IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

Blackboard Inc.,	)	
	)	
Plaintiff,	)	Case No. 9:06 CV 155
	)	
v.	)	Judge Clark
	)	
Desire2Learn Inc.,	)	
	)	
Defendant.	)	

BLACKBOARD'S MOTION FOR PREJUDGMENT INTEREST

On February 23, 2007, the jury returned a verdict in favor of Plaintiff Blackboard Inc. ("Blackboard") in the amount of $2.5 million in lost profits and $630,000 in reasonable royalties. Blackboard respectfully requests prejudgment interest based on the prime rate in the amount of $320,076 for the period of January 17, 2006 to March 10, 2008, plus a $515 per day thereafter until the entry of judgment.

I. Prejudgment Interest is Appropriate Under 35 U.S.C. § 284

Under 35 U.S.C. § 284, a patentee is entitled "damages adequate to compensate for the infringement . . . *together with interest and costs as fixed by the court*." 35 U.S.C. § 284 (emphasis added). In *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), the Supreme Court recognized that prejudgment interest is to be made part of the compensation to make a patent owner whole and that "prejudgment interest should be awarded under § 284 absent some justification for withholding such an award." *Id*. at 657. The Court explained that:

> [t]he standard governing the award of prejudgment interest under § 284 should be consistent with Congress' overriding purpose of affording patent owners complete compensation. In light of that purpose, we conclude that prejudgment interest should ordinarily

> be awarded. In the typical case an award of prejudgment interest is necessary to ensure that the patent owner is placed in as good a position as he would have been in had the infringer entered into a reasonable royalty agreement. An award of interest from the time that the royalty payments would have been received merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the forgone use of the money between the time of infringement and the date of the judgment.

Id. at 655-56 (emphasis added); *see also Crystal Semiconductor Corp. v. TriTech Microelecs. Int'l, Inc.*, 246 F.3d 1336, 1361 (Fed. Cir. 2001); *Bio-Rad Labs, Inc. v. Nicolet Instrument Corp.*, 807 F.2d 964, 970 (Fed. Cir. 1986).

Prejudgment interest applies equally to a reasonable royalty awards as well as cases awards of lost profit. *Gyromat Corp. v. Champion Spark Plug Co.*, 735 F.2d 549, 556 (Fed. Cir. 1984) ("ordinarily prejudgment interest should be awarded on both the lost profits and the royalty portions of the damages awarded for patent infringement"); *Stickle v. Heublein, Inc.*, 716 F.2d 1550, 1564 (Fed. Cir. 1983) ("[p]rejudgment interest is typically included as part of the patentee's recovery to insure compliance with the statutory mandate of 35 U.S.C. § 284 that damages be 'adequate to compensate for the infringement'"). Interest should be awarded from the date of infringement to the date of final judgment. *Nickson Indus., Inc. v. Rol Mfg.*, 847 F.2d 795, 800 (Fed. Cir. 1988).

II. The Prime Rate is the Appropriate Rate of Interest in this Case

Blackboard requests prejudgment interest at the prime rate, the market rate for bank lending. Federal law does not dictate any particular rate for prejudgment interest. Rather, the interest rate used to calculate prejudgment interest, and the method and frequency of compounding is left to the discretion of the district court. *See Uniroyal, Inc. v. Rudkin-Wiley*

Corp., 939 F.2d 1540, 1545 (Fed. Cir. 1991); *Studiengesellschaft Kohle, m.b.H. v. Dart Indus., Inc.*, 862 F.2d 1564. 1579-80 (Fed. Cir. 1988) (citing *Bio-Rad Labs.*, 807 F.2d at 969).

The prime rate is the proper rate of interest in this case.[1] The prime rate has been recognized as an appropriate rate of prejudgment interest in patent infringement cases. *See, e.g., Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056 (Fed Cir. 1983) (applying prime rate for award of prejudgment interest to compensate for delay in payment of damages); *z4 Techs., Inc. v. Microsoft Corp.*, 2006 U.S. Dist. LEXIS 58374, 82-83 (E.D. Tex. 2006) (prejudgment interest awarded at prime rate); *IMX, Inc. v. Lendingtree, LLC*, 469 F. Supp. 2d 203, 227-228 (D. Del. 2007) ("Courts have recognized that the prime rate best compensates a patentee for lost revenues during the period of infringement . . . ."). The prime rate represents the "cost of borrowing money—and not the rate of return on investing money—[thus] provid[ing] a better measure" of the harm a patentee suffers as a result of the loss of the use of money over time. *Mars, Inc. v. Conlux USA Corp.*, 818 F. Supp. 707, 720-21 (D. Del. 1993), *aff'd*, 16 F.3d 421 (Fed. Cir. 1993).

