

HONORABLE MARSHA J. PECHMAN

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

INTERVAL LICENSING LLC,

Plaintiff,

v.

AOL, INC., et al.,

Defendants.

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

DEFENDANTS' OPPOSITION TO  
PLAINTIFF'S MOTION TO LIFT  
STAY ON '314/'652 PATENT TRACK

**Note on Motion Calendar: May 11,  
2012**

ORAL ARGUMENT REQUESTED

INTERVAL LICENSING LLC,

Plaintiff,

v.

APPLE, INC.,

Defendant.

CASE NO. C11-708-MJP

LEAD CASE NO. C10-1385-MJP

INTERVAL LICENSING LLC,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

CASE NO. C11-711-MJP

LEAD CASE NO. C10-1385-MJP

1  
2 INTERVAL LICENSING LLC,  
3  
4 Plaintiff,  
5  
6 v.  
7 YAHOO! INC.,  
8  
9 Defendant.

CASE NO. C11-716-MJP  
LEAD CASE NO. C10-1385-MJP

7  
8 **I. INTRODUCTION**

9 Interval’s motion to lift the stay on the ’314/’652<sup>1</sup> patent track ignores several key factors  
10 that compel leaving the stay in place and is contrary to a recent decision of this Court. Most  
11 importantly, because the ’314 patent remains in reexamination, and because of the material  
12 similarities between the ’314 and ’652 patents, leaving the stay in place until reexamination of  
13 both patents is complete, as the Court’s Order Granting Joint Request to Stay (Dkt. No. 253)  
14 indicates, will simplify various issues including claim construction, validity, and non-  
15 infringement.

16 As acknowledged in Interval’s motion, the *inter partes* reexamination of the ’314 patent  
17 remains ongoing and is currently on appeal to the Board of Patent Appeals and Interferences (the  
18 “BPAI”).<sup>2</sup> The appeal is likely to provide relevant – and critical – clarification regarding the  
19 construction of key common claim terms as well as provide clarification regarding the  
20 appropriate interpretation of vital pieces of prior art relevant to both patents. Because the ’314  
21 patent shares the same named inventors and a common specification with the ’652 patent, the  
22 decision on these and other matters relating to the ’314 patent by the BPAI will almost assuredly  
23 implicate common issues relating to the ’652 patent. Thus, even though the reexamination of the  
24 ’652 patent has concluded, the outcome of the ’314 patent reexamination undoubtedly will affect

25  
26 <sup>1</sup> Throughout this Opposition, the “’314 patent” refers to U.S. Patent No. 6,788,314 and the “’652 patent” refers to  
U.S. Patent No. 6,034,652.

27 <sup>2</sup> The reexamination of the ’652 patent is an *ex parte* reexamination whereas the reexamination of the ’314 patent is  
an *inter partes* reexamination. Because of its filing date, the ’652 patent is only subject to *ex parte* reexamination,  
where a third-party requester cannot submit comments or appeal the decision of the Examiner to the BPAI.

1 the scope and validity of the '652 patent. In fact, it was Interval itself that argued, because the  
2 '314 and '652 patents share the same named inventors, are based on the same specification and  
3 have common claim terms and validity and infringement issues, that the Court should place them  
4 on a single track in the litigation. This is, of course, exactly what the Court did.

5 Interval's motion also ignores this Court's recent decision in *Wre-Hol*, along with  
6 decisions of other courts, finding that lifting a stay while a reexamination is pending — and  
7 specifically before the conclusion of an *inter partes* reexamination through appeal — is not  
8 prudent. As in the situation in *Wre-Hol*, lifting the stay prior to the conclusion of the '314 patent  
9 reexamination will complicate the issues for claim construction as well as trial and also lead to  
10 confusion rather than simplification.

11 Finally, the Court has twice considered Interval's claimed "prejudice" in the face of a  
12 stay, and has rejected each of Interval's arguments, finding no prejudice. Interval provides no  
13 new facts or issue relating to its purported prejudice, and the Court should, accordingly, reach no  
14 different conclusion. Interval's motion should be denied in its entirety, and the stay should  
15 remain in place.

