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Hon. Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

INTERVAL LICENSING LLC,
Plaintiff,
v.
AOL, INC.,
Defendant.

Case No. 2:10-cv-01385-MJP

**INTERVAL'S MOTION FOR
RECONSIDERATION OF
COURT'S ORDER GRANTING
MOTIONS TO STAY**

Note on Motion Calendar:

June 24, 2011

INTERVAL LICENSING LLC,
Plaintiff,
v.
APPLE, INC.,
Defendant.

Case No. 2:11-cv-00708 MJP

Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
EBAY, INC.,
Defendant.

Case No. 2:11-cv-00709 MJP

Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
FACEBOOK, INC.,
Defendant.

Case No. 2:11-cv-00710 MJP

Lead Case No. 2:10-cv-01385-MJP

MOTION FOR RECONSIDERATION RE ORDER GRANTING
MOTIONS TO STAY
Case No. 2:10-cv-01385-MJP

Susman Godfrey LLP
1201 Third Avenue, Suite 3800
Seattle WA 98101-3000

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INTERVAL LICENSING LLC,
Plaintiff,
v.
GOOGLE, INC.,
Defendant.

Case No. 2:11-cv-00711 MJP
Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
NETFLIX, INC.,
Defendant.

Case No. 2:11-cv-00712 MJP
Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
OFFICE DEPOT INC.,
Defendant.

Case No. 2:11-cv-00713 MJP
Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
OFFICEMAX INC.,
Defendant.

Case No. 2:11-cv-00714 MJP
Lead Case No. 2:10-cv-01385-MJP

INTERVAL LICENSING LLC,
Plaintiff,
v.
STAPLES INC.,
Defendant.

Case No. 2:11-cv-00715 MJP
Lead Case No. 2:10-cv-01385-MJP

1 INTERVAL LICENSING LLC,

2 Plaintiff,

3 v.

4 YAHOO! INC.,

5 Defendant.

Case No. 2:11-cv-00716 MJP

Lead Case No. 2:10-cv-01385-MJP

6 INTERVAL LICENSING LLC,

7 Plaintiff,

8 v.

9 YOUTUBE LLC,

10 Defendant.

Case No. 2:11-cv-00717 MJP

Lead Case No. 2:10-cv-01385-MJP

11
12 Interval respectfully requests that the Court reconsider its Order staying these eleven
13 actions (Dkt. # 253; the “Stay Order”). Defendants filed their Motions to Stay on March 17,
14 2011—within one day of filing their requests for reexaminations with the Patent and Trademark
15 Office (“PTO”). (Dkt. # 198) In the intervening three months since the parties briefed the
16 Motions to Stay, the parties have undertaken an incredible amount of work, most of which will be
17 of limited value should this action be stayed. In addition, the PTO rejected a number of
18 defendants’ arguments and references in granting the requests for reexamination, which further
19 supports Interval’s position that the reexaminations will not simplify the issues in these actions.
20 To the contrary, the parties will be back before the Court one, two, or six years from now most
21 likely litigating the exact same issues that are now before the Court.
22

23
24 These new facts warrant reconsideration, and demonstrate that staying these actions is
25 counterproductive and inconsistent with Federal Rule of Civil Procedure 1, mandating that the
26 Federal Rules “[b]e construed and administered to secure the just, speedy, and inexpensive
27 determination of every action and proceeding.”

1 **A. The Parties Have Completed Significant Additional Work Since Filing Their Briefs**
2 **In March**

3 The Court issued the Stay Order at 5:15 pm on the day that the parties' *Markman* briefs
4 were due. Pursuant to the scheduling order, Interval and Defendants were each to submit briefs
5 not to exceed 40 pages for each of the two tracks, for a total of 160 pages of briefing. When the
6 Court issued its order, the parties had already completed these briefs and were in the process of
7 filing them. Indeed, Interval had already filed its *Markman* brief on the '652/'314 track when the
8 Court issued the Stay Order. Interval's counsel, alone, spent hundreds of hours preparing and
9 finalizing Interval's *Markman* briefs. Counsel for the eleven defendants likely spent at least that
10 much time preparing defendants' briefs, especially considering that 50 lawyers have entered
11 appearances on behalf of defendants.
12

