Xerox Corporation v. Google Inc. et al

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EXHIBIT A

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UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

XEROX CORPORATION, *Plaintiff-Counterclaim Defendant*, v. GOOGLE INC., YAHOO! INC., RIGHT MEDIA INC., RIGHT MEDIA LLC, YOUTUBE, INC., and YOUTUBE, LLC, *Defendants-Counterclaim Plaintiffs*.	)))))))))))	C.A. No. 10-136-JJF-MPT

AGREED PROTECTIVE ORDER

To expedite the flow of discovery materials, to facilitate the prompt resolution of disputes over confidentiality of discovery materials, to adequately protect information the parties are entitled to keep confidential, to ensure that only materials the parties are entitled to keep confidential are subject to such treatment, and to ensure that the parties are permitted reasonably necessary uses of such materials in preparation for and in the conduct of trial, pursuant to Fed. R. Civ. P. 26(c), it is hereby ORDERED THAT:

1. INFORMATION SUBJECT TO THIS ORDER

Discovery materials produced in this case may be labeled as one of three categories: CONFIDENTIAL, CONFIDENTIAL OUTSIDE COUNSEL ONLY and RESTRICTED CONFIDENTIAL – SOURCE CODE, as set forth in Items A – C below. All three of the identified categories of information shall be identified collectively in this Order by the title "Protected Information."

A. Information Designated as Confidential Information

1. For purposes of this Order, "CONFIDENTIAL INFORMATION" shall mean all information or material produced for or disclosed to a receiving party that a producing party,

including any party to this action and any non-party producing information or material voluntarily or pursuant to a subpoena or a court order, considers to constitute confidential technical, sales, marketing, financial, or other commercially sensitive information (including, without limitation, information obtained from a nonparty pursuant to a current Nondisclosure Agreement ("NDA")), whether embodied in physical objects, documents, or the factual knowledge of persons, and which has been so designated by the producing party. Any CONFIDENTIAL INFORMATION obtained by any party from any person pursuant to discovery in this litigation may be used only for purposes of this litigation.

2. Any document or tangible thing containing or including any CONFIDENTIAL INFORMATION may be designated as such by the producing party by marking it "CONFIDENTIAL" prior to or at the time copies are furnished to the receiving party.

3. All CONFIDENTIAL INFORMATION not reduced to documentary, tangible or physical form or which cannot be conveniently designated as set forth in paragraph 1.A.2, shall be designated by the producing party by informing the receiving party of the designation in writing.

4. Any documents (including physical objects) made available for inspection to counsel for the receiving party prior to producing copies of selected items shall initially be considered, as a whole, to constitute CONFIDENTIAL INFORMATION (unless otherwise designated at the time of inspection) and shall be subject to this Order. Thereafter, the producing party shall have 15 days to review and designate the appropriate documents as CONFIDENTIAL INFORMATION (or otherwise as appropriate) prior to furnishing copies to the receiving party.

5. The following information is not CONFIDENTIAL INFORMATION:

a. Published advertising materials;

b. Any information that is or, after its disclosure to a receiving party, becomes part of the public domain as a result of publication not involving a violation of any obligation of confidentiality to the producing party by a party to this action;

c. Any information that the receiving party can show was already publicly known prior to the disclosure;

d. Any information that the receiving party can show by written records was received by it from a source who obtained the information lawfully and under no obligation of confidentiality to the producing party.

6. Documents designated CONFIDENTIAL and information contained therein shall be available only to:

a. Outside litigation counsel of record and supporting personnel employed in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal translators, legal secretaries, legal clerks and shorthand reporters;

b. Technical advisers who have signed the form attached hereto as Attachment A, and their necessary support personnel, subject to the provisions of paragraphs 3.A-F herein; the term "technical adviser" shall mean independent outside expert witnesses or consultants with whom counsel may deem it necessary to consult;

c. Up to three in-house counsel with responsibility for managing this litigation, except that, subject to Section 1.B.2(c) below, defendants' in-house counsel under this paragraph shall not have access to any co-defendants' CONFIDENTIAL INFORMATION; specifically, upon entry of this order, CONFIDENTIAL INFORMATION may be disclosed to the following individuals for each party:

(1) In-house counsel Lou Faber, Michelle Waites and Paul Schnose for Xerox Corporation;

(2) In-house counsel John Labarre and Catherine Lacavera for Google Inc. and YouTube LLC (the “Google Defendants”);

(3) In-house counsel Kevin T. Kramer for Yahoo! Inc. and Right Media LLC (the “Yahoo Defendants”);

d. The Court, its personnel and stenographic reporters (under seal or with other suitable precautions determined by the Court); and

e. Independent legal translators retained to translate in connection with this action; independent stenographic reporters and videographers retained to record and transcribe testimony in connection with this action; graphics, translation, or design services retained by counsel for purposes of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the actions; non-technical jury or trial consulting services not including mock jurors.

