IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

BRIGHT RESPONSE LLC	)(	
	)(	CIVIL DOCKET NO.
	)(	2:07-CV-371-CE
VS.	)(	MARSHALL, TEXAS
	)(	
GOOGLE, INC., ET AL	)(	APRIL 1, 2010
	)(	11:30 A.M.

MOTION TO COMPEL HEARING

BEFORE THE HONORABLE JUDGE CHAD EVERINGHAM

UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

FOR THE PLAINTIFF: (See attached sign-in sheet.)

FOR THE DEFENDANTS: (See attached sign-in sheet.)

COURT REPORTER: MS. SHELLY HOLMES, CSR
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(Proceedings recorded by mechanical stenography, transcript produced on a CAT system.)

I N D E X

April 1, 2010

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

All right. Where are we on the motions to compel?

MR. SPANGLER: Your Honor, Andrew Spangler, on behalf of the plaintiff. We do not have it resolved.

THE COURT: All right. Let's hear it. I mean, what's -- you know, what's the problem? What are we -- I mean, what are we really fussing about?

MR. SPANGLER: What we're fussing about -- sorry, Your Honor. What we're fussing about is we still don't have the code that we've asked from day one --

THE COURT: Okay. What is it, and how does it relate to this case exactly? Exactly what don't you have?

MR. SPANGLER: Your Honor, well, part of it is we don't know. We've had to go through every month, every week, every review, and find out more stuff they didn't produce. So it's reached the point now -- and this is what's happened in other cases. It's three months before trial, and we still don't have all the code.

For example, for Google, we've specifically accused AdSense for Search. We don't have all the code

for AdSense for Search. What has happened is we've accused, for example, Mr. Verhoeven used an example of a car. We accuse a car, a Volkswagen, we get the carburetor six months ago. And we go, "Well, there's two connections here. What are they? You didn't provide them."

"Well, here's the muffler. Here's an engine block."

Okay. Well, the engine block has lots of connections. What goes to the engine block?

And for Yahoo, that's been exacerbated because they violated the protective order and didn't produce this in the ordinary course of the business. We have no idea the structure and where they fit.

For Google, they've produced it, for example, with what are called include statements in files, and they didn't produce the include statements. We have to go through and find those, send a letter and say, "You didn't produce these. Please do it." And it's over and over and over again.

And the goal is very simple. Hundreds of thousands of costs that we've done in -- with our experts. We still don't have all the code. We still don't know how it all works, and we're three months from trial.

So we're asking for -- for the accused product, the code. They don't have to produce historical versions because we've already reached agreement on that, but we need the code. We've -- we've tried to compromise. We've tried to narrow, and what's happened is, is we've been -- the process has been abused.

THE COURT: Okay. I think I understand the fuss.

Has all the code for the accused products been produced?

MS. AINSWORTH: Your Honor, this is Jennifer Ainsworth on behalf of Google and AOL. Your Honor, all of the code for the accused products has not been produced.

THE COURT: Okay.

MS. AINSWORTH: The code for the accused instrumentalities and functionalities has all been produced.

What -- to -- to follow up on the example that Mr. Spangler gave, they have accused a carburetor, and they're asking for the code for the car, for the entire car.

Your Honor has asked him to provide exactly what they still need, and he can't do that. We have

tried to work those issues out and have worked all through this case.

Your Honor, to start out with, the local rules require that a party produce and disclose all documents and information relevant to the claims or defenses, and under Rule 3-4 in the patent rules, all source code relevant to the accused instrumentalities and functions.

When we got the plaintiff's contentions originally, when Google and AOL did, we went through and said, "We've got to get some more information from you guys on what is really accused." They said they could not provide us any more information, so we went through, decided what was relevant, and produced it. That started -- that process started almost a year ago in May of 2009. They started reviewing the code after that.

Your Honor, there have been requests made for further details from the code, the majority of which have not been relevant. And all of this information -- the example that Mr. Spangler gave with regard to Google -- with regard to one part of the Smart Ad selection system is not something that's relevant. Google has produced all of the relevant code for the accused instrumentalities.