While a patentee need not "demonstrate that it borrowed at the prime rate in order to be entitled to prejudgment interest at that rate," *Uniroyal, Inc. v. Rudkin-Wiley Corp.*, 939 F.2d at 1454, application of a lending rate, such as the prime rate or a rate close to prime, is further supported by the facts of this case. For example, as set forth in Blackboard's 10-K filing for 2006, during Blackboard's acquisition of WebCT, which closed approximately one and a half months after the '138 patent issued on January 17, 2006, Blackboard paid a portion of the

[1] The US. Treasury bill rate, the rate applied to post-judgment interest under 28 U.S.C. § 1961(a), has been criticized in the context of prejudgment interest because corporations and individuals cannot borrow at rates as low as the Treasury bill rate. *See Grain Processing Corp. v. American Maize Prods. Co.*, 893 F. Supp. 1386, 1396 (N.D. Ind. 1995) (rejecting Treasury bill rate because no one would make a long-term voluntary loan to the plaintiff at the Treasury bill rate); *Stryker Corp. v. Intermedics Orthopedics, Inc.*, 891 F.Supp. 751, 833 (E.D.N.Y.1995) (stating that the prime rate, not the Treasury bill rate, reflects the rate at which corporations would likely borrow funds.

purchasing price using a credit facility and loan facility from Credit Suisse. *Attachment 1* at 40. The interest rate on these borrowings was set to accrue at a rate selected by Blackboard, from either: "(a) adjusted LIBOR plus 2.25% or (b) an alternate base rate plus 1.25%." *Id.* The alternate base rate was set as "the higher of Credit Suisse's prime rate and the federal funds effective rate plus 0.5%." Because the federal funds effective rate plus 0.5% was not higher than the prime rate during March 2006, the alternate base rate for that time period was the prime rate, plus 1.25%. *See Attachment 2*, Table 1.

During March 2006, Blackboard chose this alternate base rate interest option. (Blackboard then switched to the adjusted LIBOR interest rate as of March 31, 2006). *Ex. 1* at 40. Blackboard reported that, by December 31, 2006, "the interest rate on the term loan facility was 7.57%." *Id.* Over the March 2006 through January 2008 period, the average monthly adjusted LIBOR rate was 7.42%. *See Attachment 2*, Table 2. The average monthly prime rate for the same period was 8.01%. *Id.* Accordingly, Blackboard's own cost of borrowing has been either set above prime rate, or at a substantially similar rate, with application of the adjusted LIBOR plus 2.25%. In contrast, the average one year Treasury rate from March 2006 through January 2008 was 4.65%, a rate much lower than prime rate over time. *See Attachment 2*, Table 3. Thus, application of the prime rate—the rate of lending—to calculate prejudgment interest most accurately reflects the actual cost of borrowing money and best serves to compensate Blackboard for its loss of the use of money during the infringement period.

III. Prejudgment Interest Should Be Awarded in the Amount of $320,076

Blackboard is requesting prejudgment interest for the period of January 17, 2006, when the patent was issued, to the present. Dr. Keith Ugone, Blackboard's damages expert at trial, has calculated prejudgment interest on the jury's verdict for that time period. *See Attachment 3*

(Declaration of Dr. Keith Ugone, ¶¶ 3-4 and Exhibits A and B). Applying the prime rate with a simple interest calculation,[2] prejudgment interest totals $320,076 through March 10, 2008, plus $515 per day thereafter. *Id.*

The final amount of prejudgment interest to be added to the jury verdict depends on the exact date on which the Court enters judgment. For the Court's convenience, Dr. Ugone has prepared a Reference Table listing potential dates on which the judgment may be entered from March 10 through March 14, 2008. For each date, the Reference Table lists the corresponding total amount of prejudgment interest due if the judgment were entered on that date. *See Attachment 3* (Ugone Declaration, Exhibit C). Using this table, the Court may reference the amount of prejudgment interest due as of the date it enters judgment.

CONCLUSION

For the reasons stated above, Blackboard respectfully requests that the Court grant Blackboard's request for prejudgment interest.

[2] While many cases support compounding monthly, quarterly or annually, which serves to increase the amount of prejudgment interest, Dr. Ugone has not compounded the interest in his calculations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 29, 2008, that a true and correct copy of the foregoing was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who have consented to electronic service.

