

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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NETCRAFT CORPORATION,

Plaintiff,

v.

EBAY INC., and  
PAYPAL INC.,

Defendants.  
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ORDER

07-cv-254-bbc

This patent infringement case was decided by a grant of summary judgment for defendants. Judgment was entered on December 18, 2007. Plaintiff appealed the judgment to the Court of Appeals for the Federal Circuit on January 16, 2008. On January 25, 2008, defendants applied for costs and on March 21, 2008, the magistrate judge awarded defendants costs totaling \$78,004.61. This matter is now before the court on plaintiff's appeal of the magistrate judge's award of costs to defendant under Fed. R. Civ. P. 54(d).

Plaintiff objects to the following costs taxed by the magistrate judge: (1) \$23,582.93 for a DVD technology tutorial; (2) \$13,746.02 for PowerPoint presentation costs; (3) \$11,639 for defendants' law firm's copying and printing costs; and (4) \$6,000 for the costs

of discovery documents that were prepared but not produced. Additionally, plaintiff requests that the award of costs be stayed pending the resolution of plaintiff's appeal to the Court of Appeals for the Federal Circuit. For the reasons discussed below, plaintiff's appeal will be granted in part and denied in part. I conclude that plaintiff has not shown that a stay of the award of costs is appropriate.

## OPINION

### A. DVD Technology Tutorial

Plaintiff objects to \$23,582.93 for a DVD technology tutorial. Defendants acknowledge that they never used the tutorial, but say they decided not to present the tutorial at the claims construction hearing for the sake of saving time. That was the defendants' choice. I informed defendants in an order dated November 7, 2007 that I would disregard the tutorial if it was not presented at the hearing. Defendants cannot successfully argue that it was reasonable to spend more than \$23,000 on a tutorial that played no role in the lawsuit. For this reason I will disallow the costs for the tutorial.

### B. PowerPoint Presentation Costs

Plaintiff objects to \$13,746.02 for a PowerPoint presentation used at the claims construction hearing. Specifically, plaintiff objects to the presentation as a redundant

presentation of evidence rather than a recoverable exemplification under 28 U.S.C. § 1920(4). Plaintiff also objects to the amount as unreasonable. Plaintiff is wrong; the presentation is a recoverable exemplification. However, I agree that defendants failed to show that the amount they spent on the presentation was reasonable.

Defendants' PowerPoint presentation was within the broad definition of exemplification adopted by the court of appeals, which includes a "wide variety of exhibits and demonstrative aids." Cefalu v. Village of Elk Grove, 211 F.3d 416, 427 (7th Cir. 2000). Plaintiff, too, relied on a PowerPoint presentation to make its case, but plaintiff's costs to print and bind the presentation were only \$312.05. Defendants' third party consultant expense is unreasonable in comparison and defendants do not offer a compelling reason to justify the high cost. Defendants argue that the relative positions of the parties in this case justifies the difference in cost for the parties' PowerPoint presentations. It may be that defendants had more to lose in this litigation, but I do not agree that this is a compelling justification for the great disparity in costs for the PowerPoint presentations. I will reduce the amount by half.

### C. Law Firm Copying and Printing Costs

Plaintiff objects to the award of \$11,639.25 for defendants' law firm's copying and printing fees. Defendants claim 75,000 pages of copies at a rate of \$.15 for regular copies

and \$.45 for color copies. Although I agree with the magistrate judge's determination that the amount charged for each copy and print is reasonable, defendants have failed to explain why this number of copies was necessary. They say only that the case was complex, but that is insufficient. For a patent case, the issues were relatively few and simple. Under 28 U.S.C. § 1920(4) defendants are entitled to recover the costs of "copies of papers necessarily obtained for use in the case." The bill of costs submitted by defendants does not provide sufficient detail for plaintiff or this court to determine that all of the copies were reasonably necessary for use in the case. I will disallow half of defendants' copying and printing costs.

#### D. Discovery Documents Not Produced

\_\_\_\_\_Plaintiff objects to \$6,000 for approximately 50,000 discovery documents that defendants prepared for production but did not produce because of the court's December 18, 2007 grant of summary judgment. In support of their bill of costs, defendants provided a declaration from their litigation support technology firm indicating an average cost of \$.12 a page for "processing the electronic pages for production, putting information in a deliverable medium and delivering the production."Dfts' Bill of Costs, Gallivan Decl. ¶ 4, dkt. #61.

Because the documents were never produced and their contents are known only to the defendants, I agree with plaintiff that defendants have failed to provide enough detail

for the court to determine whether all of the documents were necessary for use in the case. Additionally, without detail about the extent to which all or some of these 50,000 documents were processed, I am unable to determine whether the \$.12 per page rate taxed by the magistrate judge for documents actually produced is appropriate for these unproduced documents. For these reasons, I will reduce the amount the defendants may recover for the 50,000 unproduced documents by one-half.

E. Staying the Taxation of Costs Pending Resolution of Plaintiff's Appeal

Plaintiff requests that the taxation costs be stayed until the resolution of plaintiff's appeal. Plaintiff cites the substantial amount of costs awarded and the de novo standard of review that will be applied by the Court of Appeals for the Federal Circuit as justification for a stay. This court has said before that "[t]he mere possibility that a losing party will become a prevailing party on appeal is not a ground for staying imposition of costs." Campbell v. Johnson, 04-C-661-C, slip op. at 2 (W.D. Wis. Feb. 10, 2006). Accordingly, plaintiff's request for a stay will be denied.

ORDER

IT IS SO ORDERED that the appeal from the taxation of costs by plaintiff Netcraft Corporation is GRANTED in part and DENIED in part. The magistrate judge's

award of costs is reduced by \$39,275.56. FURTHER IT IS ORDERED that defendants Ebay Inc., and PayPal Inc., are entitled to costs as prevailing parties in the amount of \$38,729.05.

Entered this 12<sup>th</sup> day of June, 2008.

BY THE COURT:

/s/

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BARBARA B. CRABB  
District Judge