What -- when we discussed this in response to Your Honor's request in the last 15 minutes, Mr. Spangler made clear that he is asking for all code that could possibly exist with regard to anything that is mentioned. And that reads out the relevance requirement from our local disclosure rules.

THE COURT: Well, here's the problem, okay? I mean, this isn't a car accident case. I mean, what you're asking me to do if -- is accept your view of what's relevant and what isn't relevant insofar as the code is concerned. And I'm -- I'm not in -- inclined in something that's as sophisticated a problem as source code to just baldly accept one side's or the other side's view of they don't really need this, or, yes, we really do need this.

And what y'all are -- the position y'all are putting me in is that I'm going to have to appoint a source code expert to review all of the code and then determine whether or not one side or the other is overreaching in -- in either what they want to be produced or what they don't want to be produced and then tax the entire costs of that review against whichever side is overreaching.

And it's -- I mean -- I mean, I'm not -- I'm frustrated with the problem. I'm not frustrated with

you, but this is a recurring theme that I'm seeing in these types of cases, and I -- and it's recurring insofar -- it's been about the last six months. I hadn't seen it before the last six months, but it's starting to become a recurring problem.

MS. AINSWORTH: Your Honor, Google would agree to that procedure to the degree that that's something the Court's considering, but --

THE COURT: Well --

MS. AINSWORTH: -- in this situation, Your Honor -- back up. Under the local rules, it always -- the local rules always put the burden on the disclosing party, whether that be the plaintiff or the defendant, to make the call as to what's relevant. And then the other side can come back and say, "No, you've missed something."

Well, when you look at what's happened in this case with regard to the Google, what does the evidence show us? The evidence shows us that Google has produced 2.6 millions lines of code, more than we've produced in any other lawsuit, first of all, which is recognized by the plaintiff.

Second, if -- if you look at the question about whether there's something missing, can the plaintiff tell us there's anything missing? They can't.

And, second, what evidence is there that they have gotten the information that they've needed, that they've gotten the relevant information?

We look at their amended infringement contentions. For almost every claim asserted, they have referred back to source code. So that's evidence that Google has produced the relevant code in this case. What they're asking for is everything that could possibly exist if they even name a product or service. And that -- the problem is -- and I understand the Court's frustration.

The problem is that totally reads out the relevance requirement of the disclosure rules and puts parties in a situation of being able to create serious abuse by requiring source code production potentially for an entire company just because of something they mentioned with -- with no regard to relevance.

THE COURT: Of course, he stipulated that historical source code is not at issue, so it doesn't really remove the relevancy requirement entirely, does it?

MS. AINSWORTH: It does --

THE COURT: For instance, historical source code, I think he's agreed, isn't relevant in this case,

or at least he's not seeking it.

MS. AINSWORTH: At least he's not seeking it. But I don't think that necessarily reads out the relevance requirement because it should only be for -- the stipulation is for those portions that we have produced they're not seeking the -- the historical code for those. I mean, we think it still has to be tied to relevance.

And in -- in this case, Google has gone, we believe, above and beyond providing relevant information. Every time they've asked for something else, whether it has not been relevant, we have investigated every single request, most of which we have produced, even though it wasn't relevant.

There have been a couple of times where there's been something that fell so far outside of relevance or was so extremely protected, that we talked to them about it and said, "You don't need this because," or "You don't want this because," and we've worked it out. And there hasn't been a problem until now.

And to conclude -- and we can answer any more specific questions that the Court has.

THE COURT: Well, but --

MS. AINSWORTH: The plaintiff --

THE COURT: -- but there -- there has been other problems, hasn't there? I mean, not in this case yet, but, I mean, there have been other problems.

MS. AINSWORTH: There were problems in the -- in the PA Advisors case.

MR. PERLSON: Your -- Your Honor, sorry to interrupt here. It's David Perlson, but Ms. Ainsworth wasn't our local counsel in -- in the PA Advisors case, and so I wanted to address that, if that's okay.

THE COURT: That's fine.