7. Substitutions to the list of designated in-house counsel set forth in paragraph 1.A.6(c) shall be by order of the Court.

B. Information Designated Confidential Outside Counsel Only

1. The CONFIDENTIAL OUTSIDE COUNSEL ONLY designation is reserved for CONFIDENTIAL INFORMATION that constitutes proprietary marketing, financial, sales, web traffic, research and development, or technical data/information or commercially sensitive competitive information, including, without limitation, confidential information obtained from a nonparty pursuant to a current NDA, CONFIDENTIAL INFORMATION relating to future products not yet commercially released, strategic plans, and settlement agreements or settlement communications, the disclosure of which is likely to cause harm to the competitive position of the producing party. Documents marked CONFIDENTIAL OUTSIDE ATTORNEYS’ EYES ONLY shall be treated as if designated CONFIDENTIAL OUTSIDE COUNSEL ONLY. In

determining whether information should be designated as CONFIDENTIAL OUTSIDE COUNSEL ONLY, each party agrees to use such designation only in good faith.

2. Documents designated CONFIDENTIAL OUTSIDE COUNSEL ONLY and information contained therein shall be available only to:

a. Outside litigation counsel of record and supporting personnel employed in the law firm(s) of outside litigation counsel of record, such as attorneys, paralegals, legal translators, legal secretaries, legal clerks and shorthand reporters;

b. Technical advisers who have signed the form attached hereto as Attachment A, and their necessary support personnel, subject to the provisions of paragraphs 3.A-F herein;

c. For each party, in-house counsel among those identified in paragraph 1.A.6(c) whose duties and activities do not include involvement in patent preparation, prosecution, or patent claim drafting activities of the party, but only to the extent that such counsel review unredacted versions of pleadings, briefs, motions or other papers filed and to be filed with the Court (and drafts thereof), expert reports (including drafts), Court orders, and written responses (including drafts) to interrogatories or requests for admission (except that, absent written consent of the designating party, this provision shall not permit in-house counsel for the Yahoo! Defendants and in-house counsel for the Google Defendants to review one another's Confidential Outside Counsel Only designated expert reports and interrogatory responses, unless such materials have been filed with the Court in connection with a motion other than a discovery motion);

d. The Court, its personnel and stenographic reporters (under seal or with other suitable precautions determined by the Court); and

e. Independent legal translators retained to translate in connection with this

action; independent stenographic reporters and videographers retained to record and transcribe testimony in connection with this action; graphics, translation, or design services retained by counsel for purposes of preparing demonstrative or other exhibits for deposition, trial, or other court proceedings in the actions; non–technical jury or trial consulting services not including mock jurors.

C. Information Designated Restricted Confidential - Source Code

1. A party's confidential, proprietary and/or trade secret source code may be designated "RESTRICTED CONFIDENTIAL—SOURCE CODE," whether in electronic or hard copy form, and including where reproduced or excerpted in another document.

2. All such source code shall be subject to the following provisions, except that Protected Information merely excerpting source code shall be subject only to subparagraphs (f), (g), (k) and (l) - (o):

a. Source code shall be made available in electronic format for inspection at the New York offices of the producing party's primary outside counsel of record in this action. Source code will be loaded onto no more than four non-networked computers that are password protected and maintained in a secure, locked area. Use or possession of any input/output device (e.g., USB memory stick, CDs, floppy disk, portable hard drive, etc.) or recording device (e.g., camera phone, video camera, laptop with video camera, PDA camera, etc.) is prohibited while accessing the computer containing the source code. Use or possession of any printer or other peripheral (e.g., monitor, projector, etc.) or printer paper is also prohibited while accessing the computer containing the source code except to the extent provided by the producing party. The computers containing source code will be made available for inspection during regular business hours upon reasonable notice to the producing party (not less than three business days in advance with respect to the initial inspection of source code in a given location, and not less

than two business days in advance with respect to inspections at such location thereafter). Inspection to take place outside regular business hours shall require advance notice of not less than two business days, and inspection on a weekend shall require notice made no later than the close of business of the preceding Wednesday. The parties agree that a receiving party's current acceptance of a single source-code review location shall not, in and of itself, be used against the receiving party should the receiving party subsequently move to modify this order to provide for additional source-code review locations.

