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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

HTI IP, LLC; NETWORK FLEET, INC.,)	Civil No. 10cv1783 DMS (NLS)
)	
Plaintiffs,)	ORDER REGARDING JOINT MOTION
v.)	FOR DETERMINATION OF
)	DISCOVERY DISPUTE NO. 3
WEBTECH WIRELESS INC.; WEBTECH)	
WIRELESS USA LTD.; XIRGO)	[Doc. No. 178]
TECHNOLOGIES, LLC; PROCON, INC.,)	
)	
Defendants.)	
_____)	
AND ALL RELATED COUNTERCLAIMS.)	
_____)	

Plaintiffs HTI IP, LLC and Networkfleet, Inc. (collectively, HTI) filed this patent infringement suit against Procon, Inc., Xirgo Technologies, LLC (Xirgo), and WebTech Wireless, Inc. and WebTech Wireless USA, LTD (collectively, WebTech). The four patents asserted relate to a wireless appliance placed in a car and a host computer that analyzes the data received from that appliance.

HTI and Xirgo filed this joint motion to resolve a third discovery dispute that relates to whether the stipulated protective order allows HTI to make and transport electronic copies of relevant portions of Xirgo’s source code. HTI argues the protective order allows its expert to make temporary electronic copies of certain portions of Xirgo’s source code and transport those electronic copies to later print out hard copies. Xirgo argues that the protective order does not allow making electronic copies of its source code solely for the purpose of printing out those portions for an expert’s review.

1 For the following reasons, the court **GRANTS** the joint motion to determine the discovery
2 dispute and determines the protective order requirements as follows.

3 **Relevant Facts.**

4 **1. The Protective Order.**

5 The protective order sets out the parameters for an expert's review of an opposing party's source
6 code. The relevant provisions provide:

7 21. Source Code Material shall be produced as follows:

8 (a) Access to a Party's Source Code Material shall be provided only on "stand-alone"
9 computer(s) (that is, the computer may not be linked to any network, including a local
10 area network ("LAN"), an intranet or the Internet). The stand-alone computer(s) may be
11 connected to (i) a printer, or **(ii) a device capable of temporarily storing electronic
12 copies solely for the limited purposes permitted pursuant to paragraphs 21 (h and
13 k) below.** Additionally, except as provided in paragraph 21(k) below, the stand-alone
14 computer(s) containing Defendants' source code may only be located at the offices of
15 Fulbright & Jaworski LLP in Los Angeles, CA (for so long as Fulbright & Jaworski
16 L.L.P. is counsel in this civil action) or at Iron Mountain in San Diego, CA, and the
17 stand-alone computer(s) containing Plaintiffs' source code may only be located at the San
18 Diego offices of Paul, Hastings, Janofsky & Walker LLP. The Parties may stipulate to
19 another location for the stand-alone computer as circumstances dictate;

20 (g) Except as set forth in paragraph 21(k) below, no electronic copies of Source Code
21 Material shall be made without prior written consent of the Producing Party, except as
22 necessary to create documents which, pursuant to the Court's rules, procedures and order,
23 must be filed or served electronically;

24 (h) The Receiving Party shall be permitted to make printouts and photocopies of
25 Source Code Material, all of which shall be designated and clearly labeled
26 "CONFIDENTIAL-OUTSIDE ATTORNEYS' EYES ONLY" and the Receiving Party
27 shall maintain a log of all such files that are printed or photocopied;

28 (k) A Producing Party's Source Code Material may only be transported by the
Receiving Party at the direction of a person authorized under paragraph 21(e) above
[outside counsel and outside consultants or experts (i.e., not existing employees or
affiliates of a Party or an affiliate of a Party) retained for the purpose of this litigation and
approved to access such Protected Materials] to another person authorized under
paragraph 21(e) above, on paper or removable electronic media (e.g., a DVD, CD-ROM,
or flash memory "stick") via hand carry, Federal Express or other similarly reliable
courier. Source Code Material may not be transported or transmitted electronically over a
network of any kind, including a LAN, an intranet, or the Internet. Source Code Material
may only be transported electronically for the purpose of Court proceeding(s) or
deposition(s) as set forth in paragraph 21 (j) above and is at all times subject to the
transport restrictions set forth herein. But, for those purposes only, the Source Code
Materials may be loaded onto a stand-alone computer.

Harris Decl., Ex. 1 (Protective Order) ¶ 21 (emphasis added).

///

1 HTI reads paragraph 21(a) and 21(h) together, which, it contends, allows its expert to either print
2 out portions of the source code from the stand alone computer or make temporary electronic copies of
3 the source code to be printed out later. Xirgo reads paragraph 21(a) in conjunction with 21(h) and
4 21(k), and argues that the downloading is only available for source code to be included in court filings
5 or depositions.

6 **2. The Expert's Review.**

7 Xirgo agreed to make its source code available at the Iron Mountain facility in San Diego. HTI's
8 expert, Stephen Gray, lives in San Diego and has been going to Iron Mountain since May 2010 to
9 review Xirgo's source code. Xirgo provided a standalone computer that contained the source code.
10 Xirgo did not, however, provide a printer, and says that Gray should have brought his own printer.¹
11 With no printer provided, Gray made temporary electronic copies of the relevant source code files for
12 the purpose of printing them out on an off-site printer. He either made the printouts himself, or gave the
13 flash drive to HTI's counsel to make the printouts. HTI asserts that after each printout, the electronic
14 copy of the portion of source code was deleted. Also, Gray kept a log of the files that were printed.

15 It was not until November 18, 2010 that Xirgo told HTI that it believed Gray's copying of the
16 source code files and transporting them off-site violated the protective order. After a meet and confer
17 session, HTI believed that the parties resolved the issue and that Xirgo agreed to provide a printer. But
18 when HTI requested access to Iron Mountain on December 6, 2010, Xirgo said the issue had not in fact
19 been resolved, and that HTI would have to agree to additional demands before reviewing the source
20 code. Namely, Xirgo requested that the review now take place at counsel's office in Los Angeles and
21 that HTI confirm that it and its expert destructively deleted source code from the flash drives and did not
22 load it onto a network.

23 **Order.**

24 The court has considered both parties' arguments in this dispute, and finds that while paragraph
25 21(a) appears to limit the practice of making electronic downloads to those purposes listed in paragraphs
26 21(h) and (k), the paragraph is ambiguous as to how to proceed if no printer is provided with the

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28 ¹Gray has also reviewed the source code of the other two defendants. Both WebTech and Procon
provided a printer with the standalone computer and source code. Printouts of WebTech's source code
were also the subject of a previous discovery dispute. *See* Dkt. Nos. 150, 156.

1 standalone computer. Based on this ambiguity and the reasonableness of the expert needing to make
2 copies of portions of source code for later review and analysis, the court finds that there is no
3 justification for severe sanctions against either party. The court, therefore, **ORDERS:**

4 1. Xirgo's source code shall remain available for inspection at Iron Mountain in San Diego.

5 2. Xirgo, if it has not yet done so, shall provide a printer in conjunction with the standalone
6 computer, to be used to make printouts of portions of its source code.

7 3. Counsel for HTI and Stephen Gray shall provide declarations to Xirgo by **January 18,**
8 **2011** confirming (a) the manner in which they destructively deleted source code from the flash drives;
9 and (b) that the source code is not available on any network.

10 **IT IS SO ORDERED.**

11 DATED: January 11, 2011

12 

13 Hon. Nita L. Stormes
14 U.S. Magistrate Judge
15 United States District Court