

# EXHIBIT D

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**From:** Fabrizio, Steven B  
**Sent:** Wednesday, May 25, 2011 11:59 AM  
**To:** ALeibnitz@fbm.com; RThompson@fbm.com; DGupta@fbm.com  
**Cc:** Pozza, Duane; Platzter, Luke C; TSchoenberg@fbm.com  
**Subject:** RE: Hotfile - Source Code Version Control Software

Andy – While we are trying to give you the benefit of the doubt, as we have had very good relations to date, your protestation that you are “not trying to be counterproductive” is hard to accept in this instance. We have had multiple extended telephone conversations on these exact issues. You have told us definitively that defendants are not giving us the source code and will not identify whether Hotfile uses a version control software and, if so, which one. For you to now “innocently” ask questions that were asked and discussed ad nauseam on multiple calls tells us that you are just posturing or worse, trying to obfuscate. That, we suggest, is counterproductive. And, please, do not suggest that you and I have not discussed issues when, in truth, we have. That too is counterproductive, and does nothing to advance either of our clients’ interests.

To be clear – hopefully for the last time:

- Defendants’ claim of “burden” in producing source code is, in our view, frivolous. Although you have refused to tell us the volume of the source code we have requested (which also is unreasonable in light of the parties’ obligations to cooperate on ESI discovery), giving defendants every benefit of the doubt, the volume is likely to be well under 500 MB – a trivial volume of data in the scheme of things, less than half the size of a single full-length movie. You and I have likely spent far more time in this email exchange than it would have taken to make a copy of the code. So we can only wonder whether there is something unusual about the way Hotfile maintains its source code and versions that could possibly lead defendants to press a “burden” objection. Hence the reason we keep asking whether Hotfile uses a source code version control software system and, if so, which one. We don’t have to debate whether there would be different burdens if Hotfile used Perforce or Vault version control software. Both are fairly standard and producing all versions of the Hotfile code (“every line” as you put it) with either would be a very simple matter – hardly a burden by any standard. If you want to tell us that Hotfile uses one of those two, without identifying which one, that would suffice for our purposes. However, we do not want to rule out the possibility that Hotfile uses some non-standard version control software that might present different issues (issues we might be able to address if we knew the name of the software). For these reasons, knowing whether Hotfile uses a source code version control system – and which one (so we can understand whether there are any anomalous issues raised by some non-standard software) – bears directly on defendants’ claim of burden.

- As for relevance, we have explained in some detail that source code is relevant to nearly every technical issue in this case. We doubt you or defendants truly fail to see the potential probative value of the source code. To illustrate (with just one among numerous issues), plaintiffs allege that defendants readily could take any number of technological steps to stop or mitigate the infringement on Hotfile. As we understand it, defendants are contesting that issue (if we misunderstand, please tell us). Thus, what technological steps defendants could take, and the relative ease of taking them, is directly in dispute. The source code provides the best – and sometimes the only – means to get to the bottom of this issue. Under your theory, plaintiffs would have to use proxy evidence, including asking defendants’ engineers. But, apart from being unreasonable on its face, your suggestion proves the relevance of the source code. We would not need proxy evidence if source code was truly irrelevant.

If what you are really claiming is that the source code is a trade secret and too confidential to produce despite its relevance (and despite the absence of burden), then why not just say that so the parties can litigate over the real objection. In our view, you would be wrong. There is no suggestion that the source code for Hotfile is any more than a combination of pre-existing software that defendants did not even write, except in limited respects. It is certainly not the equivalent of Google’s search engine source code, which arguably lies at the heart of Google’s competitive advantage over its competitors. Tellingly, throughout this entire process, you have not claimed otherwise, relying instead on vague and generalized assertions that the source code is “the most sensitive information.” Moreover, at your urging, the parties negotiated a stipulated protective order, which has now been so ordered by the Court, that specifically provides for the production of source code and provides super-heightened confidentiality and security measures to protect the source code. Thus, under the Protective Order, discovery material can be given no confidentiality designation or it can be designated either “CONFIDENTIAL” (restricting access to only parties), “HIGHLY CONFIDENTIAL” (restricting access to only in-house and outside counsel, among other restrictions), or “RESTRICTED CONFIDENTIAL-SOURCE CODE.” The RESTRICTED CONFIDENTIAL-SOURCE CODE designation contains – at defendants’ insistence – substantial additional restrictions, including, among others, limiting access to outside counsel and disclosed experts, limiting the number of copies that can be made, and regulating the manner in which copies must be accessed and maintained (to the point that we must keep a log of every time anyone even looks at the source code). Having negotiated for and agreed to those specific source code provisions, defendants cannot now credibly argue confidentiality as a basis for refusing to produce the code.

Regardless, the point of meet and confers – of which we have had several – is to get down to the real objections so that, as necessary, those can be presented to the Court or resolved. Defendants’ refusal to provide the basic administrative ESI information we have requested runs counter to that objective. That is why this issue has become frustrating.

