UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

BRIGHT RESPONSE, LLC,
     Plaintiff,
 	
 vs.
 	
 GOOGLE INC., et al.,
     Defendants.
	Civil Action No. 2:07-cv-371-CE
	 JURY TRIAL DEMANDED

YAHOO! INC.'S RESPONSE TO
BRIGHT RESPONSE, LLC'S EMERGENCY SUPPLEMENTAL BRIEF IN SUPPORT
OF JANUARY 25, 2010 MOTION TO COMPEL YAHOO! INC. TO COMPLY WITH
COURT ORDER OF NOVEMBER 5, 2009 AND PRODUCE SOURCE CODE IN
NATIVE FORMAT AS MAINTAINED IN THE ORDINARY COURSE OF BUSINESS

I.   INTRODUCTION

Plaintiff Bright Response, LLC's ("Bright Response") motion is directed to only one issue: Defendant Yahoo! Inc.'s ("Yahoo!") click protection source code. Yahoo! has not produced this code for several reasons including:

(1) Bright Response has not accused the Click Protection System of infringement, thus there is no legal basis requiring production; and

(2) Bright Response has never provided a substantive explanation why it believes this source code is relevant.

In short, Yahoo! is not obligated to produce irrelevant source code that does not relate to any accused instrumentality. Therefore, unless and until Bright Response can articulate a substantive justification regarding the relevancy of this source code, it should not be produced.

The production of this source code is not a light matter. The click protection source code is one of Yahoo!'s most valuable pieces of source code, maybe even more important than its proprietary search algorithms. Like many businesses, one of the main pillars of Yahoo!'s

business rests on its ability to establish a trusting relationship with its clients. The click protection source code is the core of that trust. As a business, Yahoo! places a link to an advertiser's website on its search results page and other web properties. When an internet user clicks on an ad, the user is taken to the advertiser's webpage, and in turn the advertiser pays Yahoo!. Because each click on an advertiser's link costs money, advertisers demand assurance that clicks are non-fraudulent. To assuage its advertisers' concerns in this regard, Yahoo! has developed a proprietary click protection system. The source code behind this system is comprised of a complex series of filters that work 24 hours a day to identify click fraud and/or invalid clicks. In short, the click protection source code exists to ensure advertisers that Yahoo will not bill them for fraudulent clicks. If this source code was made public, individuals that seek to exploit this system would gain a significant advantage. In short, if this source code ever became public, the foundational trust between Yahoo! and its advertisers could be destroyed. And absent a trusting relationship with its paying clients, Yahoo!'s entire business model is threatened. For that reason, Yahoo! very seriously protects this source code from any possible unnecessary disclosure.

Given Yahoo!'s sensitivity to this issue, it should come as no surprise that Yahoo! has not produced this irrelevant and highly secret source code. In this case, Yahoo! should not be compelled to produce this source code because Bright Response has never accused the click protection system of infringement, and has never identified any substantive basis for why this source code is relevant. In summary, the benefit of the production of this source code to Bright Response is zero, while the risk to Yahoo! is tremendous. For these reasons, and those described in detail below, Bright Response's motion should be denied.

II.   ARGUMENT

As an initial matter, Bright Response's attempt to muddy the waters regarding discovery should not distract this Court from analyzing the sole discovery dispute at issue in this motion: Yahoo!'s click protection source code. After the April 1, 2010 hearing, Bright Response and Yahoo! discussed a variety of outstanding source code issues. (*See* Plaintiff Bright Response's Motion, Ex. A-D) ("Pl. Mot.") (Dkt. No. 322). After resolving several of the open issues, Bright Response added a new issue when it asked for the production of the click protection source code for the first time on April 28, 2010. (Pl. Mot. Ex. F). A few days later, on May 4, 2010, the parties discussed a variety of open discovery and scheduling issues in the case. As to the source code issues, Bright Response stated that the only open issue between the parties was the production of the click protection source code. (Sherwin Decl. ¶ 2). At no other time on this call, or since, has Bright Response discussed any other source code production issue. (Sherwin Decl. ¶ 3). Thus, despite Bright Response's allegations and demands in its motion, Bright Response and Yahoo! resolved all of the source code issues, with the exception of the request for the production of the click protection code made on April 28, 2010, which is the sole issue in their pending motion.

