

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

BEDROCK COMPUTER  
TECHNOLOGIES LLC,

Plaintiff,

v.

SOFTLAYER TECHNOLOGIES, INC.,  
CITIWARE TECHNOLOGY SOLUTIONS,  
LLC, GOOGLE INC., YAHOO! INC.,  
MYSPACE INC., AMAZON.COM INC.,  
PAYPAL INC., MATCH.COM, LLC., AOL  
LLC, and CME GROUP INC.,

Defendants.

CASE NO. 6:09-CV-00269

Hon. Leonard E. Davis

**JURY TRIAL DEMANDED**

---

**GOOGLE'S RESPONSE TO  
BEDROCK'S MOTION TO CLARIFY THE AGREED PROTECTIVE ORDER**

## **INTRODUCTION**

Over several months, the parties heavily negotiated the provisions of the Agreed Protective Order in this case (Dkt. No. 170) (the “Protective Order”) The resulting Protective Order provided a framework that carefully protects the Defendants’ highly confidential and proprietary source code, while allowing Bedrock to investigate its infringement allegations.

Now, months after the Court has entered an order reflecting the terms that the parties negotiated and agreed to, Bedrock seeks to avoid entire aspects of these carefully crafted source code protections. The parties agreed that Bedrock would be limited to a single copy of printed source code by providing that, “no subsequent copies shall be made of the printed [source code].” Now Bedrock seeks to *print* subsequent copies, arguing that the limitation only narrowly applies to photocopies. The Protective Order also provided that, with regard to experts, “no more than two (2) individuals may have access to any one Defendant's source code.” Now, Bedrock argues that the limitation only applies to experts that visit the facility where the source code is produced for inspection.

Bedrock crafts interpretations (unsupported by the documents evidencing the Parties’ negotiations) that impermissibly expand the scope of disclosure the parties agreed upon and strip Google of the ability to control how and where its highly confidential source code is disclosed. The Court should reject Bedrock’s strained reading of the Protective Order.

## **FACTUAL BACKGROUND**

**The Agreed Protective Order.** After a lengthy negotiation between Bedrock and the several Defendants in this case, the parties agreed upon most of the limitations and restrictions on the use of confidential information in the Protective Order. The parties took extra care to negotiate the appropriate protections for the Defendants’ source code. In particular, the parties agreed without dispute to the following two provisions, at issue here:

- ix. **No more than two (2) individuals, per producing party, who qualify under paragraph 7.1D, above, for each receiving party, may have access to the Source Code Computers.** As an example to illustrate the foregoing sentence, Plaintiff may have up to eighteen (18) individuals have access to the source code of nine (9) Defendants, however **no more than two (2) individuals may have access to any one Defendant's source code.** For each day that counsel for the receiving party requests a review of the Source Code Computers, it must give at least three business days (and at least 72 hours) notice to the counsel for the producing party that it will be sending individual(s) authorized to review the source code made available on the Source Code Computers. **The receiving party shall identify all individuals who will be given access to the source code at least fourteen days prior to any inspection; after that identification, the producing party may object to providing source code access to any persons so identified.**

...

- xii. Other than in connection with pleadings filed under seal and depositions designated HIGHLY CONFIDENTIAL – SOURCE CODE, **no subsequent copies shall be made of the printed copies provided by the producing party to the requesting party.** Hard copies of the source code also may not be converted into an electronic document, and may not be scanned using optical character recognition (“OCR”) technology;

(Dkt. No. 170 (emphasis added).) While the parties agreed on the above provisions, they disputed two other provisions and submitted those to the Court. (See Dkt. No. 165.) Bedrock argues that one of those disputed provisions – dealing with the procedure for printing out source code – is pertinent to this dispute. (Motion at 1-2.) (“Source Code Computers shall be equipped with a printer to print copies of the source code on yellow, pre-Bates numbered paper, which shall be provided by the producing party.”) At the time, the Defendants explained that they were concerned with the provision because it did not allow the Defendants to retain a record of which portions of source code Bedrock had in its possession. (See Dkt. No. 165 at 5.) Neither party represented that this provision authorized the printing of unlimited copies of Defendants’ source code.

**Meet and Confer.** Counsel for Google and Bedrock had a telephonic meet and confer regarding the source code issues here. Google expressed its concern that Bedrock wanted to make an unlimited number of copies and disclose Google's source code to an unlimited number of experts. As a compromise, Google said it would consider allowing Bedrock to have more than one copy and disclose its source code to more than two experts, but that any agreement would need to be for a finite and capped number of copies and experts. Following the meet and confer, in a sincere effort to resolve the dispute without Court intervention, Google offered to make exceptions to the Protective Order to accommodate Bedrock by allowing it to have three copies of the printed source code and to make disclosure to three experts. (*See* Ex. 1 at 2.) Bedrock ignored Google's offer of compromise and instead filed the instant motion.<sup>1</sup>

Counsel for Bedrock only responded to Google's offer to comprise *after* it filed the instant motion. Bedrock's response included a series of additional and unreasonable demands that were not discussed during the parties' meet and confer and that have no basis in the Protective Order. (*See* Ex. 1 at 1.)