SBF

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**From:** ALeibnitz@fbm.com [mailto:ALeibnitz@fbm.com]  
**Sent:** Wednesday, May 25, 2011 10:12 AM  
**To:** Fabrizio, Steven B; RThompson@fbm.com; DGupta@fbm.com  
**Cc:** Pozza, Duane; Platzer, Luke C; TSchoenberg@fbm.com  
**Subject:** Re: Hotfile - Source Code Version Control Software

Steve:

I am certainly not trying to be counterproductive. Taking the Perforce technology as an example, since that is the technology with which I am most familiar, perhaps you could explain exactly how Perforce's tools ease production of the ENTIRE code base. In your view, how does Perforce make the task any easier than Vault (or any other technology)? Given that Plaintiffs have demanded every line of code ever written for Hotfile, how do the capabilities of any code management software at all regarding individuated branches of code have any bearing on the proposed task before Hotfile?

If you are going to attempt to memorialize our conversation regarding source code, we also submit that it would make sense for you to memorialize how exactly the most sensitive information from any technology company is required to prove the basic operation of Hotfile's website. Demanding source code in this copyright case strikes us as akin to requiring an electron microscope to study gross anatomy. This is not a patent case. With respect, we have yet to hear a sufficient justification for producing all of our source code ever written (or indeed any code) for this case.

Regards,  
Andy

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**From:** Fabrizio, Steven B [mailto:SFabrizio@jenner.com]  
**Sent:** Wednesday, May 25, 2011 06:29 AM  
**To:** Leibnitz, Andrew (21) x4932; Thompson, Rod (27) x4445; Gupta, Deepak (22) x4419  
**Cc:** Pozza, Duane <DPozza@jenner.com>; Platzer, Luke C <LPlatzer@jenner.com>; Schoenberg, Tony (28) x4963  
**Subject:** RE: Hotfile - Source Code Version Control Software

Andy – We will take your answer as a rejection of our request, and will proceed accordingly. However, it is counterproductive to our ongoing dealings for you to mischaracterize our discussions. We did in fact explain how the information was relevant to your claim of burden. We also have explained in considerable detail the multitude of ways the source code is more than relevant.

SBF

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**From:** ALeibnitz@fbm.com [mailto:ALeibnitz@fbm.com]  
**Sent:** Tuesday, May 24, 2011 9:55 PM  
**To:** Fabrizio, Steven B; RThompson@fbm.com; DGupta@fbm.com  
**Cc:** Pozza, Duane; Platzer, Luke C; TSchoenberg@fbm.com  
**Subject:** Re: Hotfile - Source Code Version Control Software

Steve:

As discussed on our last call, the information requested regarding Hotfile's code base has little or no bearing on Hotfile's burden in responding to Plaintiffs' demand for every line of source code ever

written by Hotfile. We have yet to hear any answer from Plaintiffs as to how it would be easier to produce code if it were kept in a Perforce database, a Vault database, or no database at all. In any case, the amount of code remains the same. Moreover, any production of source code at all remains overly burdensome given the absence of support for Plaintiffs' allegations of relevance here.

Regards,  
Andy

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**From:** Fabrizio, Steven B [mailto:SFabrizio@jenner.com]  
**Sent:** Tuesday, May 24, 2011 10:46 AM  
**To:** Thompson, Rod (27) x4445; Leibnitz, Andrew (21) x4932; Gupta, Deepak (22) x4419  
**Cc:** Pozza, Duane <DPozza@jenner.com>; Platzer, Luke C <LPlatzer@jenner.com>  
**Subject:** Hotfile - Source Code Version Control Software

Rod/Andy – Plaintiffs have asked on multiple occasions for defendants to identify the source code version control software, if any, that defendants use for Hotfile's source code. You originally indicated that you would ask your clients. In a later meet-and-confer Andy confirmed that you had asked your clients. However, inexplicably (to us at least), Andy then said that if your clients responded you would pass along the information, but that you would not make any further inquiry or effort to obtain that information for us. We are writing to ask one last time.

Among other objections to producing source code, in our meet-and-confer sessions, you have repeatedly indicated that defendants are objecting on the basis of an alleged burden. As defendants unquestionably know, information as to the source code version control software used by Hotfile would bear directly on any claim of burden. We believe it would reveal that any burden claim is unfounded. Burden may not be defendants' primary objection, but if defendants are going to object on the basis of burden at all, then plaintiffs are entitled to the information we have requested. One purpose of meet-and-confer sessions is precisely this sort of informal exchange of ESI information. Indeed, you gave us the same type of information about Hotfile's databases, advising us that Hotfile used MySQL database software. We gave you informal information in response to your inquiry about one plaintiff's use of the Hotfile rights holder account. We are at a loss to understand why your clients are drawing the line here, except to suspect that defendants know full well that identifying the version control software would reveal their burden objection to be baseless.

The information we are requesting is purely administrative – akin to asking whether you use Word or WordPerfect as your word processing software (and no more difficult to find out). Accordingly, we ask again that you advise us of the

source code version control software, or at least explain why defendants are refusing.

Regards.

SBF

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