/s/ Michael S. Nadel
Michael S. Nadel

CERTIFICATE OF CONFERENCE

Pursuant to Local Rule CV-7(h), counsel for Blackboard conferred with opposing counsel regarding this matter in an attempt to resolve it without court intervention. Desire2Learn opposes the relief sought in this motion.

/s/ Michael S. Nadel
Michael S. Nadel

Attachment 1

10kWIZARD

FORM 10-K

BLACKBOARD INC - BBBB

Filed: February 23, 2007 (period: December 31, 2006)

Annual report which provides a comprehensive overview of the company for the past year

Net cash used in investing activities was $102.4 million during the year ended December 31, 2006 as compared to $53.1 million during the year ended December 31, 2005. This increase in cash usage was primarily due to the $154.6 million in net cash paid related to the acquisition of WebCT. This increase was offset by the sale of $62.6 million in short–term investments to fund a portion of the acquisition of WebCT. Cash expenditures for purchase of property and equipment were $10.1 million for the year ended December 31, 2006, which represents approximately 5.5% of total revenues for the year ended December 31, 2006. We expect cash expenditures for purchases of property and equipment to be approximately 8% of revenues during the year ended December 31, 2007 due to the one–time costs related to the re–location of our corporate headquarters and expect these expenditures to return to the 6% to 7% range in future periods.

Net cash provided by financing activities was $34.4 million during the year ended December 31, 2006 as compared to $11.0 million during the year ended December 31, 2005. This change was primarily due to the $67.5 million in proceeds, net of $2.5 million in debt issuance costs, associated with the credit facilities agreement we entered into with Credit Suisse to fund a portion of the acquisition of WebCT. During the year ended December 31, 2006, we repaid the $10.0 million revolving credit facility and $35.6 million of the term loan facility. We also received $9.2 million in proceeds from exercise of stock options as compared to $11.8 million for the year ended December 31, 2005.

In connection with the acquisition of WebCT, we paid a portion of the purchase price using borrowings under a $70.0 million senior secured credit facilities agreement with Credit Suisse. The agreement provided for a $60.0 million senior secured term loan facility repayable over six years and a $10.0 million senior secured revolving credit facility due and payable in full at the end of five years. The interest rate on the facilities will accrue at one of the following rates selected by us: (a) adjusted LIBOR plus 2.25% or (b) an alternate base rate plus 1.25%. The alternate base rate is the higher of Credit Suisse's prime rate and the federal funds effective rate plus 0.5%. If we choose the adjusted LIBOR interest rate option, interest payments would be due on the last day of the interest period (one, two, three or six months) as selected by us. If we choose the alternate base rate interest rate option, interest payments would be due on the last day of each calendar quarter. During March 2006, we chose the alternate base rate interest rate option. As of March 31, 2006, we changed to the adjusted LIBOR interest rate option. At December 31, 2006 the interest rate on the term loan facility was 7.57%. This interest rate does not reflect the impact of the amortization of debt issuance costs, discussed below, as interest expense.

We repaid $10.0 million on the revolving credit facility on March 28, 2006. As of December 31, 2006, no amounts were outstanding on the revolving credit facility and $10.0 million in borrowings were available. We are required to pay a commitment fee, due at the end of each calendar quarter until the maturity date, equal to 0.5% on the average daily unused portion of the revolving credit facility as defined in the senior secured credit facilities agreement. We record this fee in interest expense.

The senior secured credit facilities agreement allows for voluntary principal prepayments of principal and requires mandatory principal prepayments within 90 days after calendar year–end based on a calculation of excess cash flow as defined in the senior secured credit facilities agreement. We do not expect any mandatory principal prepayments within 90 days after year–end based on the calculation of excess cash flow as defined in the senior secured credit facilities agreement. We made scheduled principal payments on the term loan facility of $150,000 which were due on the last day of each quarter from March 31, 2006 through December 31, 2006. A principal payment in the amount of $62,000 is due on the last day of each quarter from March 31, 2007 through December 31, 2010 with a $1.7 million principal payment each due on March 31, 2011 and June 30, 2011 and a $19.9 million payment due on September 30, 2011. We prepaid $10.0 million during each of August and December, 2006 and prepaid $5.0 million during each of September, October and November, 2006. As of December 31, 2006, we had $24.4 million outstanding on the term loan facility.