13 In addition to the *Markman* briefs, the parties spent hundreds of hours completing the
14 tasks leading up to the *Markman* briefs, including submitting a prehearing statement and joint
15 claim charts that exceeded 150 pages. During that process, the parties met and conferred for
16 hours in an attempt to reach compromise and narrow the issues to present to the Court for
17 resolution. If the actions are stayed, then at least one of the twelve parties will no doubt use the
18 delay as a justification to reject compromises already reached during this process.
19

20 The parties have also completed an extraordinary amount of discovery since March,
21 especially with respect to the production and review of defendants' source code. When the
22 parties submitted their briefs on the Motions to Stay in March, not a single defendant had
23 produced source code. Since that time, every defendant has produced code that, together,
24 amounts to hundreds of thousands of lines of code.
25

26 By its nature, the review of source code is incredibly expensive and time consuming.
27 First, Interval retained seven experts to review defendants' source code. Second, the reviews
28

1 have been conducted at the offices of defendants' outside counsel throughout the United States,
2 including Chicago, Virginia, Palo Alto, San Francisco, and Portland. Third, the code reviews are
3 conducted in accordance with seven pages of stringent source code review protocols set forth in ¶
4 11 of the protective order (Dkt. # 222). These protocols limit the number of pages that Interval's
5 experts can print and limit the nature of the notes that Interval's experts can take. These two
6 limitations together make it likely that much of the source code review will have to be repeated
7 after the stay is lifted because of the difficulty for Interval's experts to pickup where they left off
8 years earlier because of the lack of comprehensive notes and printed source code.

10 In addition, because defendants designated their source code highly confidential under the
11 protective order, each of Interval's seven experts had to sign Exhibit A to the protective order
12 before gaining access to the code. By signing Exhibit A and reviewing the code, the experts are
13 now subject to the patent prosecution bar in ¶ 6(b) of the protective order (Dkt. # 222). Pursuant
14 to the prosecution bar, the experts
15

16 shall not prosecute, supervise, or assist in the prosecution of any
17 patent application involving technology related to software for
18 recommending information to a user or other information filtering
19 techniques aimed at notifying users of items that are likely to be of
20 interest to that user or software directed to the engagement of the
peripheral attention of a person in the vicinity of a display device,
before any foreign or domestic agency, including the United States
Patent and Trademark Office.

21 This bar remains in place until one year after the final resolution of this action. Accordingly, the
22 Stay Order has the effect of extending the prosecution bar for these seven experts, likely for
23 years. This places an undue burden on the experts' ability to pursue future engagements.

24 These new facts warrant the reconsideration of the Court's Stay Order.

1 **B. In Granting The Requests For Reexaminations, The PTO Rejected A Number Of**
2 **Defendants’ Arguments And References**

3 The Stay Order noted that “Defendants have presented a substantial body of prior art that
4 they believe will reshape the four patents at issue in this litigation.” Order at 2. That is not
5 entirely accurate because the PTO already rejected a number of those references in granting the
6 reexaminations and instead focused on a single reference in granting most of the reexaminations.

7 First, in granting reexamination of the ‘314 patent, the examiner declined to reject any
8 claims based on the Rakavy reference. Instead, the grant of reexamination was premised on a
9 single primary reference—Kjorsvik. In addition, the examiner refused to adopt any of the
10 rejections defendants proposed in their request. (Dkt. # 247-5)

11 Second, in granting the reexamination of the ‘652 patent, the examiner mentioned only
12 one of the references that defendants identified (Petrecca). Although the examiner is not
13 precluded from relying on the other references, the failure even to mention those references in
14 granting the reexamination suggests that the examiner discounted defendants’ arguments. (Dkt. #
15 247-4)

16 Third, the PTO issued an office action concerning the ‘682 patent. In that office action,
17 the examiner refused to adopt any of the rejections defendants proposed in their request. Indeed,
18 the office action rejected the claims over a single reference—Bezos. (Dkt. # 247-2)

19 Fourth, in granting reexamination of the ‘507 patent, the examiner did not mention four of
20 the references that defendants identified (Joachims, Chesnais, Iwayama, and Yuasa). Again, the
21 examiner is not precluded from later relying on those references, but the failure to mention them
22 suggests that the examiner discounts defendants’ arguments. (Dkt. # 247-1)

23 In addition, the reexaminations will not simplify the issues for *Markman* or trial because
24 none of the requests for reexamination were joined by all of the defendants who are accused of
25

1 infringing that patent. Defendants undoubtedly will argue when these patents emerge from re-
2 examination that at least one of the defendants can still raise all of the arguments now before the
3 PTO no matter the result of the reexamination.¹ Such tactics reek of gamesmanship and leave
4 little doubt that the parties will be in the exact same position as they are now after the
5 reexaminations are completed years down the road.