## 16 **II. LIFTING THE STAY WITH RESPECT TO THE '314 PATENT WHILE ITS** 17 **REEXAMINATION IS PENDING IS NOT PRUDENT**

18 The reexamination of the '314 patent is not yet complete. The third-party requester in  
19 that *inter partes* reexamination, Apple, filed an appeal brief on April 3, 2012 challenging the  
20 Examiner's confirmation of original claims 1-4 and 7-15 and allowance of new claims 16-31.  
21 Apple's appeal brief raises several significant claim construction and validity issues to be  
22 determined by the BPAI. *See* Jost Decl., Ex. 1 at 8. Interval is expected to file a response brief  
23 that will set forth its positions regarding the issues raised by Apple. Given that the  
24 reexamination of the '314 patent is ongoing, lifting the stay now would likely result in the  
25 duplication of effort by the Court and the parties, if, as defendants expect, the BPAI overturns all  
26 or part of the Examiner's original disposition of the subject claims and thus simplifies the claims  
27 at issue in this litigation. *See Wre-Hol, LLC v. Pharos Science & Applications, Inc.*, Case

1 No. C09-1642 MJP (W.D. Wash. Dec. 27, 2011) (refusing to lift stay until exhaustion of entire  
2 reexamination proceedings including appeal); *see also Like.com v. Superfish, Inc.*, 2010 U.S.  
3 Dist. LEXIS 70458, at \*9 (N.D. Cal. June 30, 2010). Interval cites no case law to support its  
4 argument for lifting a stay while a reexamination decision is under appeal to the BPAI.

5 Further, there are several issues regarding the Examiner's claim construction and  
6 interpretation of the prior art to be decided in the '314 patent reexamination, including those  
7 discussed below, that are common to the '652 patent. Because the appeal in the '314 patent  
8 reexamination is underway and will address many issues concerning both patents, the stay should  
9 be maintained for the '314/'652 patent track until the entire reexamination process has been  
10 concluded.<sup>3</sup> To do otherwise would foil the Court's logic in placing these two patents on the  
11 same track.

### 12 **III. LIFTING THE STAY WITH RESPECT TO THE '652 PATENT IS NOT** 13 **PRUDENT BECAUSE OF THE PENDING '314 REEXAMINATION**

#### 14 **A. The '314 Patent and the '652 Patent Are Inextricably Linked**

15 The '652 patent and the '314 patent are inextricably linked and therefore should be, as the  
16 Court has already ordered (Dkt. No. 248), litigated together. Both patents share the same  
17 specification and the same named inventors. Interval also alleges that the same products infringe  
18 these patents. Because the '314 patent is a continuation of the '652 patent, claim terms common  
19 to both patents presumptively share the same meaning. *See, e.g., Omega Eng'g, Inc. v. Raytek*  
20 *Corp.*, 334 F.3d 1314, 1334 (Fed. Cir. 2003) (“[W]e presume, unless otherwise compelled, that  
21 the same claim term in the same patent or related patents carries the same construed meaning.”).  
22 Thus, the claim construction and validity issues to be decided in the '314 patent reexamination  
23 will affect the claim construction and validity of the '652 patent, as well as Interval's  
24 infringement allegations. Lifting the stay on the '652 patent alone and staying the litigation on  
25 the '314 patent until completion of its reexamination would result in duplicative efforts on fact

26  
27 <sup>3</sup> Interval's statement in the introduction to its motion that it will take 3-5 years to resolve the appeal in the '314  
patent reexamination is misleading. Interval itself notes that appellate review by the BPAI lasts an average of 32  
months. (Dkt. No. 261 at 5).

1 and expert discovery, claim construction, dispositive motions, and trial, and also could lead to  
2 inconsistent findings between the Court and the Patent Office.