b. The receiving party's outside counsel and/or experts may request that commercially available licensed software tools for viewing and searching source code be installed on the source code computers, which request shall not be unreasonably denied. The receiving party must provide the producing party with the CD or DVD containing such software tool(s) at least four business days in advance of the inspection to facilitate installation by the producing party. Nothing in this paragraph, however, shall prevent the producing party from providing and installing any such requested software tools itself at its own cost so long as those tools have not been altered in any way. The parties agree to divide the cost of the computers, peripherals and specifically requested software tools used to facilitate source code review equally between the producing party and the receiving party.

c. The receiving party's outside counsel and/or experts shall be entitled to take notes relating to the source code but may not copy the source code into the notes. All such notes will be taken on bound (spiral or other type of permanently bound) notebooks. No loose paper or other paper that can be used in a printer may be brought into the secure facility specified in paragraph 1.C.2(a) by the receiving party or its experts. No copies of all or any portion of the source code may leave the room in which the source code is inspected except as otherwise provided herein. Further, no other written or electronic record of the source code is

permitted except as otherwise provided herein.

d. No person shall copy, e-mail, transmit, upload, download, print, photograph or otherwise duplicate any portion of the designated source code, except that the receiving party may print a reasonable number of pages of source code, as provided herein, but only if and to the extent reasonably necessary for the preparation of its case. Upon a request made by the receiving party, outside counsel for the producing party will make arrangements for printers to be connected to the computers containing source code. The producing party shall provide printing paper that is pre-Bates stamped and that bears the appropriate confidentiality legend (*i.e.*, "RESTRICTED CONFIDENTIAL − SOURCE CODE"), but that is otherwise blank. Source code may be printed only on such paper via the designated printers. At the time of printing, the receiving party will provide the producing party with the printed source code. The producing party will make a copy of any source code printed by the receiving party and will provide that copy to the receiving party within 48 hours. If the printed source code exceeds 200 pages, the producing party will provide the copy to the receiving party within 72 hours. Printing and copying may not be done in such volume as to circumvent the purpose of this provision in protecting the parties' source code to the fullest extent possible.

e. **[[Defendants propose the following paragraph: "The receiving party shall be entitled to 1,500 printed pages of source code in aggregate from each producing party (where each defendant group constitutes one producing party) during the duration of the case without prior written approval by the producing party. If the receiving party reasonably believes that more than 1,500 pages of source code from a producing party are required, then the receiving party may request permission from the producing party to exceed the 1,500 page limit, and the producing party will not unreasonably withhold its consent to such a request. Should there be a dispute between the parties concerning the**

receiving party's request to exceed 1,500 pages of printed source code in the aggregate and a producing party's refusal thereto, the parties agree that the receiving party may seek expedited resolution from the Court. Until such a matter is resolved by the Court, the producing party shall immediately provide one printed copy of the requested code to be kept in a secure location under the direct control of outside counsel for the receiving party. Should the dispute concern receiving party's request to exceed 3,000 pages of printed source code in aggregate from a producing party, however, contested source code print outs need not be produced to the requesting party until that matter is resolved by the Court." Plaintiff opposes this addition.]]

f. Any printed pages of source code, and any other documents or things quoting source code or excerpting source code, may not be copied, digitally imaged or otherwise duplicated, except in limited excerpts necessary to prepare exhibits for depositions, expert reports, or court filings as discussed below. However, the receiving party shall be entitled to up to two additional copies of the printed source code upon request, which copies shall be provided within the time limits stated in paragraph 1.C.2(d) above.

g. Any paper copies designated "RESTRICTED CONFIDENTIAL - SOURCE CODE" shall be stored or viewed only at (i) the offices of outside counsel for the receiving party, (ii) the offices of outside experts or consultants who have been approved to access source code; (iii) the site where any deposition is taken; (iv) the Court; or (v) any intermediate location necessary to transport the information to a hearing, trial or deposition. Any such paper copies shall be maintained at all times in a secure location under the direct control of an individual authorized to view RESTRICTED CONFIDENTIAL − SOURCE CODE materials pursuant to paragraph 1.C.2(k). When not in use, any such paper copies must be maintained in a locked room to which access is restricted to those individuals authorized to

view RESTRICTED CONFIDENTIAL − SOURCE CODE materials pursuant to paragraph 1.C.2(k). The receiving party's outside counsel shall maintain a log of all copies of the source code (received from a producing party) that are delivered by the receiving party to any qualified person under paragraph 1.C.2(k). The log shall include the names of the custodians of all copies of the printed source code, and the location where the copies are stored. The producing party will be entitled to a copy of the log upon request and reasonable notice.

h. A list of names of persons who will view the source code will be provided to the producing party in conjunction with any written (including email) notice requesting inspection. The receiving party shall maintain a daily log of the names of persons who enter the locked room containing the source code review computers and when they enter and depart. The producing party shall be entitled to have a person observe all entrances and exits from the source code viewing room, and to a copy of the log.