## **ARGUMENT**

### **I. THE PROTECTIVE ORDER EXPRESSLY DENIES BEDROCK THE ABILITY TO MAKE COPIES OF PRINTED SOURCE CODE.**

In its motion, Bedrock reads too much into the plural use of the word "copies" in a provision which does not even discuss making copies. Bedrock completely ignores the very next

---

<sup>1</sup> Bedrock has taken the same approach with regard to its Motion to Compel from Google a Complete Response to Bedrock's Third Interrogatory and Production of Google's Source Code (Dkt. No. 210.) As explained in Google's Response to that motion, Google similarly offered in good faith to produce additional source code if Bedrock specified what source code it wanted to inspect and how it was relevant to the case. Instead, Bedrock demanded production of all of the approximately sixty-thousand files in the Linux kernel.

Paragraph 8(B)(xii), which unambiguously prohibits making additional copies of the printed source code:

Other than in connection with pleadings filed under seal and depositions designated HIGHLY CONFIDENTIAL – SOURCE CODE, ***no subsequent copies shall be made of the printed copies*** provided by the producing party to the requesting party. Hard copies of the source code also may not be converted into an electronic document, and may not be scanned using optical character recognition (“OCR”) technology.

Bedrock sought to circumvent the prohibition on subsequent copies by printing multiple copies of the source code. Google denied this request, explaining that such a reading of the Protective Order would vitiate the express and unambiguous limitation in Paragraph 8(B)(xii).

Given the clear prohibition on making additional copies of the printed source code, Bedrock urges the Court to adopt a strained interpretation of Paragraph 8(B)(xi), which describes the procedure for printing source code at the inspection site. That paragraph states: “Source Code Computers shall be equipped with a printer to print copies of the source code on yellow, pre-Bates numbered paper, which shall be provided by the producing party.” Bedrock argues that since that provision refers to “copies” in the plural, it authorizes the printing of multiple copies of the source code. But the provision makes no such authorization. A far more plausible reading is that the word “copies” was used in the plural to indicate that more than one page could be printed, not multiple versions of the same page.

Indeed, in light of the unambiguous prohibition in the very next paragraph that “no subsequent copies shall be made of the printed copies,” it would be nonsensical to ascribe such a strained meaning to the incidental use of the plural, “copies,” which is susceptible to a far more reasonable interpretation. The obvious intent of Paragraph 8(B)(xii) was to place a limit the number of printed copies of source code. There is no functional difference, however, between making a photocopy and printing out multiple copies from the computers at the inspection site.

Bedrock's interpretation must be rejected because it would nullify the prohibition in Paragraph 8(B)(xii) against making subsequent copies.

## **II. THE PROTECTIVE ORDER EXPRESSLY LIMITS ACCESS TO SOURCE CODE TO TWO TECHNICAL ADVISORS, CONSULTANTS, AND TESTIFYING EXPERTS.**

Paragraph 8(B)(ix) of the Protective Order specifies that a maximum of two technical advisors, consultants or testifying experts (collectively "experts") may access any particular Defendants' source code. Although the provision initially refers to "Source Code Computers," the illustrative example clearly states that "no more than two (2) individuals may have access to any one Defendant's *source code*." When Bedrock disclosed a third technical expert, on April 28, 2010, Google reminded Bedrock of this requirement. In response, Bedrock disavowed the plain language of Paragraph 8(B)(ix) and offered a narrow interpretation that would make it only applicable to access of the physical computers. Bedrock's interpretation would nullify the expressly stated provision, and it makes no sense, particularly in light of the notification and objection procedure outlined in the same paragraph.

Paragraph 8(B)(ix) adds an extra layer of protection when it comes to technical advisors, consultants and testifying experts accessing source code. Bedrock asserts that Paragraphs 7.1 and 7.2 set forth "unambiguous language allowing for the disclosure of source code to any number of qualified experts." (Motion at 3.) This conclusion is a *non-sequitur*. As Google has explained to Bedrock during meet and confer, it is Paragraph 8(B)(ix) that places the restrictions on disclosure of source code when it comes to experts. Google does not dispute that experts disclosed pursuant to Paragraphs 9-11 are "qualified" under Paragraphs 7.1 and 7.2 to receive source code. Rather, Paragraph 8(B)(ix) makes it clear that only two such "qualified" experts may access any one Defendant's source code, and then only after providing Google with a second chance to object to their access.

