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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

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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.<sup>1</sup> 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.

6  
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.  
14

### 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.  
23  
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26 \_\_\_\_\_  
27 <sup>1</sup> 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,

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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:

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