i. Unless otherwise agreed in advance by the parties in writing, following each inspection, the receiving party's outside counsel and/or experts shall remove all notes, documents, laptops, and all other materials from the room that may contain work product and/or attorney-client privileged information. The producing party shall not be responsible for any items left in the room following each inspection session.

j. The receiving party will not copy, remove, or otherwise transfer any source code from the source code computers including, without limitation, copying, removing, or transferring the source code onto any other computers or peripheral equipment. The receiving party will not transmit any source code in any way from the location of the source code inspection.

k. Only the following individuals shall have access to "RESTRICTED CONFIDENTIAL - SOURCE CODE" materials, absent the express written consent of the

producing party or further court order:

(1) Outside counsel of record for the parties to this action, including any attorneys, paralegals, technology specialists and clerical employees of their respective law firms;

(2) Up to six (6) outside experts or consultants per party, pre-approved in accordance with paragraphs 3.A-F and specifically identified as eligible to access source code, and their necessary support personnel;

(3) The Court, its technical advisor (if one is appointed), the jury, court personnel, and court reporters or videographers recording testimony or other proceedings in this action;

(4) While testifying at deposition or trial in this action only: (i) any current or former officer, director or employee of the producing party or original source of the information; (ii) any person designated by the producing party to provide testimony pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure; and/or (iii) any person who authored, previously received, or was directly involved in creating, modifying, or editing the source code, as evident from its face or reasonably certain in view of other testimony or evidence. Persons authorized to view source code pursuant to this sub-paragraph shall not retain or be given copies of the source code except while so testifying. **[[Plaintiff proposes the following: "Upon request, the producing party shall make source code computers available for depositions, in which case such depositions will be held at the offices of the producing party's outside counsel pursuant to paragraph 1.C.2(a)." Defendants oppose this addition.]]**

l. Except as provided in this paragraph, the receiving party may not create electronic images, or any other images, of the source code from the paper copy for use on a computer (e.g., may not scan the source code to a PDF, or photograph the code). The receiving

party may create electronic copies or images of excerpts of source code for use in pleadings, briefs, motions, exhibits, expert reports, discovery documents, deposition transcripts, other Court documents, or any drafts of these documents ("SOURCE CODE DOCUMENTS"). The receiving party shall only include such excerpts as are reasonably necessary for the purposes for which such part of the source code is used, and no such excerpt shall exceed 100 consecutive lines of source code. Images or copies of source code shall not be included in correspondence between the parties (references to production numbers shall be used instead) and shall be omitted from pleadings and other papers except to the extent permitted herein. The receiving party may create an electronic image of a selected portion of the source code only when the electronic file containing such image has been encrypted using commercially reasonable encryption software including password protection. The communication and/or disclosure of electronic files containing any portion of source code shall at all times be limited to individuals who are authorized to see source code under the provisions of this Protective Order. The receiving party shall maintain a record of all electronic images of source code in its possession or in the possession of its retained consultants, including the names of the recipients and reviewers of any electronic or paper copies and the locations where the copies are stored, in accordance with paragraph 1.C.2(g) above.

m. To the extent portions of source code are quoted in a SOURCE CODE DOCUMENT, the entire document will be stamped and treated as CONFIDENTIAL OUTSIDE COUNSEL ONLY.

n. All paper copies of source code shall be securely destroyed if they are no longer in use. Copies of source code that are marked as deposition exhibits shall not be provided to the Court Reporter or attached to deposition transcripts; rather, the deposition record will identify the exhibit by its production numbers.

o. The receiving party's outside counsel may disclose a copy of the source code only to individuals specified in paragraph 1.C.2(k) above. Source code may not be disclosed to in-house counsel, except as provided in paragraph 1.B.2(c) above.

D. Use of Protected Information at Trial

The parties will not oppose any request by the producing party that the courtroom should be sealed, if allowed by the Court, during the presentation of any testimony relating to or involving the use of any Protected Information.

2. PROSECUTION BAR

A. Any person reviewing any of an opposing party's CONFIDENTIAL materials, CONFIDENTIAL OUTSIDE COUNSEL ONLY materials or RESTRICTED CONFIDENTIAL—SOURCE CODE materials (all of which shall also be referred to as "Prosecution Bar Materials") shall not, for a period commencing upon receipt of such information and ending one year following the conclusion of this case (including any appeals) engage in any Prosecution Activity (as defined below) on behalf of a party asserting a patent in this case. Furthermore, any person reviewing Prosecution Bar Materials shall not, for a period commencing upon receipt of such information and ending one year following the conclusion of this case (including any appeals) engage in any Prosecution Activity involving any application in the same family as the patents-in-suit, or any other claims on a method, apparatus, or system that automatically generates queries based on the content of documents to retrieve related content, or claims on a method, apparatus, or system for integrating information from heterogeneous document and data sources. The provisions of this paragraph do not apply where a party discloses its own Prosecution Bar Materials to an invidividual not designated under this Order to receive such materials.

