date by which the case will be ready for trial.

Plaintiff's Contention: Interval believes that the case will be ready for trial by no later than February 13, 2012.

Defendants' Contention: As set forth in paragraph 6(B) above, Defendants believe that, given the complexity of the case, including the number of defendants and patents, this is not the typical patent case and will require more time to litigate to trial. Defendants propose that the case will be ready for trial by August 30, 2012.

12. Jury Trial: Plaintiff has requested a jury trial on all non-equitable issues.

13. Trial Days: The parties were not able to agree on the number of trial days.

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(A) Plaintiff's Contention: Interval believes that between 10-15 trial days are needed to complete the trial.

(B) Defendants' Contention: Defendants believe that if separate trials were undertaken for each defendant, each trial might require 7-10 trial days, although this number could be higher depending on the number of accused products. If all defendants are included in one trial, the combined trial could require 20-30 trial days.

14. The names, addresses and telephone numbers of all trial counsel:

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15. Service: Defendants have been duly served with the complaint, and proofs of service have been filed.

16. Scheduling Conference:

Plaintiff's Contention: Defendants have changed their minds twice on whether they would request a scheduling conference, including most recently two business days before this report was due. Plaintiff does not believe a scheduling conference is necessary, but has tried to work with Defendants on a date. At the Rule 26(f) conference – when all of the issues in this report were discussed –Defendants stated that they would request a scheduling conference. Plaintiff asked Defendants if they would join in a call to the Court to determine if there was availability the week of November 8. Defendants then changed their mind, and told Plaintiff that it was not requesting a scheduling conference. On Thursday, November 4, however, Defendants changed their mind once again, and indicated that they would request a scheduling conference. Plaintiff informed Defendants that due to an impending fact discovery cutoff of December 10 in another case with international depositions, late November and early December were especially bad. Plaintiff is available at any point before Thanksgiving, although November 17 and 18 are not preferable. Plaintiff has no objection to the Defendants' preferred date of November 23, but does not believe it is necessary to wait until the motions to dismiss and sever are fully briefed. If the Court is not available on November 23, Plaintiff believes that the scheduling conference should be held sooner rather than later.

Defendants' Contention: Given the significant disputes identified above, Defendants believe that a scheduling conference may be helpful. While Defendants earlier thought that a scheduling conference might not be necessary, the need for one became evident after receiving Plaintiff's draft Joint Status Report, which showed more significant disputes on scheduling and other issues than previously thought. Plaintiff's counsel has indicated that they will be traveling

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for some of November and the first half of December due to an impending fact discovery cutoff in another case, and are available for a scheduling conference on November 8-12, 15, 16, 19, 22, and 23. Defendants are available on November 23, December 2-3, 14 and 16. Defendants request that the conference occur after the pending motions to dismiss and sever are fully briefed (November 12), as those motions will likely significantly impact the issues in the scheduling order. Thus, Defendants request that the Court hold a scheduling conference on November 23, if possible.

17. Tutorial: The parties agree to consider whether a tutorial may be helpful, and the format of any such tutorial.

18. Neutral Expert: At this point, the parties do not believe that a neutral expert is necessary in this case.

Dated: November 8, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following counsel of record:

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