3 Interval's own motion acknowledges that the two patents are closely linked: "The issues  
4 will largely, if not entirely, overlap." (Dkt. No. 261 at 8). Interval also previously argued that  
5 these patents should be tracked together because they are related, asserted against the same  
6 defendants, and Interval relies on similar infringement theories. (Dkt. No. 167 at 3). The close  
7 relationship between the '314 and '652 patents led the Court to place them in a single litigation  
8 track and Interval has failed to show that they should be litigated separately. In short, lifting the  
9 stay at this juncture would waste the judicial economy the Court found relevant in placing these  
10 two patents on the same track and in granting the stay.

11 **B. At Least Three Key Issues on Appeal in the '314 Patent Reexamination Are**  
12 **Likely to Substantially Affect Claim Construction, Validity, and Non-**  
**Infringement Issues Concerning Both the '314 and '652 Patents**

13 Although defendants understand that the parties have not yet provided to the Court in  
14 granular detail the claim construction and prior art issues relevant to the '314 and '652 patents,  
15 there are several key claim construction and prior art issues that are common and central to both  
16 patents. Defendants outline the substantial overlap of contested issues below, which compels  
17 leaving the stay in place for both patents until the '314 patent reexamination concludes.

18 **1. A Key Claim Limitation at Issue in the '314 Patent Reexamination**  
19 **Appeal is a Limitation of Claims 4-8, 11, and 34-67 of the '652 Patent**

20 Each of the independent claims of the '314 patent includes the limitation "in an  
21 unobtrusive manner that does not distract the user of the display device . . . from a primary  
22 interaction" (referred to herein as the "unobtrusive" limitation). Jost Decl., Ex. 1 at 39-47. This  
23 limitation also appears in claims 4-8, 11, and new claims 34-67 of the '652 patent. Jost Decl.,  
24 Ex. 2 at 3-9. The construction of the "unobtrusive" limitation in both the '314 and '652 patents  
25 is disputed by the parties in the litigation. (*E.g.*, Dkt. No. 240 at p. 7).

26 In both reexaminations, the same Examiner applied an interpretation of this limitation  
27 that excluded the "screensaver embodiment" disclosed in the common specification of both

1 patents. Jost Decl., Ex. 3 at 16-17, Ex. 4 at 6-11. This construction of the “unobtrusive”  
2 limitation was critical to both reexaminations because, based on this construction, the Examiner  
3 refused to adopt the proposed anticipation rejections based on U.S. Patent No. 5,748,190 (the  
4 “Kjorsvik reference”). Jost Decl., Ex. 3 at 8-9, Ex. 4 at 12-21. The Examiner found that the  
5 Kjorsvik reference was limited to a “savesaver embodiment,” and thus did not disclose the  
6 “unobtrusive” limitation. Jost Decl., Ex. 4 at 13. In its ’314 appeal brief, Apple explains that,  
7 because the ’314 patent specification teaches that the “savesaver embodiment” is a type of  
8 “unobtrusive” display, the Examiner misapplied the “broadest reasonable interpretation”  
9 standard required for reexaminations and instead adopted an overly-narrow claim construction.  
10 Jost Decl., Ex. 1 at 10-15. If the BPAI overturns the Examiner’s construction of the  
11 “unobtrusive” limitation in the ’314 patent reexamination appeal, as the defendants expect, then  
12 the construction of that limitation in the ’652 patent reexamination also would be incorrect. On  
13 the other hand, if the BPAI affirms the Examiner’s findings, any arguments that Interval raises  
14 on appeal to narrow the “unobtrusive” limitation will become an important part of the intrinsic  
15 record for both patents. Thus, the ’314 patent reexamination appeal would affect how this Court  
16 construes the “unobtrusive” limitation.