A.   Yahoo! has no Duty to Produce Source Code For Services That Are Not Accused of Infringement in This Case

Yahoo! has not and should not be required to produce its most sensitive and valuable source code because it is not relevant to this case, and it cannot lead to the discovery of admissible evidence. First, as explained below, Bright Response never mentions the click protection system in its infringement contentions cover pleading (which lists over 20 accused services) or either of the infringement contentions claim charts (which total over 330 pages). (Sherwin Decl., Ex. 2) (infringement contentions cover pleading); (*see* Pl. Mot. Ex. F) (excerpt).

Second, Bright Response never articulated a substantive reason why the click protection source code is relevant. After learning that Bright Response sought the production of the click protection source code on April 28, 2010, the parties held a meet-and-confer to discuss the issue. At this time, Yahoo! expressed its concern that this source code is not relevant to any of the claims or defenses in this case. (Sherwin Decl., Ex. 1) (Sherwin letter to Weiss). In particular, Yahoo! explained that this source code does not relate to sending or receiving an electronic message, as required by the asserted claims. (*Id.*). This is critical because the only independent claim-at-issue requires the sending and receiving of an electronic message. Further, the click protection system never provides a response to the "source," or internet user, as required by the asserted claims, after the click protection system determines that the click may be improper. Also, this source code involves an analysis of the number, frequency, and source of clicks on an advertisement link. Not a single claim at issue is relevant to this functionality. Therefore, this source code is not relevant and should not be produced in this case.

B. Bright Response Has Never Explained Why They Believe This Source Code is Relevant

Despite, Yahoo!'s assurances to Bright Response that this source code is not relevant to any claim at issue in this case, Bright Response still demands that Yahoo! release its most valuable and sensitive source code. The support for their demand, however, is an empty conclusory assertion that this source code is relevant merely because Bright Response says it is relevant. Specifically, when the parties first discussed Bright Response's request for the source code at the April 28, 2010 meet-and-confer, Yahoo! explained why the source code was irrelevant, and then asked Bright Response to explain the substantive basis for why it believed the source code to be relevant. (Sherwin Decl., Ex. 1) (Sherwin letter to Weiss). Instead of providing any basis, Bright Response merely stated that it was relevant to claim 28 and that

either its first or second infringement contentions provided the details. (*Id.*). Despite Bright Response's assertion in their motion,[1] Yahoo! stated that it would not be able to review all of Bright Response's infringement contentions, which total over 330 pages, during the meet-and-confer. Yahoo! again asked Bright Response for a substantive explanation so it could determine if there was a legitimate basis to produce this source code, but Bright Response refused, merely restating that its infringement contentions regarding claim 28 provided a basis. Based on this discussion alone, Bright Response chose to file this unwarranted motion to compel.

Bright Response has failed to identify in its pending motion a substantive basis for the relevancy of the click protection source code. Bright Response's only argument regarding the relevancy of this source code is a citation to a single vague passage in over 330 pages of infringement contentions. Specifically, Bright Response points to the following as its basis:

> The Accused Instrumentalities comprises the methods capable of classifying the electronic message as requiring assistance from a human operator. . . . Yahoo may also select advertisers and publishers with poorly performing advertisements and creatives for human evaluation.

(Pl. Mot. Ex. F). This single passage, however, provides no substantive information that ties the click protection source code to this case. First, the click protection source code is not related to the performance of a "creative," which is Yahoo!'s term for an advertisement. It is only concerned with distinguishing legitimate clicks from fraudulent clicks, not whether a legitimate click will lead to a sale for the advertiser. (Pl. Mot., Ex. G at YH-PSET2137003-004) (*see* section entitled: 8. If the Click Protection System addresses click fraud, does that mean that all other traffic will convert?). Second, Bright Response has never stated that the click protection

---

[1] Bright Response, presumably unintentionally, mischaracterized the May 4, 2010 meet-and-confer when it stated that "Yahoo acknowledged that the source code was referenced in Bright Response's infringement contentions." (Mot. at 2). In reality, when Bright Response stated that its entire basis for requesting this source code was found in either their first or second infringement contentions, Yahoo! stated that it did not have them memorized, and would not be able to review them during the meet-and-confer because they are hundreds of pages long.

system is an Accused Instrumentality, nor does Bright Response list this source code as relevant to claim 28. This is critical because all of the case law cited in Bright Response's motion concerns the production of information that is explicitly identified in an Infringement Contention. Having not accused the click protection system of infringing, however, Rule 26(b)(1) – which defines the scope of discovery to non-privileged matters "relevant to the claim or defense of any party" – bars Bright Response from discovery of source code related to non-accused instrumentalities.

