Sony Computer Entertainment America LLC v. Hotz et al

EXHIBIT 5

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March 13, 2011

VIA EMAIL at stewart@etrny.com and jack@mbvlaw.com

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Re: *Sony Computer Entertainment America LLC v. Hotz, et al.*
Case No. C-11-00167 SI (N.D. Cal)

Gentlemen:

We are writing in response to your March 12, 2001 letter regarding the proposed order on impoundment and jurisdictional discovery. We believe that our proposed order accurately reflects the rulings of the Court. However, in an effort to address the concerns raised in your letter, we have made some revisions to the proposed order. Attached is a redlined version reflecting the changes we have made. Our response is set forth below.

Paragraph 1

1. We agree to include your sentence about the protective order. We have also added a sentence to set forth the procedure should the parties be unable to reach agreement on its terms. We have included this provision at the end of the order so the paragraph numbers will not change.

2. You state that the subpoenas themselves are to be modified and not returnable. This is incorrect. As reflected in the transcript and Judge Spero's order of March 10, 2011, the Court simply ordered SCEA's counsel to advise the subpoenaed parties of their right to file a motion to quash and to inform them that any information provided in response to the subpoenas will be treated as "Attorneys' Eyes Only." This ruling in no way alters the information requested in the subpoenas. As such, there is no need for them to be redrafted. Moreover, Judge Spero did not order that the subpoenas "are not to be returned." Your proposal that the third parties be allowed 45 days to respond is also unacceptable. The Court did not order this. Further, under

this time frame, third party jurisdictional discovery will not be produced until long after the April 8, 2011 hearing on the motion to dismiss.

In short, with respect to the filing of any motion to quash and the "Attorney's Eyes Only" designation, we stand by the Court's order issued on March 10, 2011.

3. We agree that all of the subpoenaed parties, not just PayPal, are to be advised of their right to file a motion to quash and that information received will be treated as "Attorneys' Eyes Only." Although the Court has already issued a separate order on this subject, we have slightly modified paragraph 2 in the proposed order to clarify.

4. With respect to the PayPal subpoena, we tracked the Court's language for how the subpoena should be redrafted. Transcript 4:16-23; 6:25-5. Our concern with your proposed language is that PayPal may not have an address of record on file for all of the payers and may only be able to identify whether the funds came from California through other records in its system. Accordingly, we are retaining the language as ordered by the Court.

Paragraph 2

Although the Court acknowledged that Mr. Hotz does not object to SCEA's issuance of the subpoena to Twitter, we will delete the preliminary statement as requested.

Paragraph 3

The Court has ordered Mr. Hotz to appear in California for a deposition relating solely to the question of personal jurisdiction. SCEA is entitled to cross-exam Mr. Hotz on his declarations and uncover his contacts with California. You did not raise any burdensome objections during the hearing and instead focused on getting assurances from SCEA that neither it nor its related entities would serve Mr. Hotz while he is in California for a deposition and SCEA so stipulated. Accordingly, SCEA stands by its originally proposed paragraph 3, which reflects the Court's order and the parties' stipulation made on the record. We will of course meet and confer on an appropriate date for the deposition.

Paragraph 4 (c)

The Court has ordered that TIG be allowed to proceed as set forth in its February 27, 2011 Certification Letter. Transcript 16:20-17:3; 17:22-24. The February 27, 2011 Certification Letter incorporates the February 26, 2011 certification that is attached as Exhibit A. Indeed, our understanding is that the February 27, 2011 certification discusses how the impoundment is to be performed in a forensically sound manner at a high level, while Exhibit A includes additional details on how the impoundment will be conducted. See, e.g., paragraphs 7-10 of Exhibit A. Accordingly, to address your concerns regarding what TIG can and cannot do, we will attach a copy of the February 27 Certification and Exhibit A as an exhibit to the proposed order.

Paragraph 4 (d)

1. To address your concerns, we have slightly modified the language regarding Judge Illston's impoundment order. We believe that language should be included in the proposed order to provide context for the parties' meet and confer. Our statement on the meet and confer is accurate, but we have also added language similar to what you have proposed. We agree that the parties need to meet and confer on what information is related to Mr. Hotz's circumvention of the TPMs in the PS3 System, as well as a procedure on how the search is to be performed. With respect to establishing this procedure, SCEA is at an unfair advantage because we do not currently know what is on the impounded devices. We therefore propose that the parties, along with TIG, meet and confer on these issues. We propose a deadline of March 28, 2011 for submission of a protocol to the Court. This will allow TIG sufficient time to begin its review of the impounded devices, gain a better understanding of what they contain, and develop a proposed protocol for searching for information related to the circumvention. As Judge Spero noted during the hearing, TIG is best suited for determining the most forensically sound manner to perform this task. Transcript 18: 6-12.

2. Please see above.

Paragraph 5 and 5(b)

The Court has ordered that the impounded devices be searched for SCEA's development tools and access to the PSN because, despite your argument to the contrary, this material is relevant to jurisdiction and the impounded devices are not immune from discovery just because they are in the possession of a third party neutral. Transcript 22:17-23:5; 23:19-22.

1. The Court has authorized discovery from "copies of the devices." Transcript 24:18-24. This necessarily includes the impounded calculator. The calculator is not exempt from discovery as you suggest. We do not know what material the calculator contains. Indeed, it already contains the circumvention devices. If the calculator does not contain the material ordered discoverable by the Court, TIG will tell us so after the agreed upon search is performed.