17 **2. The Examiner’s Error Regarding the Disclosure of the Rakavy**  
18 **Reference in the ’314 Reexamination is Relevant to Both the ’314 and**  
19 **’652 Patents**

20 The pending ’314 patent reexamination also will address the Examiner’s inconsistent  
21 findings regarding another anticipatory reference – U.S. Patent No. 5,190,040 (the “Rakavy  
22 reference”). In the ’314 patent reexamination Action Closing Prosecution (“ACP”), the  
23 Examiner found that the Rakavy reference discloses a “wallpaper embodiment,” but refused to  
24 consider this embodiment based on a technical (and erroneous) ground. Jost Decl., Ex. 4 at 22.  
25 As a result, the Examiner did not adopt Apple’s proposed rejection of claims 1-15 of the ’314  
26 patent as being anticipated by the Rakavy reference. *Id.* at 21-22. In the ’652 patent  
27 reexamination Office Action mailed the same day as the ACP of the ’314 patent reexamination,  
the same Examiner stated that the Rakavy reference does not disclose a “wallpaper

1 embodiment,” but only a “savesaver embodiment.” Jost Decl., Ex. 5 at 9. Citing the lack of  
2 disclosure of a “wallpaper embodiment,” the Examiner found claims 4-8, 11, and 34-67 of the  
3 ’652 patent allowable over Rakavy. *Id.*; Ex. 3 at 17. Thus, the Examiner’s findings with respect  
4 to the Rakavy reference in the two reexaminations are irreconcilably in conflict.

5 The Examiner’s refusal to consider the Rakavy reference’s disclosure of a “wallpaper  
6 embodiment” is a key issue in the ’314 patent reexamination appeal. Jost Decl., Ex. 1 at 28-30.  
7 The BPAI’s decision will provide relevant clarification on whether the Rakavy reference  
8 discloses a “wallpaper embodiment” and whether the Examiner should have considered this  
9 embodiment during both reexaminations. Thus, if the BPAI finds that the Rakavy reference  
10 discloses a “wallpaper embodiment,” that decision will likewise demonstrate that the Examiner’s  
11 decision in the ’652 patent reexamination was in error.

12 For this additional reason, maintaining the stay regarding the ’652 patent until the  
13 conclusion of the ’314 patent reexamination will further simplify or eliminate important issues.

14 **3. The Examiner’s Error Regarding the Disclosure of the Kjorsvik**  
15 **Reference in the ’314 Reexamination Appeal is Relevant to Both the**  
16 **’314 Patent and at Least Claims 15-18 of the ’652 Patent**

17 Another key issue common to both the ’314 patent and the ’652 patent is whether the  
18 Kjorsvik reference discloses an embodiment in which content is provided to the content display  
19 system without prior aggregation at a remote location. Apple argues in its ’314 patent  
20 reexamination appeal brief that the Examiner failed to acknowledge that the Kjorsvik reference  
21 discloses two embodiments in which presentation content is not aggregated in a remote location  
22 prior to being displayed by a content display system. Jost Decl., Ex. 1 at 21-26.

23 The same question also is directly relevant to the validity of the ’652 patent. During the  
24 ’652 patent reexamination, Interval argued that claims 15-18 of the ’652 patent were allowable  
25 over the Kjorsvik reference because it teaches only a “centralized presentation management  
26 system” that aggregates and manages data in a remote server. Jost Decl., Ex. 6 at 17-21. Based  
27 on this flawed reading of the Kjorsvik reference, the Examiner allowed claims 15-18. Again, the  
BPAI’s decision in the pending ’314 patent reexamination regarding whether the Kjorsvik

1 reference discloses embodiments without prior remote aggregation will determine whether the  
2 Examiner's reasons for allowing claims 15-18 of the '652 patent are valid. This provides yet  
3 another reason why it would be imprudent to lift the stay with respect to the '652 patent before  
4 the '314 patent reexamination appeal concludes.