7 For good reason, courts throughout the country, including other judges in this District and
8 in the Federal Circuit, have expressed increasing reluctance to stay cases during the re-
9 examination process. It is routine for patents to be involved both in litigation and re-examination
10 proceedings at the same time. Interval can only enforce its patents through litigation, and
11 delaying that process by as much as a few years is substantially prejudicial to Interval.
12 Defendants, on the other hand, will not be prejudiced at all by moving forward in a timely fashion
13 in an Article III court.

15 CONCLUSION

16 Interval respectfully requests that this Court reconsider its Order staying these actions.
17 The parties already have spent incredible amounts of time of money getting these eleven actions
18 to the brink of the *Markman* hearing and within six months of the end of fact discovery. Much of
19 the benefit of this work will be lost after a stay. This Court should deny the stay and keep these
20 actions on schedule to be heard by a jury next summer. Because the opening *Markman* briefs are
21 complete, Interval has no objection to moving the *Markman* hearing to a date later in the summer,
22 with a corresponding change in the discovery dates.

26 _____
27 ¹ Interval will vigorously oppose any attempt by a defendant to argue that it is not bound by a
28 particular reexamination because it did not join in the request.

1 Dated: June 24, 2011

Respectfully submitted,

3 /s/ Justin A. Nelson

4 Justin A. Nelson
5 WA Bar No. 31864
6 E-Mail: jnelson@susmangodfrey.com

7 Edgar G. Sargent
8 WA Bar No. 28283
9 E-Mail: esargent@susmangodfrey.com

10 Matthew R. Berry
11 WA Bar No. 37364
12 E-Mail: mberry@susmangodfrey.com

13 SUSMAN GODFREY L.L.P.
14 1201 Third Ave, Suite 3800
15 Seattle, WA 98101
16 Telephone: (206) 516-3880
17 Facsimile: (206) 516-3883

18 Max L. Tribble, Jr.
19 E-Mail: mtribble@susmangodfrey.com
20 SUSMAN GODFREY L.L.P.
21 1000 Louisiana Street, Suite 5100
22 Houston, Texas 77002
23 Telephone: (713) 651-9366
24 Facsimile: (713) 654-6666

25 Oleg Elkhunovich
26 E-Mail: oelkhunovich@susmangodfrey.com
27 SUSMAN GODFREY L.L.P.
28 1901 Avenue of the Stars, Suite 950
Los Angeles, California 90067
Telephone: (310) 789-3100
Facsimile: (310) 789-3150

Michael F. Heim
E-mail: mheim@hpcllp.com

Eric J. Enger
E-mail: eenger@hpcllp.com

Nathan J. Davis
E-mail: ndavis@hpcllp.com

Niraj P. Patel
E-mail: npatel@phcllp.com
HEIM, PAYNE & CHORUSH, L.L.P.
600 Travis, Suite 6710
Houston, Texas 77002

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Telephone: (713) 221-2000

Facsimile: (713) 221-2021

Attorneys for INTERVAL LICENSING LLC

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2011, 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:

Attorneys for AOL, Inc.

Cortney Alexander	cortney.alexander@finnegan.com
Robert Burns	robert.burns@finnegan.com
Elliot Cook	elliott.cook@finnegan.com
Gerald Ivey	gerald.ivey@finnegan.com
Scott Johnson	scott.johnson@stokeslaw.com
Molly Terwilliger	mollyt@summitlaw.com

Attorneys for Apple, Inc.

David Almeling	dalmeling@omm.com
Brian Berliner	bberliner@omm.com
George Riley	griley@omm.com
Jeremy Roller	jroller@yarmuth.com
Scott Wilsdon	wilsdon@yarmuth.com
Neil Yang	nyang@omm.com
Xin-Yi Zhou	vzhou@omm.com

Attorneys for eBay, Inc.