B. The following documents and materials shall not be eligible for classification as Prosecution Bar Materials: (i) documents and information related only to damages or reasonable royalty rates; (ii) publications, including patents and published patent applications; (iii) materials regarding a third party system or product that is publicly known, on sale, or in public use unless such materials are designated as Prosecution Bar Materials by that third party or are subject to confidentiality obligations owed to that third party; and (iv) information that is publicly available.

C. **[[Plaintiff proposes: "Except with respect to reexaminations of the patents-in-suit,"; Defendants propose: "Including with respect to reexaminations,"]]** Prosecution Activity shall mean: (1) prepare and/or prosecute any patent application (or portion thereof), whether design or utility, and either in the United States or abroad on behalf of a patentee or assignee of patentee's rights; (2) prepare patent claim(s) on behalf of a patentee or assignee of patentee's rights; (3) participate in any reissue proceedings on behalf of a patentee or assignee of patentee's rights; or (4) provide advice, counsel or suggestions regarding, or in any other way influencing, claim scope and/or language, embodiment(s) for claim coverage, claim(s) for prosecution, or products or processes for coverage by claim(s) on behalf of a patentee or assignee of patentee's rights. In addition, nothing in this paragraph shall prevent any attorney from sending Prior Art to an attorney involved in patent prosecution for purposes of ensuring that such Prior Art is submitted to the U.S. Patent and Trademark Office (or any similar agency of a foreign government) to assist a patent applicant in complying with its duty of candor. Prior Art shall mean (i) publications, including patents and published patent applications; and (ii) materials or information regarding a third party system or product that was publicly known, on sale, or in public use as of the relevant priority date, unless such materials are designated as Prosecution

Bar Materials by that third party or are subject to confidentiality obligations owed to that third party.

3. DISCLOSURE OF TECHNICAL ADVISERS

A. Information designated by the producing party under any category of Protected Information and such copies of this information as are reasonably necessary for maintaining, defending or evaluating this litigation may be furnished and disclosed to the receiving party's technical advisers and their necessary support personnel.

B. No disclosure of Protected Information to a technical adviser or their necessary support personnel shall occur until that person has signed the form attached hereto as Attachment A, and a signed copy has been provided to the producing party; and to the extent there has been an objection under paragraph 3.D., that objection is resolved as discussed below.

C. A party desiring to disclose Protected Information to a technical adviser shall also give prior written notice by email to the producing party, who shall have five business days after such notice is given to object in writing. The party desiring to disclose Protected Information to a technical adviser must provide the following information for each technical adviser: name, address, curriculum vitae, current employer, employment history for the past five years, and a listing of cases in which the witness has testified as an expert at trial or by deposition within the preceding five years, and a identification of any patents or applications for patents in which the technical adviser is identified as an inventor or applicant, which the technical advisor is involved in the prosecution or maintenance thereof, or any patents or patent applications that the technical advisor has any pecuniary interest. No Protected Information shall be disclosed to such expert(s) or consultant(s) until after the expiration of the foregoing notice period.

D. A party objecting to disclosure of Protected Information to a technical adviser shall state with particularity the ground(s) for the objection and the specific categories of documents that are the subject of the objection. The objecting party's consent to the disclosure of Protected Information to a technical adviser shall not be unreasonably withheld, and its objection must be based on that party's good faith belief that disclosure of its Protected Information to the technical adviser will result in specific business or economic harm to that party.

E. If after consideration of the objection, the party desiring to disclose the Protected Information to a technical adviser refuses to withdraw the technical adviser, that party shall provide notice to the objecting party. Thereafter, the objecting party shall move the Court, within five business days of receiving such notice, for a ruling on its objection. A failure to file a motion within the five business day period shall operate as an approval of disclosure of the Protected Information to the technical adviser. The parties agree to cooperate in good faith to shorten the time frames set forth in this paragraph if necessary to abide by any discovery or briefing schedules.

F. The objecting party shall have the burden of showing to the Court "good cause" for preventing the disclosure of its Protected Information to the technical adviser. This "good cause" shall include a particularized showing that: (1) the Protected Information is confidential commercial information, (2) disclosure of the Protected Information would result in a clearly defined and serious injury to the objecting party's business, and (3) that disclosure of Protected Information to the proposed technical advisor would likely result in Protected Information being disclosed to the objecting party's competitors, or other particularized, substantiated injury to the objecting party.