5 **IV. THE COURT'S FINDINGS SUPPORTING A STAY HAVE NOT CHANGED**  
6 **SINCE THE STAY WAS ORDERED**

7 As the Court indicated in its order granting the stay, courts generally consider three  
8 factors in weighing a stay pending reexamination: (1) whether a stay will simplify the issues in  
9 question and the trial; (2) whether discovery is complete and whether a trial date has been set;  
10 and (3) whether a stay will unduly prejudice or present a clear tactical disadvantage to the non-  
11 moving party. (Dkt. No. 253 at 2) (citing *Implicit Networks, Inc. v. Advanced Micro Devices,*  
12 *Inc.*, 2009 WL 357902, at \*2 (W.D. Wash. Feb. 9, 2009)). In granting the current stay of the  
13 '314/'652 patent track and denying Interval's motion for reconsideration, the Court found that all  
14 three factors weighed in favor of a stay pending final resolution of the reexaminations, and that a  
15 stay would simplify the issues for trial and would provide the Court the benefit of the Patent  
16 Office's findings. (Dkt. No. 253 at 2-3; Dkt. No. 258). The reasons relied upon by the Court in  
17 granting the stay remain unchanged.

18 The BPAI's decision on the '314 reexamination appeal will provide findings on claim  
19 construction and the scope of the prior art relevant to both the '314 and '652 patents. Should the  
20 Court lift the stay, issues currently before the BPAI will be relitigated with the risk of contrary  
21 conclusions and great expense to the litigants and the Court. Moreover, the inconsistent  
22 positions taken by the Examiner in the two reexaminations will lead to further confusion without  
23 the benefit of the BPAI review.

24 There likewise has been no change in discovery or trial since the Court granted the stay  
25 pending reexamination.

26 Finally, the Court has previously determined that Interval will not be prejudiced by  
27 staying the litigation until the completion of the reexaminations. (Dkt. No. 253 at 3). The delay



1 inherent in the reexamination process does not, by itself, constitute undue prejudice. *Pacific*  
2 *Bioscience Labs., Inc. v. Nutra Luxe MD, LLC*, Case No. 2:10-cv-230 JLR, Dkt. No. 41 at 9  
3 (W.D. Wash. Jan. 10, 2011). Further, Interval is a licensing company that can be adequately  
4 compensated for any potential infringement by monetary damages. *See Motiva, LLC v. Nintendo*  
5 *Co., Ltd.*, Case No. 2:10-cv-349 RSL, Dkt. No. 123 at 3 (W.D. Wash. June 11, 2010); *Implicit*  
6 *Networks, Inc. v. Advanced Micro Devices, Inc.*, 2009 WL 357902, at \*3 (W.D. Wash. Feb. 9,  
7 2009).

## 8 V. CONCLUSION

9 Lifting the stay with respect to the '314 patent would be imprudent while the  
10 reexamination appeal is pending. *Wre-Hol, LLC v. Pharos Science & Applications, Inc.*, Case  
11 No. C09-1642 MJP (W.D. Wash. Dec. 27, 2011) (refusing to lift stay until exhaustion of entire  
12 reexamination proceedings including appeal). Interval has not cited to any case law to support  
13 doing so. This is not surprising as courts have found that the better practice is to keep the stay in  
14 place until the reexamination process is concluded. *See id.* at 2 (citing *Like.com v. Superfish,*  
15 *Inc.*, 2010 U.S. Dist. LEXIS 70458, at \*9 (N.D. Cal. June 30, 2010)).

16 Given the common issues generally with respect to the '314 and '652 patents and the  
17 specific overlapping issues that are the subject of the appeal in the '314 patent reexamination,  
18 allowing litigation and reexamination to proceed on either patent now is inefficient and is likely  
19 to waste judicial resources. Lifting the stay now on either patent risks work being done on claim  
20 construction, invalidity and non-infringement issues for both the '314 and '652 patents that  
21 would be obviated or wasted depending on the outcome of the '314 patent reexamination.

22 For all of the foregoing reasons and for the same reasons the Court originally granted the  
23 stay, Interval's motion to lift the stay should be denied.

1 DATED this 7th day of May, 2012.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 7, 2012, I caused the foregoing DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO LIFT STAY ON '314/'652 PATENT TRACK to be:

electronically filed with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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