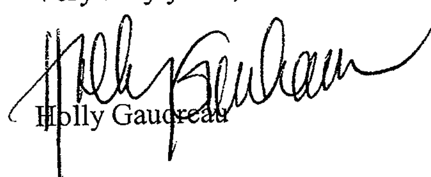
2. The Court ordered the parties to meet and confer on the procedure for conducting a search for SCEA's development tools. Transcript 24:7-24. Our proposed order reflects this ruling. The Court did not limit the search to only those portions that "explicitly state that SCEA owns the SDK and that SCEA is located in California" as you suggest. Indeed, the fact that Hotz possessed material distributed by SCEA is relevant. The Court contemplated that the parties would meet and confer and later submit a search protocol for its approval. TIG needs to be involved in determining the protocol.

3. During the hearing, we offered to confirm with SCEA that a normal computer can be used to connect to the PSN. The Court did not require us to do so. Nonetheless, we will confirm with SCEA tomorrow. With respect to the actual protocol, we will of course provide guidance to TIG on the procedures for connecting to the PSN to assist TIG in their search. Once the parties agree on a protocol with TIG, we will submit to the Court for approval. Accordingly,

in the proposed order, we will include a statement that the parties will meet and confer on the proper procedure for searching the items for the jurisdictional discovery authorized by the Court.

Please let us know by Noon tomorrow (March 14, 2011) if you will agree to the attached proposed order as modified. Again, our objective with the proposed order is to simply reflect what the Court decided on March 10, 2011. If you do not agree to the attached proposed order, the parties will each need to submit their separate proposed orders for the Court's review, accompanied by a joint letter setting forth the parties' respective positions by 5:00 p.m. tomorrow.

Very truly yours,



Holly Gaudreau

Enclosure

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On March 10, 2011, the Court held a hearing on the parties' February 18, 2011 and February 28, 2011 joint letters (Docket Nos. 85 and 86) on discovery and impoundment disputes. Having considered all the papers and arguments, the Court enters the following order:

(1) Plaintiff SCEA is authorized to serve third party PayPal, Inc. with a subpoena seeking the following limited information relating to personal jurisdiction: documents sufficient to identify the source of funds in California that went into any PayPal account associated with geohot@gmail.com for the period of January 1, 2009 to February 1, 2011. SCEA is ordered to redraft its subpoena to seek this information. SCEA is further ordered to inform PayPal, Inc. and other subpoenaed parties that any information produced in response to the subpoena shall be provided on an Attorneys' Eyes Only basis and that the issuance of the subpoena is without prejudice to its right to file a Motion to Quash. (See Docket No. 92)

(2) ~~As defendant George Hotz did not object to SCEA's issuance of the third party subpoena to Twitter,~~ Mr. Hotz is ordered to sign a consent for SCEA to obtain his Twitter posts from January 1, 2009 to the present.

(3) Defendant George Hotz is ordered to appear in California for a deposition relating solely to the question of personal jurisdiction. SCEA shall pay reasonable expenses of Mr. Hotz to be deposed in California. The parties shall determine the date of the deposition. Additionally, the parties have stipulated that Mr. Hotz cannot be served with process by the parties to this action or the parties identified in SCEA's Certification of Interested Entities or Person (Docket No. 16) when he appears at his personal jurisdiction deposition in California.

(4) With regard to the impoundment, the Court orders that:

(a) The Intelligence Group ("TIG"), the third party neutral chosen by both parties, shall only take steps with regard to the impounded devices that are authorized by Court order.

(b) The first $7000 of TIG costs will be split equally between SCEA and Mr. Hotz. SCEA has agreed to and shall pay any amount over the $7000.

(c) TIG is ordered to conduct the impoundment in the forensically sound manner as proposed in its Certification of February 27, 2011, including Exhihit A to that certification. Attached hereto as Exhibit 1 is a true and correct copy of the ~~Feburary~~February 27, 2011 Certification and Exhibit A.

(d) Judge Illston's modified impoundment order requires the isolation, segregation and/or removal of ~~the removal of not only circumvention devices found on the impounded devices, but also~~ information related to Defendant Hotz's ~~relating to~~ circumvention of the technological protection measures in the PS3 System. The Court orders the parties and TIG to meet and confer regarding what exactly is information related to the circumvention of the technological protection measures in the PS3 System and a procedure to isolate, segregate and remove such information. [The parties ~~agree to consult with TIG to determine the most~~

~~forensically sound manner to address this issue and~~shall submit a description of the protocol to the Court for entry into an order by no later than March ~~1~~285, 2011.]

(5) With regard to jurisdictional discovery of the impounded devices, the Court orders that:

(a) In order to avoid conducting discovery searches on original impounded devices belonging to Mr. Hotz, TIG shall make an additional copy of both the encrypted and unencrypted versions of the impounded hard drives and keep them in their possession.

(b) TIG shall then conduct a forensically sound search of the impounded devices to determine whether: (i) they contain all or portions of the development tools for the PlayStation 3 System and (ii) the impounded devices have been used to access or connect to the PlayStation Network. The Court orders the parties and TIG to meet and confer on a protocol for TIG to perform these searches. The parties shall submit a description of the protocol to the Court for entry into an order by no later than March 16, 2011.

(6) The parties shall enter a Stipulated Protective Order for all discovery matters. To the extent the parties are unable to agree on the terms, they are ordered to file a joint letter no longer than 10 pages to set forth the disputed terms and the parties' respective positions.