4. CHALLENGES TO CONFIDENTIALITY DESIGNATIONS

A. The parties shall use reasonable care when designating documents or information as Protected Information. Nothing in this Order shall prevent a receiving party from contending that any documents or information designated as Protected Information have been improperly designated. A receiving party may at any time request that the producing party cancel or modify the Protected Information designation with respect to any document or information contained therein.

B. A party shall not be obligated to challenge the propriety of a designation of any category of Protected Information at the time of production, and a failure to do so shall not preclude a subsequent challenge thereto. Such a challenge shall be written, shall be served on counsel for the producing party, and shall particularly identify the documents or information that the receiving party contends should be differently designated. The parties shall use their best efforts to resolve promptly and informally such disputes. If an agreement cannot be reached, the receiving party shall request that the Court cancel or modify a designation. The burden of demonstrating the confidential nature of any information shall at all times be and remain on the designating party.

C. Until a determination by the Court, the information in issue shall be treated as having been properly designated and subject to the terms of this Order.

5. LIMITATIONS ON THE USE OF PROTECTED INFORMATION

A. All Protected Information shall be held in confidence by each person to whom it is disclosed, shall be used only for purposes of this litigation, shall not be used for any business purpose, and shall not be disclosed to any person who is not entitled to receive such information as herein provided. All produced Protected Information shall be carefully maintained so as to preclude access by persons who are not entitled to receive such information.

B. Except as may be otherwise ordered by the Court, any person may be examined as a witness at depositions and trial and may testify concerning all Protected Information of which such person has prior knowledge. Without in any way limiting the generality of the foregoing:

1. A present director, officer, and/or employee of a producing party may be examined and may testify at his or her deposition or at trial concerning all Protected Information which has been produced by that party;

2. A former director, officer, agent and/or employee of a producing party may be examined and may testify at his or her deposition or at trial concerning all Protected Information to which he or she had access in the course of his or her employment, including any Protected Information that refers to matters of which the witness has or reasonably may have personal knowledge, which has been produced by that party; and

3. Non-parties may be examined or testify concerning any document containing Protected Information of a producing party which appears on its face or from other documents or testimony to have originated from the non-party or to have been communicated to the non-party by the producing party. Any person other than the witness, his or her attorney(s), or any person qualified to receive Protected Information under this Order shall be excluded from the portion of the examination concerning such information, unless the producing party consents to persons other than qualified recipients being present at the examination. If the witness is represented by an attorney who is not qualified under this Order to receive such information, then prior to the examination, the producing party shall request that the attorney provide a signed statement, in the form of Attachment A hereto, that he or she will comply with the terms of this Order and maintain the confidentiality of Protected Information disclosed during the course of the examination. In the event that such attorney declines to sign such a

statement prior to the examination, the parties, by their attorneys, shall jointly seek a protective order from the Court prohibiting the attorney from disclosing Protected Information.

4. All transcripts of depositions, exhibits, answers to interrogatories, pleadings, briefs, and other documents submitted to the Court which have been designated as Protected Information, or which contain information so designated, shall be filed under seal in a manner prescribed by the Court for such filings.

5. Outside attorneys of record for the parties are hereby authorized to be the persons who may retrieve confidential exhibits and/or other confidential matters filed with the Court upon termination of this litigation without further order of this Court, and are the persons to whom such confidential exhibits or other confidential matters may be returned by the Clerk of the Court, if they are not so retrieved. No material or copies thereof so filed shall be released except by order of the Court, to outside counsel of record, or as otherwise provided for hereunder. Notwithstanding the foregoing and with regard to material designated as RESTRICTED CONFIDENTIAL – SOURCE CODE, the provisions of paragraph 1.C. are controlling to the extent those provisions differ from this paragraph.

6. Protected Information shall not be copied or otherwise produced by a receiving party, except for transmission to qualified recipients, without the written permission of the producing party, or, in the alternative, by further order of a court of law or other tribunal of competent jurisdiction, provided, however, that a receiving party who becomes subject to an order to disclose a producing party's Protected Information shall promptly notify the producing party of the order so that the producing party may have an opportunity to appear and be heard on whether such Protected Information should be disclosed. Nothing herein shall, however, restrict a qualified recipient from making working copies, abstracts, digests and analyses of CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information for use in

connection with this litigation and such working copies, abstracts, digests and analyses shall be deemed Protected Information under the terms of this Order. Further, nothing herein shall restrict a qualified recipient from converting or translating CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information into machine readable form for incorporation into a data retrieval system used in connection with this action, provided that access to that Protected Information, in whatever form stored or reproduced, shall be limited to qualified recipients.