Since Bedrock's interpretation makes no sense as a practical matter, Bedrock invented the justification that Google sought to include Paragraph 8(B)(ix) in the protective order "to minimize the number of visitors to their facilities." (Motion at 4.) For support, Bedrock only cites to a letter its counsel wrote making the same unsubstantiated claim. (*See id.* at Ex. A.3 at 1.) Indeed, Bedrock did not cite to any correspondence with Google or any other Defendant stating this justification because no such correspondence exists and no Defendant expressed this concern.

Upon close scrutiny of Paragraph 8(B)(ix), the "number of visitors to the facility" justification by Bedrock falls apart even further. Specifically, the portion that Bedrock relegated to ellipses:

- disclosed the additional obligation to "identify all individuals who will be given access to the *source code* at least fourteen days prior to any inspection;" and
- explained that "after that identification, the producing party may object to providing *source code* access to any persons so identified."

Bedrock avoids addressing this notification and objection procedure in its motion. The notification and objection procedure clarifies the intent of Paragraph 8(B)(ix) to provide an additional level of security when Bedrock wishes to disclose Defendants' highly confidential source code to experts previously disclosed under Paragraph 9 and "qualified" under Paragraph 7.2. Bedrock's narrow interpretation is not in harmony with the notification and objection procedure of Paragraph 8(B)(ix). There would be no compelling reason to impose a fourteen day notification and objection procedure to address a concern about an over abundance of visitors coming to their facilities.

Bedrock finally argues that Paragraph 8(B)(ix) "would exclude practically everyone." This is at best a red herring. Google previously explained to Bedrock that the limitation applies only to experts. Bedrock bizarrely states that "no such distinction is in that paragraph," but the

distinction in that paragraph could not be any plainer. It clearly limits access to “[n]o more than two (2) individuals, per producing party, *who qualify under paragraph 7.1D . . .*” Paragraph 7.1(D), in turn, describes only “[t]echnical advisors, consultants, and testifying experts that are disclosed and qualified pursuant to the terms of paragraph 9.” As a result, Paragraph 8(B)(ix) does not exclude other categories of persons authorized under the Protective Order.

Finally, it would be antithetical to the clear intent of the special source code restrictions to apply the limitation on expert access only to the physical computers and not the printouts. When Bedrock’s expert came to inspect Google’s source code, he printed out the entirety of the source code that Google made available for inspection. (*See* Dkt. No. 210-17, Decl. of Dr. Martin at ¶ 16.1.) Thus, even if there may have once been a meaningful distinction between access to “Source Code Computers” and access to “source code,” no such difference exists now. An expert with access to the printouts from the Source Code Computer has the same access to the source code Google made available on the Source Code Computer. Under Bedrock’s interpretation, however, an unlimited number of experts may view the printouts, while it admits that only two could access the code at the physical computers. Such an interpretation would only encourage Bedrock to print out as much source code as possible so that it could elude the restrictions on expert access. Not only would this result be antithetical to the clear intent of the limitation on experts’ access, but also on the restriction that printouts be limited to portions reasonably related to the case. (*See* Protective Order at ¶ 8(B)(xi).)



**CONCLUSION**

For the foregoing reasons, Defendant Google respectfully asks the Court to reject Bedrock's strained reading of the Protective Order and instead adopt Google's clarification that the Protective Order 1) only permits Bedrock to print a single copy of source code that is reasonably related to this case, and 2) limits source code access to only two of Bedrock's technical advisors, consultants, and testifying experts.

Dated: June 7, 2010

Respectfully submitted,

By: /s/ Michael E. Jones

Michael E. Jones  
State Bar No. 10929400  
POTTER MINTON  
110 N. College Ave., Ste. 500  
Tyler, Texas 75702  
Telephone: (903) 597-8311  
Facsimile: (903) 593-0846  
Email: mikejones@potterminton.com

Claude M. Stern  
Todd M. Briggs  
Evette D. Pennypacker  
QUINN EMANUEL URQUHART & SULLIVAN, LLP  
555 Twin Dolphin Dr., Suite 560  
Redwood Shores, CA 94065  
Telephone: 650-801-5000  
Facsimile: 650-801-5100  
Email: claudestern@quinnemanuel.com  
Email: toddbriggs@quinnemanuel.com

*Attorneys for Defendants Google and  
Match.com LLC*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that counsel of record who are deemed to have consented to electronic service are being served with a copy of this motion via the Court's CM/ECF system per Local Rule CV-5(a)(3) and electronic mail on June 7, 2010. Any other counsel of record will be served via First Class U.S. Mail on this same date.

*/s/ Michael E. Jones*

\_\_\_\_\_  
Michael E. Jones