The click protection system is not an accused instrumentality. Bright Response never referenced the click protection source code anywhere in its first Infringement Contentions, approximately 80 pages, second Infringement Contentions, approximately 250 pages, or its cover pleading. (Sherwin Decl., Ex. 2) (infringement contentions cover pleading). Bright Response has, however, identified other information in its infringement contentions that it believes is relevant to claim 28. (Pl. Mot., Ex. F) (listing King Kong, Behavioral Targeting, DUDE, Prisma, and Vespa). The click protection source code is not listed. (*Id.*) In other words, after reviewing Yahoo!'s documents and source code for months, Bright Response chose to file amended Infringement Contentions without any reference to the click protection source code. They cannot now, approximately two months before trial, seek production of source code that is irrelevant, never previously identified as a part of this case, and premised on a conclusory catch-all statement – particularly in light of Yahoo!'s representation that this source code is not relevant to this case.[2]

---

[2] As an additional argument, Plaintiff's continued requests for irrelevant source code should be rejected – especially in light of its refusal to limit who reviews Yahoo's source code. *See* Dkt. No. 288.

C. Bright Response's Miscellaneous Arguments and Demands are Unfounded

In its motion, Bright Response has stated that Yahoo! could "stipulate[e] regarding the relevant functionality of this source code." (Pl. Mot. at 3). In effect, this is what Yahoo! has already done. Yahoo! stated that the click protection source code does not meet the limitations of any accused claim. (Sherwin Decl., Ex. 1) ("[Yahoo!] does not believe that any of this source code relates to sending or receiving an electronic message.") Further, Yahoo! offered to supplement this information with a 30(b)(6) deponent that would explain why it is not relevant nor could it lead to the discovery of admissible evidence in this litigation. (Doan Decl., Ex. 3) (Doan email to Wiley). Bright Response has rejected these offers as insufficient. (Doan Decl., Ex. 4) (Spangler email to Doan). The end result is that this motion is premised on approximately five minutes of conversation at the May 4, 2010 meet-and-confer, where Yahoo! informed Bright Response that this source code was not relevant.

At the end of its motion, Bright Response makes unwarranted demands. These are improper because these issues have already been briefed before this court (*see, e.g.*, Dkt. No. 256), oral argument has already been heard on these issues (Dkt. No. 306), and currently the only remaining issue regarding source code in this case is the click protection source code. (Sherwin Decl. ¶¶ 2-3). Bright Response cannot now seek to enlarge the scope of this dispute by stylizing this motion as a "supplemental brief" to a prior motion.[3] After the April 1, 2010 hearing, Bright Response and Yahoo! resolved all of their source code disputes. A new dispute did not arise until April 28, 2010, when Bright Response for the first time demanded the production of the click protection source code. That is the only issue before this Court. Bright Response's request for this source code should be denied because 1) this source code is not relevant to this case and

---

[3] Indeed, such a "supplemental brief" is not contemplated by the Local Rules and would be improper without first seeking leave to file. *See* Local Court Rules 7(f).

Bright Response cannot articulate any substantive basis why this source code is relevant, and 2) Bright Response has not identified the click protection system as an accused instrumentality.

III. CONCLUSION

For the above reasons, this Court should deny Bright Response's request for the production of the click protection source code.

Dated: May 24, 2010

Respectfully Submitted,

/s/ Jennifer H. Doan
Jennifer Doan
Joshua Reed Thane
HALTOM & DOAN
Crown Executive Center, Suite 100
6500 Summerhill Rd.
Texarkana, Texas 75503
Tel: 903.255.1002
Fax: 903.255.0800
Email: jdoan@haltomdoan.com
Email: jthane@haltomdoan.com

Jason C. White
Mansi Shah
Scott Sherwin
HOWREY LLP
321 N. Clark, Suite 3400
Chicago, IL 60654
Tel: 312.595.1239
Fax: 312.595.2250
Email: whitej@howrey.com
Email: shahm@howrey.com
Email: sherwins@howrey.com

William C. Rooklidge
HOWREY, LLP
4 Park Plaza, Suite 1700
Irvine CA 92614-2559
Telephone: (949) 721-6900
rooklidgew@howrey.com

Attorneys for Defendant Yahoo! Inc.

CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). All other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by certified mail, return receipt requested, on May 24, 2010.

<div align="right">

/s/ Jennifer H. Doan
Jennifer H. Doan

</div>