In connection with obtaining the senior secured credit facilities, we incurred $2.5 million in debt issuance costs. These costs, which are recorded as a debt discount, are netted against the remaining principal amount outstanding. The debt discount is being amortized as interest expense using the effective interest method over the term of the senior secured credit facilities and such amortization has been adjusted for any prepayments on the term loan facility. During the year ended December 31, 2006, we recognized approximately $1.2 million in

Defendant's Exhibit 343

Attachment 2

TABLE 1

Average Monthly Federal Funds Rate and Prime Rate March 2006 – January 2008		
Month	**Federal Funds Rate**	**Prime Rate**
March 2006	4.59%	7.53%
April 2006	4.79%	7.75%
May 2006	4.94%	7.93%
June 2006	4.99%	8.02%
July 2006	5.24%	8.25%
August 2006	5.25%	8.25%
September 2006	5.25%	8.25%
October 2006	5.25%	8.25%
November 2006	5.25%	8.25%
December 2006	5.24%	8.25%
January 2007	5.25%	8.25%
February 2007	5.26%	8.25%
March 2007	5.26%	8.25%
April 2007	5.25%	8.25%
May 2007	5.25%	8.25%
June 2007	5.25%	8.25%
July 2007	5.26%	8.25%
August 2007	5.02%	8.25%
September 2007	4.94%	8.03%
October 2007	4.76%	7.74%
November 2007	4.49%	7.50%
December 2007	4.24%	7.33%
January 2008	3.94%	6.98%

Sources:

(1) Federal Funds Rate: http://www.federalreserve.gov/releases/h15/data/Monthly/H15_FF_O.txt

(2) Prime Rate: http://www.federalreserve.gov/releases/h15/data/Monthly/H15_PRIME_NA.txt

TABLE 2

Average Monthly LIBOR and Prime Rate March 2006 – January 2008		
Month	**LIBOR**	**Prime Rate**
March 2006	5.19%	7.53%
April 2006	5.33%	7.75%
May 2006	5.40%	7.93%
June 2006	5.60%	8.02%
July 2006	5.66%	8.25%
August 2006	5.50%	8.25%
September 2006	5.38%	8.25%
October 2006	5.36%	8.25%
November 2006	5.30%	8.25%
December 2006	5.24%	8.25%
January 2007	5.37%	8.25%
February 2007	5.38%	8.25%
March 2007	5.20%	8.25%
April 2007	5.28%	8.25%
May 2007	5.33%	8.25%
June 2007	5.45%	8.25%
July 2007	5.38%	8.25%
August 2007	5.19%	8.25%
September 2007	5.06%	8.03%
October 2007	4.88%	7.74%
November 2007	4.52%	7.50%
December 2007	4.42%	7.33%
January 2008	3.44%	6.98%
Average	**5.17%**	**8.01%**

Sources:
(1) LIBOR: http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=141&a=627
(2) Prime Rate: http://www.federalreserve.gov/releases/h15/data/Monthly/H15_PRIME_NA.txt

TABLE 3

Average 1-Year Treasury and Prime Rate March 2006 – January 2008		
Month	**1-Year Treasury**	**Prime Rate**
March 2006	4.77%	7.53%
April 2006	4.90%	7.75%
May 2006	5.00%	7.93%
June 2006	5.16%	8.02%
July 2006	5.22%	8.25%
August 2006	5.08%	8.25%
September 2006	4.97%	8.25%
October 2006	5.01%	8.25%
November 2006	5.01%	8.25%
December 2006	4.94%	8.25%
January 2007	5.06%	8.25%
February 2007	5.05%	8.25%
March 2007	4.92%	8.25%
April 2007	4.93%	8.25%
May 2007	4.91%	8.25%
June 2007	4.96%	8.25%
July 2007	4.96%	8.25%
August 2007	4.47%	8.25%
September 2007	4.14%	8.03%
October 2007	4.10%	7.74%
November 2007	3.50%	7.50%
December 2007	3.26%	7.33%
January 2008	2.71%	6.98%
Average	**4.65%**	**8.01%**

Sources:

(1) 1-Year Treasury:
http://www.federalreserve.gov/releases/h15/data/Monthly/H15_TCMNOM_Y1.txt

(2) Prime Rate: http://www.federalreserve.gov/releases/h15/data/Monthly/H15_PRIME_NA.txt

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	)	
Defendant.	)	

PROPOSED ORDER

The Court has reviewed Blackboard's Motion for Prejudgment Interest. It is hereby ORDERED that the Motion is GRANTED; and it is further

ORDERED that Blackboard is awarded prejudgment interest at the prime rate using a simple interest calculation. Interest on the damage award through March 10, 2008 is $320,076. Thereafter, interest accrues at a rate of $515 per day until the Court enters judgment.

SO ORDERED.