7. At the request of any party, the original and all copies of any deposition transcript, in whole or in part, shall be marked "CONFIDENTIAL" or "CONFIDENTIAL OUTSIDE COUNSEL ONLY" by the reporter. This request may be made orally during the deposition or in writing within fifteen (15) days of receipt of the final certified transcript. Deposition transcripts shall be treated as CONFIDENTIAL OUTSIDE COUNSEL ONLY until the expiration of the time to make a confidentiality designation. Any portions so designated shall thereafter be treated in accordance with the terms of this Order.

6. NON-PARTY USE OF THIS PROTECTIVE ORDER

A. A non-party producing information or material voluntarily or pursuant to a subpoena or a court order may designate such material or information as Protected Information pursuant to the terms of this Protective Order.

B. A non-party's use of this Protective Order to protect its Protected Information does not entitle that non-party to access to the Protected Information produced by any party in this case.

7. NO WAIVER OF PRIVILEGE

Nothing in this Protective Order shall require production of information that a party contends is protected from disclosure by the attorney-client privilege, the work product

immunity or other privilege, doctrine, right, or immunity. If information subject to a claim of attorney-client privilege, work product immunity, or other privilege, doctrine, right, or immunity is nevertheless inadvertently or unintentionally produced, such production shall in no way prejudice or otherwise constitute a waiver or estoppel as to any such privilege, doctrine, right or immunity. Any party that inadvertently produces materials protected by the attorney-client privilege, work product privilege, or other privilege, doctrine, right, or immunity may obtain the return of those materials by promptly notifying the recipient(s) and providing a privilege log for the inadvertently produced materials. The recipient(s) shall promptly gather and return all copies of the privileged material to the producing party, except for any pages containing privileged markings by the recipient, which pages shall instead be destroyed and certified as such by the recipient to the producing party. Notwithstanding this provision, outside litigation counsel of record are not required to delete information that may reside on their respective firm's electronic back-up systems that are over-written in the normal course of business.

8. MISCELLANEOUS PROVISIONS

A. Any of the notice requirements herein may be waived, in whole or in part, but only in writing signed by the attorney-in-charge for the party against whom such waiver will be effective.

B. Inadvertent or unintentional production of documents or things containing Protected Information which are not designated as one or more of the three categories of Protected Information at the time of production shall not be deemed a waiver in whole or in part of a claim for confidential treatment. With respect to documents, the producing party shall immediately notify the other parties of the error in writing and provide replacement pages bearing the appropriate confidentiality legend. In the event of any unintentional or inadvertent disclosure of Protected Information other than in a manner authorized by this Protective Order,

counsel for the party responsible for the disclosure shall immediately notify opposing counsel of all of the pertinent facts, and make every effort to further prevent unauthorized disclosure including, retrieving all copies of the Protected Information from the recipient(s) thereof, and securing the agreement of the recipients not to further disseminate the Protected Information in any form. Compliance with the foregoing shall not prevent the producing party from seeking further relief from the Court.

C. Within sixty days after the entry of a final non-appealable judgment or order, or the complete settlement of all claims asserted against all parties in this action, each party shall, at the option of the producing party, either return or destroy all physical objects and documents which embody Protected Information it has received, and shall destroy in whatever form stored or reproduced, all physical objects and documents, including but not limited to, correspondence, memoranda, notes and other work product materials, which contain or refer to any category of Protected Information. All Protected Information not embodied in physical objects and documents shall remain subject to this Order. In the event that a party is dismissed before the entry of a final non-appealable judgment or order, this same procedure shall apply to any Protected Information received from or produced to the dismissed party. Notwithstanding this provision, outside litigation counsel of record are not required to delete information that may reside on their respective firm's electronic back-up systems that are over-written in the normal course of business. Notwithstanding the foregoing, outside counsel shall be entitled to maintain copies of all pleadings, motions and trial briefs (including all supporting and opposing papers and exhibits thereto), written discovery requests and responses (and exhibits thereto), deposition transcripts (and exhibits thereto), trial transcripts, and exhibits offered or introduced into evidence at any hearing or trial, and their attorney work product which refers or is related to any CONFIDENTIAL and CONFIDENTIAL OUTSIDE COUNSEL ONLY information for

archival purposes only. If a party opts to destroy CONFIDENTIAL or CONFIDENTIAL OUTSIDE COUNSEL ONLY information, the party must provide a Certificate of Destruction to the producing party.