Chris Carraway	chris.carraway@klarquist.com
Kristin Cleveland	Kristin.cleveland@klarquist.com
Klaus Hamm	Klaus.hamm@klarquist.com
Arthur Harrigan, Jr.	arthurh@dhl.com
Jeffrey Love	Jeffrey.love@klarquist.com
Derrick Toddy	derrick.toddy@klarquist.com
John Vandenberg	john.vandenberg@klarquist.com
Christopher Wion	chrisw@dhl.com

Attorneys for Facebook, Inc.

Chris Durbin	cdurbin@cooley.com
Heidi Keefe	hkeefe@cooley.com
Sudhir Pala	spala@cooley.com
Michael Rhodes	mrhodes@cooley.com
Elizabeth Stameshkin	lstameshkin@cooley.com
Mark Weinstein	mweinstein@cooley.com

Attorneys for Google, Inc.

Aaron Chase	achase@whitecase.com
Dimitrios Drivas	ddrivas@whitecase.com
John Handy	jhandy@whitecase.com
Warren Heit	wheit@whitecase.com

1 Scott Johnson scott.johnson@stokeslaw.com
2 Shannon Jost shannon.jost@stokeslaw.com
3 Kevin McGann kmcgann@whitecase.com
4 Wendi Schepler wschepler@whitecase.com
5 Theresa Wang theresa.wang@stokeslaw.com

Attorneys for Netflix, Inc.

5 Chris Carraway chris.carraway@klarquist.com
6 Kristin Cleveland Kristin.cleveland@klarquist.com
7 Klaus Hamm Klaus.hamm@klarquist.com
8 Arthur Harrigan, Jr. arthurh@dhlt.com
9 Jeffrey Love jeffrey.love@klarquist.com
10 Derreck Toddy derrick.toddy@klarquist.com
11 John Vandenberg john.vandenberg@klarquist.com

Attorneys for Office Depot, Inc.

10 Chris Carraway chris.carraway@klarquist.com
11 Kristin Cleveland Kristin.cleveland@klarquist.com
12 Klaus Hamm Klaus.hamm@klarquist.com
13 Arthur Harrigan, Jr. arthurh@dhlt.com
14 Jeffrey Love jeffrey.love@klarquist.com
15 Derreck Toddy derrick.toddy@klarquist.com
16 John Vandenberg john.vandenberg@klarquist.com

Attorneys for OfficeMax, Inc.

15 Kevin Baumgardner kbaumgardner@correronin.com
16 Steven Fogg sfogg@correronin.com
17 John Letchinger letchinger@wildman.com
18 Jeffrey Neumeyer JeffNeumeyer@officemax.com
19 Douglas Rupert rupert@wildman.com

Attorneys for Staples, Inc.

19 Chris Carraway chris.carraway@klarquist.com
20 Kristin Cleveland Kristin.cleveland@klarquist.com
21 Klaus Hamm Klaus.hamm@klarquist.com
22 Arthur Harrigan, Jr. arthurh@dhlt.com
23 Jeffrey Love jeffrey.love@klarquist.com
24 Derrick Toddy derrick.toddy@klarquist.com
25 John Vandenberg john.vandenberg@klarquist.com

Attorneys for Yahoo! Inc.

24 Francis Ho fho@mofo.com
25 Richard S.J. Hung rhung@mofo.com
26 Michael Jacobs mjacobs@mofo.com
27 Matthew Kreeger mkreeger@mofo.com
28 Dario Machleidt dmachleidt@flhlaw.com
Eric Ow eow@mofo.com

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Mark Walters
Gregory Wesner

mwalters@flhlaw.com
gwesner@flhlaw.com

Attorneys for YouTube, LLC

Aaron Chase
Dimitrios Drivas
John Handy
Warren Heit
Scott Johnson
Shannon Jost
Kevin McGann
Wendi Schepler
Theresa Wang

achase@whitecase.com
ddrivas@whitecase.com
jhandy@whitecase.com
wheit@whitecase.com
scott.johnson@stokeslaw.com
shannon.jost@stokeslaw.com
kmcgann@whitecase.com
wschepler@whitecase.com
theresa.wang@stokeslaw.com

By: /s/ Tammie DeNio
Tammie DeNio