MR. PERLSON: Okay. In the PA Advisors case, plaintiff made similar complaints. And what Judge Rader did in that case -- well, first of all, this -- what Judge Rader did in that case is he said -- in response to plaintiff's request, basically, that they get everything regarding the accused products, basically the same thing they're asking for here, Judge Rader said -- "I mean, I can state I want everything that Google's got. You're not going to get that. So tell me what you want and make it specific."

Whenever plaintiff has done that, we have, as Jennifer -- as Ms. Ainsworth said, we have investigated and cooperated with them. If you note in their --

THE COURT: Well, when they tell you what

they want, have you produced everything that they've asked for?

MR. PERLSON: As far as I know, there are two instances -- two specific instances in which -- that we haven't been able to resolve the dispute, one of which is regarding a request regarding the refill code which we just frankly don't understand. We thought that we produced all the code regarding refill that was relevant or that related to a request of refill. And they seem to be requesting it. We asked them to explain it. They refused.

There was another line of code -- aspect of code regarding a map engine that relates to how data is stored. That does not -- from our review of their contentions, we can't tell at all --

THE COURT: What --

MR. PERSON: -- that's relevant.

THE COURT: -- type of data?

MR. PERLSON: I'm sorry?

THE COURT: What type of data?

MR. PERLSON: It's data that's used by the SmartASS system, which is one of -- part of what's accused, but it doesn't -- it's not related to how SmartASS uses the system or uses this data which is accused.

It relates to how the system that the SmartASS server calls, how it stores the data. It's completely irrelevant. And all we asked them, we just said, "Look, we're -- we're willing to talk to you. Just please -- just explain to us why you think it's relevant." They refused.

And in -- in their initial motion, they raised two specific issues. They didn't ask for all the source code in their initial motion. That's not really what they requested. The -- the request was all code related to SmartASS and all code related to normalization. We pointed out in our opposition, we've produced that stuff.

And if you look at their infringement contentions, they have source code related to all of it. And then faced with the evidence that we've actually either produced or offered to cooperate on the very, very minimal specific pieces of code that they are still raising, they now come back and say, "Oh, we need all," pointing to this PA Advisors case again.

But, again, it's -- the same -- and another thing that -- that Judge Rader actually pointed out the problems that we had in that case because we had a hard time finding out what code was relevant because they

were having a hard time providing their contentions.

Judge Rader said, "I'm seeing a little pattern here that goes back to before I came in the case where you give contentions, you conduct discovery, you amend contentions, you request more discovery, you amend contentions, you request more discovery, and then based on discovery, you request more discovery. When does this end?"

And what Judge Rader did was to simply say, "Plaintiff, tell -- say specifically what you need. Google, you know, work it out with them in response to that."

We stand ready to do that as we have been in the case. We -- we have produced code, as far -- as far as we can tell, for all relevant aspects of the code. You look at their contentions. They cite code for almost every single element. So that's the best proof, Your Honor, that Google has done everything.

And -- and just to clarify one thing, what Ms. Ainsworth had said, is that Google, Ya -- and Yahoo would both agree to the proposal regarding this third party. I understand that that's not the ideal proposal. We think the motion should be denied, but, you know, both -- all parties would agree to that.

THE COURT: All right.

MR. SPANGLER: Your Honor, may I have a short rebuttal?

THE COURT: Yes.

MR. SPANGLER: Thank you.

And do I have your permission to put up a few documents?

THE COURT: Well, before you do that.

Ms. Ainsworth, he interrupted you. Did you have anything else you wanted to tell me?

MS. AINSWORTH: I had one point I had wanted to make, just in -- in conclusion, which was that I thought -- with regard to the motion against Google, the main point that the plaintiff was trying to make they made in their first substantive sentence which was that we're filing this motion so that you can't later say we didn't file a motion.

And there was not a real pending dispute over particular sections of code because every time they've asked for particular sections of code, we've worked with them for months on getting them everything that they wanted. But that's why the motion was really filed, not because there was a serious dispute. And I thought that there -- they were really rather straightforward about that, which is not the purpose of the discovery and disclosure rules or of the motion to

compel practice.