D. If at any time documents containing Protected Information are subpoenaed by any court, arbitral, administrative or legislative body, the person to whom the subpoena or other request is directed shall immediately give written notice thereof to every party who has produced such documents and to its counsel and shall provide each such party with an opportunity to object to the production of such documents. By entering this order and limiting the disclosure of information in this case, the Court does not intend to preclude another court from finding that information may be relevant and subject to disclosure in another case. Any person or party subject to this order who becomes subject to a motion to disclose another party's information designated CONFIDENTIAL or CONFIDENTIAL OUTSIDE COUNSEL ONLY pursuant to this Order shall promptly notify that party of the motion so that the party may have an opportunity to appear and be heard on whether that information should be disclosed. If a producing party does not take steps to prevent disclosure of such documents within ten business days of the date written notice of the motion is given, the party to whom the referenced motion is directed may produce such documents in response thereto.

E. Testifying experts shall not be subject to discovery on any draft of their reports in this case and such draft reports, notes, outlines, or any other writings leading up to an issued report(s) in this litigation are exempt from discovery. In addition, all communications to and from a testifying expert, and all materials generated by a testifying expert with respect to that person's work, are exempt from discovery unless relied upon by the expert in forming any opinions in this litigation.

F. Nothing in this Order shall prevent any party from disclosing materials in which

all Protected Information has been redacted to an individual or third party not designated under this Order to receive Protected Information.

G. Nothing herein precludes counsel for a party from providing advice or opinions to his or her client regarding this litigation based on his or her evaluation of Protected Information—provided that such rendering of advice and opinions shall not reveal the content of Protected Information except by prior written agreement with counsel for the producing party.

H. No party shall be required to identify on their respective privilege log any document or communication dated on or after the filing of the lawsuit.

I. This Order is entered without prejudice to the right of any party to apply to the Court at any time for additional protection, or to relax or rescind the restrictions of this Order, when convenience or necessity requires. Furthermore, without application to this Court, any party that is a beneficiary of the protections of this Order may enter a written agreement releasing any other party hereto from one or more requirements of this Order even if the conduct subject to the release would otherwise violate the terms herein.

J. The United States District Court for the District of Delaware is responsible for the interpretation and enforcement of this Agreed Protective Order. After termination of this litigation, the provisions of this Agreed Protective Order shall continue to be binding except with respect to those documents and information that become a matter of public record. This Court retains and shall have continuing jurisdiction over the parties and recipients of the Protected Information for enforcement of the provision of this Agreed Protective Order following termination of this litigation. All disputes concerning Protected Information produced under the protection of this Agreed Protective Order shall be resolved by the United States District Court for the District of Delaware.

SIGNED this ____ day of _______, 2010.

____

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF DELAWARE

XEROX CORPORATION,	)	
	)	
Plaintiff-Counterclaim Defendant,	)	
	)	
v.	)	C.A. No. 10-136-JJF-MPT
	)	
GOOGLE INC., YAHOO! INC., RIGHT MEDIA INC., RIGHT MEDIA LLC, YOUTUBE, INC., and YOUTUBE, LLC,	)))	
	)	
Defendants-Counterclaim Plaintiffs.	)	

ATTACHMENT A TO THE AGREED PROTECTIVE ORDER

CONFIDENTIAL AGREEMENT

I reside at ____.

1. My present employer is ____.

2. My present occupation or job description is ______________________________.

3. I have read the Agreed Protective Order dated ___________, 2010, and have been engaged as _________________________________ on behalf of __________________________ ____________ in the preparation and conduct of the above-captioned litigation.

4. I am fully familiar with and agree to comply with and be bound by the provisions of said Order. I understand that I am to retain all copies of any documents designated as CONFIDENTIAL, CONFIDENTIAL OUTSIDE COUNSEL ONLY and/or RESTRICTED CONFIDENTIAL-SOURCE CODE information in a secure manner, and that all copies are to

remain in my personal custody until I have completed my assigned duties, whereupon the copies and any writings prepared by me containing any CONFIDENTIAL, CONFIDENTIAL OUTSIDE COUNSEL ONLY and/or RESTRICTED CONFIDENTIAL-SOURCE CODE information are to be returned to counsel who provided me with such material.

5. I will not divulge to persons other than those specifically authorized by said Order, and will not copy or use except solely for the purpose of this action, any information obtained pursuant to said Order, except as provided in said Order. I also agree to notify any stenographic or clerical personnel who are required to assist me of the terms of said Order.

6. In accordance with paragraph 3.C of the Agreed Protective Order (if applicable), I have attached my resume, curriculum vitae or other information to this executed Confidentiality Agreement sufficient to identify my current employer and employment history for the past five (5) years, and the cases in which I have testified as an expert at trial or by deposition within the preceding five (5) years.

7. I state under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on ____________________, 20____.

____