THE COURT: Well, but neither is it the purpose to have these things linger on for months. I mean, that's --

MS. AINSWORTH: That's correct, and -- and we don't think that it should have lingered on for months. We think that the original production was what was relevant. And as in most productions I've been involved with, there's usually one or two follow-ups where they say, "Hey, you forgot this, or we think that this links to something else, produce it." And that usually occurs within a reasonable period of time.

We think what's gone on since then has been information that's not been relevant. Anything that links or calls to something else, they've asked for, but it doesn't mean that it's relevant.

So thank you, Your Honor.

THE COURT: All right. Appreciate it.

MR. SPANGLER: Your Honor, let me address really quickly -- but, first, to clarify for the Court, the issues with Google and their conduct are very different than that with Yahoo. Yahoo's conduct is far worse, and I'll -- I'll bring that to the Court's attention.

Do I have permission to put the document I showed you up on the screen?

MR. PERLSON: Yes.

MR. SPANGLER: Thank you. They said -- for example, there's still some stuff they haven't produced, even though everything we've asked for has been produced. One of the accused products is called AdWords, okay? And what they mentioned -- part of AdWords is a SmartASS server, okay?

Is the ELMO working here?

So this is the overall system architecture for AdWords and the components of the SmartASS system. They're the SmartASS mapper. We have the SmartASS server. We asked for the map engine. They go, "It's not relevant. Why do you need it?" Well, it's integrated with the two servers and map. We need to see what exactly it does. Haven't gotten that.

There is no question that we have raised some issues since the motion to compel was filed. That's because it keeps changing. There's no question that we had the include statements on very relevant files, files they produced at the very beginning, but they -- I guess they didn't have an engineer go through and actually review it. They just went and grabbed it and threw it out there.

The fact that they've done 2.5 million lines of code, the volume, to me, doesn't matter.

And in the PA Advisors case -- I'm glad they brought that up, because we are still getting relevant code after expert reports were due and after summary judgment motions have been filed against us. And the fact that source code -- and to address Ms. Ainsworth's point -- reviewing source code, this isn't my first rodeo either -- either. I mean, I've reviewed it with an expert side-by-side, so I know how it works and I know that sometimes there's follow-up. I've never seen this much follow-up.

The protective order in this case was entered nearly two years ago, agreed protective order, and we still didn't get it all. And that's for Google, explain that.

But I want to raise some specific issues with respect to Yahoo if the Court will allow me.

One, not only do we not have the source code for Yahoo, that they've engaged in the same sort of conduct, but they've refused to produce it in the ordinary course of business which, again, is a violation of that protective order. It says you have to do it that way.

They've disabled search features on their

review computers. Again, a violation of the protective order. They just start doing it, don't tell us. But more importantly is the structure. If the Court wants to find, for example, a particular song on his computer, you can go to the C drive, you can go to program files, you can go to iTunes, you can go to the library. When you finally get there, at the very top is an address bar with all the layers that took you to that bottom part, right? And that helps tell you where iTunes fit -- that music file fits with the overall system, what subset it's in, how it's tied. They didn't do that. They didn't -- we don't know how it's set up.

Now, the rules require them to produce in the ordinary course of business. In their motion, they're saying it's too problematic now. It's too difficult now because we've done a rolling production. If they'd done it from the very beginning, instead of waiting until October of last year to start, then it wouldn't have been overly burdensome.

So, again -- and -- and their perception of the local rules, I completely disagree with. They have in their brief any suggestion by Bright Response that the Court's order -- that was the one from November 5th -- was broader as inaccurate. Yahoo was only ordered to produce specifically listed source code. So

Yahoo's position is when the Court says, "You need to produce this code that they're asking for," it means they can ignore the other Court's order that says, "You'll produce mandatory disclosure requirements. You'll produce it."

Now, we've been trying to work with them. The historical code is all relevant. We said, "Okay, we don't want you to have to produce all that extra stuff. We'll -- we'll agree to a stipulation." We went to them to try and save them from that extra burden so we didn't have to do that.

Now, they say they'll jump all over the Court's offer of hiring an extra expert. If the Court wants to do that, of course. You're the Court. We don't know if we're overreaching or not because we didn't get it. And now they've waited until the last second and in fact, admonished me, because I made the call on behalf of my client to file, for filing so soon.

We're three months from trial, and we still don't have it all. And they're putting the burden on us to identify still what's missing. We don't know because they didn't produce it all, and they didn't start until August of last year for Google and October of last year for Yahoo.

THE COURT: Response from Yahoo?

MR. PERLSON: I just want to correct one factor -- misrepresentation. We actually made our code available I believe it was April or May, not August. They made that misrepresentation in their briefing. He's done it here again.

MR. SPANGLER: Can I address that one specific point, Your Honor? Or -- I'll let it go.

MR. WHITE: Your Honor, if may I respond on behalf of Yahoo?

THE COURT: Yes.

MR. WHITE: I want to pick up with his last point first because we were here previously on a motion to compel, and at that time, we represented to the Court that we believed that we had produced all of the relevant source code, and there was some discussion back and forth.

And you told plaintiff's counsel that they were to give us a list of things that they thought were missing. And you said they needed to be specific, and that when we left, Yahoo -- when we left that hearing, we would know what additional files the plaintiff was requesting.

We got that list. We complied with the order, and we produced that code. There have been additional follow-ups since then for additional code.

We've never refused any of those. We've -- we've looked for, identified, and produced any relevant code that they've asked for after that initial order that you gave.

So, again, we believe that all the relevant code has been produced, and we've gone beyond -- above and beyond that to produce additional code. The same is true for Yahoo that it is for Google, that this case has involved more production of code than any other case. They've spent hundreds of days reviewing it. They've got full access -- we will give them access to anything else that they deem relevant that they think they need. We think they have it all already.

We're happy to provide them and talk with them further about specific requests, but at this point, we don't have it. All we have is that we want everything. We think they have what they need, and we're happy to work with them further if they think they need additional things. But at this point, we're just at -- at our wit's end as to what else to give them.

THE COURT: Well, does the protective order require it to be produced as it's kept in the ordinary course of business?

MR. WHITE: It does, and that's --

THE COURT: Was it -- well, and was it

produced?

MR. WHITE: It was. Your Honor, it was. I know they keep talking about a direct restructure. As we told them before, there is no index of our code. We have individual sets of code that reside on servers. We've pulled that code off. We haven't stripped it out or redacted. There's internal references to code in the code. If someone calls for another file, it's referenced there, and so you've got one piece of code that may call another piece of code, but it -- it's mentioned in a call. We haven't redacted that or somehow impeded their ability to receive the code. They've got all the sections of code. They can figure out how it works together.

Their complaint is that we haven't given them some index that we simply don't have, and I think we've explained to them before. So our position is that, yes, we have produced it as it's kept in the ordinary course of business.

THE COURT: Okay. All right. Reply?

MR. SPANGLER: Your Honor, first of all, to be clear, we're not asking for an index. This is why every time we've asked for a directory, the code be produced in its directory structure, that's what they've come back with.

I'm not asking for an index of all their files. What I'm asking for, instead of taking a specific picture and then putting it on a disk without me knowing where it came from, that that's not how it's kept in the ordinary course. You copy it, you paste it as part of that overall directory, it must be served on -- it must be located on their server. I assume they don't have five million lines of code just sitting horizontal. It's not laying horizontal. We're not asking for an index. We're asking that it be produced in the ordinary course.

They didn't do that. They've still not done that despite our request. We stopped reviewing actually, Your Honor, a couple of weeks ago because we were -- the money was crazy, but they had turned off the search features on the computers.

I mean, I think it's great that they can stand here and say they've got lots of code in the contentions. That doesn't mean we have all their code. It means we found some. I think it's great that they say, "Yeah, we've produced what we think we have," but every time they say they're done, every time, we found more code. More code that specifically call -- and this is Google and Yahoo. They've represented over and over again to us, "We think you have everything. We think

you have everything." We can't wait any longer.

And in another case with Judge Bush, I was admonished for not moving faster and for sitting on my rights. That's why we're here.

THE COURT: Well, is there always going to be some other feature or place in the code that's being called by what you've had produced to you, if you've had -- if you've not had all of it produced to you?

MR. SPANGLER: I'm sorry, re -- reask that the question.

THE COURT: Well, you just said every time you get something, there -- you know, there's a call to some other thing that you haven't gotten -- hadn't had produced to you.

And my question is, isn't that always going to be the case in a situation where you've received a portion of the overall code, as opposed to all of the overall code?

MR. SPANGLER: It depends. It depends on what code is produced.

And early on, Your Honor, when we started getting the code, we tried to narrow which includes we asked for, okay? We reached a point with our expert -- and if the Court wants to bring in our expert and have her sit at the witness stand and you ask questions, we

are glad to do that.

She -- one, said it's not as unwieldily as they say, although the computers that -- that Yahoo sent that were antiquated caused real problems, that now due to speed stuff, we're three months away. Expert reports are probably going to be due in six weeks. We need to have it all. So, yes, in this case, yes. If we had gotten it when we were supposed to, it's possible that we wouldn't even be here and we would have had it worked out.

But time constraints and what's happened in other cases and Judge Bush's order forced us to step this up. And I'd like to address the April/May issue. The April/May issue came about because Google said, "You only get one review." And it's based on statements that I made at a hearing.

Now, Mr. Perlson is shaking his head and making negative comments, but he wasn't at the hearing. I argued the hearing in front of Judge Folsom. And the issues was there are going to be some features in the PA Advisors case and some in this case that were slightly different, okay? And under the current protective order where Google was not agreeing to Dallas, our expert was going to have to look at the information here for Bright Response and then go to California.

Now, the parties were going back and forth in e-mail correspondence on "When you say one review, what do you mean?" "Well, it means one review." "Does that mean we have to sit at one time and do them all?" "It means one review."

Finally, the parties worked it out and said, "Okay. Yeah, you can have it." But we weren't going to access it. We weren't going to review it unless we knew we were going to get multiple shots at it because a review that big takes time.

So, yes, technically, it was in a file on a computer before August, but it didn't start up until August. And, of course, Yahoo, it didn't start until October.

THE COURT: All right. I'll give you an order as quickly as I can.

MR. PERLSON: Excuse me, Your Honor. We have one more housekeeping issue.

MR. VERHOEVEN: I don't know if this needs to be decided right now, but since I'm here, Your Honor, I just wanted to note that the trial -- jury selection, I believe, has been set for July of this year, and I just wanted to let Your Honor know that I -- there's a case, Acqis, A-c-q-i-s, versus IB -- and one of the defendants is IBM, which is a client of mine. And it's

before Judge Davis.

The Markman is set for the week after the jury selection, so we submitted a paper sug -- suggesting that we set the trial for the last two weeks in July which I could do, but if it gets set for that following week, I'm going to have a conflict with Judge Davis and the Markman.

THE COURT: Well --

MR. VERHOEVEN: July 8th is the Markman.

THE COURT: The rule around here is that I'll yield to Judge Davis' settings, but if I have to give you -- I mean, if I have to --

MR. VERHOEVEN: I'm not sure it's a problem at all because I know the last trial we did, we did the jury selection and did the trial three weeks later.

THE COURT: That's -- that's --

MR. VERHOEVEN: I just wanted --

THE COURT: I mean, I'll -- I'll schedule the trial around the Markman hearing. I don't know if I'm going to schedule it for the end of the -- end of the month. I may just take a day off or something. That way you'll be able to argue your Markman hearing in front of Judge Davis.

MR. VERHOEVEN: Thank you, Your Honor.

MR. SPANGLER: Thank you.

THE COURT: Okay.

COURT SECURITY OFFICER: All rise.

(Recess.)

CERTIFICATION

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the stenographic notes of the proceedings in the above-entitled matter to the best of my ability.

SHELLY HOLMES Date
Deputy Official Reporter
State of Texas No.: 7804
Expiration Date: 12/31/10